DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-218
Title PPL Montana, LLC, Petitioner
v.
Montana
Docketed: August 16, 2010
Linked with 09A1188
Lower Ct: Supreme Court of Montana
Case Nos.: (DA 08-0506)
Decision Date: March 30, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 7 2010	Application (09A1188) to extend the time to file a petition for a writ of certiorari from June 28, 2010 to August 12, 2010, submitted to Justice Kennedy.
Jun 8 2010	Application (09A1188) granted by Justice Kennedy extending the time to file until August 12, 2010.
Aug 12 2010	Petition for a writ of certiorari filed. (Response due September 15, 2010)
Aug 12 2010	Appendix of PPL Montana, LLC filed.
Sep 7 2010	Order extending time to file response to petition to and including October 15, 2010.
Sep 15 2010	Brief amici curiae of Edison Electric Institute, et al. filed.
Sep 15 2010	Brief amicus curiae of Montana Water Resources Association filed.
Sep 15 2010	Motion for leave to file amici brief filed by Professors David Emmons, et al.
Sep 15 2010	Brief amici curiae of Montana Farm Bureau Federation, et al. filed.
Sep 21 2010	Opposition to motion of Prof. Emmons, et al., for leave to file amici brief by respondent Montana filed.
Oct 1 2010	Brief of respondent Montana in opposition filed.
Oct 12 2010	Reply in support of motion for leave to file brief of Professors David M. Emmons, et al. filed. (Not Printed}
Oct 13 2010	DISTRIBUTED for Conference of October 29, 2010.
Oct 13 2010	Reply of petitioner LLC PPL Montana filed. (Distributed)
Nov 1 2010	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 20 2011	Brief amicus curiae of United States filed.
May 31 2011	DISTRIBUTED for Conference of June 16, 2011.
May 31 2011	Supplemental brief of petitioner LLC PPL Montana filed. (Distributed)
Jun 20 2011	Motion for leave to file amici brief filed by Professors David Emmons, et al. GRANTED.

Jun 20 2011	Petition GRANTED limited to Question 1 presented by the petition.
Jul 14 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 31, 2011.
Jul 14 2011	The time to file respondent's brief on the merits is extended to and including October 27, 2011.
Aug 19 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 24 2011	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioner.
Aug 31 2011	Joint appendix filed. (Three volumes) (Statement of costs filed)
Aug 31 2011	Brief of petitioner LLC PPL Montana filed.
Sep 6 2011	Brief amici curiae of Freeport-McMoRan Corporation, et al. filed.
Sep 7 2011	Brief amicus curiae of United States filed.
Sep 7 2011	Brief amici curiae of Creekside Coalition, et al. filed.
Sep 7 2011	Brief amici curiae of Professors John L. Allen, et al. filed.
Sep 7 2011	Brief amici curiae of Montana Farm Bureau Federation, et al. filed.
Sep 7 2011	Brief amici curiae of Mountain States Legal Foundation and the Utah Farm Bureau Foundation filed.
Sep 7 2011	Brief amici curiae of Montana Water Resources Association, et al. filed.
Sep 7 2011	Brief amici curiae of Edison Electric Institute, et al. filed.
Sep 7 2011	Brief amici curiae of American Petroleum Institute, et al. filed.
Sep 7 2011	Brief amici curiae of Wilbur and Kathryn Hardy, et al. filed.
Sep 12 2011	SET FOR ARGUMENT ON Wednesday, December 7, 2011.
Sep 14 2011	CIRCULATED
Sep 30 2011	Record received from Supreme Court of Montana. (1 box)
Oct 12 2011	Record received from District Court of Lewis & Clark Counties, Montana. (8 boxes)
Oct 27 2011	Brief of respondent Montana filed. (Distributed)
Nov 2 2011	Brief amici curiae of National Wildlife Federation, et al. filed. (Distributed)
Nov 3 2011	Brief amici curiae of California Sportfishing Protection Alliance, et al. filed. (Distributed)
Nov 3 2011	Brief amicus curiae of Stephenie Ambrose Tubbs filed. (Distributed)
Nov 3 2011	Brief amici curiae of Oregon, et al. filed. (Distributed)
Nov 3 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 22 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 28 2011	Reply of petitioner LLC PPL Montana filed. (Distributed)
Dec 7 2011	Argued. For petitioner: Paul D. Clement, Washington, D. C.; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Gregory G. Garre, Washington, D. C.
Feb 22 2012	Judgment REVERSED and case REMANDED. Kennedy, J., delivered the opinion for a unanimous Court.
Mar 26 2012	MANDATE ISSUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

10-216 AUG 12 2010

OFFICE OF THE CLERK

No. ____

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

PETITION FOR WRIT OF CERTIORARI

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St, Ste. 1500
Billings, MT 59101
(406) 252-2166

PAUL J. LAWRENCE
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for Petitioner

August 12, 2010

QUESTION PRESENTED

The Montana Supreme Court held on a summary judgment record that the State of Montana owns the riverbeds under more than 500 miles of river, including the riverbeds under multiple hydropower facilities on the upper Missouri, Madison, and Clark Fork rivers. This came as quite a shock, because for more than a century the riverbeds beneath those facilities have been treated as owned by private parties or the federal government. In reaching this result, the lower court concluded that the rivers were navigable when Montana joined the Union in 1889 and, therefore, that Montana held title to the riverbeds. The court upheld summary judgment for the State, notwithstanding a prior federal court decree, as well as 500 pages of expert testimony and exhibits disputing Montana's claim to title, establishing that the relevant sections of the rivers were not navigable at statehood. The consequences are draconian: The court below held that the State is entitled to collect tens of millions in retroactive back rent and millions more in future payments from the owners of the hydropower facilities.

The questions presented are:

1. Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of

present-day recreational use, with the question "very liberally construed" in the State's favor?

2. When a hydropower project is licensed under the Federal Power Act, a process that includes an economic analysis of the project and solicits state input, and the hydropower producer has obtained easements from private parties and paid substantial rents to the federal government on the understanding that the riverbeds under the hydropower facilities are owned by those private parties or the federal government, is a State's attempt retroactively to claim title and impose tens of millions of back and future rent obligations for use of the riverbeds preempted?

RULE 29.6 STATEMENT

The sole member of petitioner PPL Montana, LLC is PPL Montana Holdings, LLC, a privately held Delaware limited liability company. The sole member of PPL Montana Holdings, LLC is PPL Generation, LLC; the sole member of PPL Generation, LLC is PPL Energy Supply, LLC; and the sole member of PPL Energy Supply, LLC is PPL Energy Funding Corporation.

PPL Energy Funding Corporation is a wholly owned subsidiary of PPL Corporation, a publicly traded Pennsylvania corporation. No publicly held company owns 10% or more of PPL Corporation's stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES viii

PETITION FOR CERTIORARI 1

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. PPL's Hydropower Projects 5

B. The Trial Court Proceedings 8

1. The Preemption Ruling 9

2. The Navigability Ruling 9

3. The Final Judgment 12

C. The Montana Supreme Court's Decision 13

REASONS FOR GRANTING THE PETITION 17

I. The Court Should Grant Review To Clarify That *Utah* Remains The Proper Test For Determining Navigability For Title Purposes. 18

A. The Montana Supreme Court's Navigability Analysis Contravenes This Court's Precedents. 19

B. The Montana Supreme Court's Navigability Analysis Conflicts With Decisions From Other Courts. 24

C. The Montana Supreme Court's Reliance On Present-Day Navigability Conflicts With Decisions From Other Courts. 26

II. The Montana Supreme Court's Decision Misconstrues The Preemptive Reach Of The Federal Power Act. 29

A. The Montana Statute Under Which The Rental Obligation Purportedly Arises Is Preempted. 30

B. The State's Attempts To Impose Rental Obligations On PPL Are Preempted. 33

III. The Montana Supreme Court's Decision Raises Important Federal Issues That Implicate Private Property Rights And Can Only Be Effectively Resolved By This Court. 35

CONCLUSION 38

APPENDIX

TABLE OF APPENDICES ..... App-i

Appendix A

Opinion of the Supreme Court of Montana App-1

Appendix B

Memorandum of Decision of the Montana First Judicial District Court, Lewis & Clark County, dated June 13, 2008 ..... App-118

Memorandum and Order on the Navigability of the Missouri, Madison and Clark Fork Rivers of the Montana First Judicial District Court, Lewis & Clark County, dated Aug. 28, 2007 ..... App-130

Memorandum and Order of the Montana First Judicial District Court, Lewis & Clark County, dated Apr. 14, 2006 ..... App-145

Appendix C

U.S. Const., Art. VI, cl. 2 ..... App-161

Relevant Provisions of the Federal Power Act, 16 U.S.C. §§ 791a-823d App-162

16 U.S.C. § 797 ..... App-162

16 U.S.C. § 799 ..... App-168

16 U.S.C. § 800 ..... App-169

16 U.S.C. § 801 ..... App-171

16 U.S.C. § 802 ..... App-172

16 U.S.C. § 803 ..... App-174

Relevant Provisions of the Montana Hydroelectric Resources Act, Title 77, chap. 4, pt. 2 ..... App-185

Mont. Code Ann. § 77-4-201 ..... App-185

Mont. Code Ann. § 77-4-202 ..... App-185

Mont. Code Ann. § 77-4-203 ..... App-185
Mont. Code Ann. § 77-4-204 ..... App-186
Mont. Code Ann. § 77-4-205 ..... App-186
Mont. Code Ann. § 77-4-206 ..... App-186
Mont. Code Ann. § 77-4-207 ..... App-187
Mont. Code Ann. § 77-4-208 ..... App-187
Mont. Code Ann. § 77-4-209 ..... App-188
Mont. Code Ann. § 77-4-210 ..... App-188
Mont. Code Ann. § 77-4-211 ..... App-189

Appendix D

Affidavit of David M. Emmons, dated Nov. 3, 2006 ..... App-190

Affidavit of Stanley A. Schumm, dated Nov. 3, 2006 ..... App-205

Report by David M. Emmons, dated June, 2007 ..... App-216

TABLE OF AUTHORITIES

Cases

Alaska v. Ahtna, Inc.,
891 F.2d 1401 (9th Cir. 1989) 28

Albany Eng'g. Corp. v. FERC,
548 F.3d 1071 (D.C. Cir. 2008) 32

Arkansas La. Gas Co. v. Hall,
453 U.S. 571 (1981) 34

Brewer-Elliott Oil & Gas Co. v. United States,
260 U.S. 77 (1922) 20, 37

California v. FERC,
495 U.S. 490 (1990) 30, 34

City of Centralia, Wash. v. FERC,
851 F.2d 278 (9th Cir. 1988) 24

First Iowa Hydro-Elec. Coop. v. FPC,
328 U.S. 152 (1946) 30

Hughes v. Washington,
389 U.S. 290 (1967) 37

Loving v. Alexander,
745 F.2d 861 (4th Cir. 1984) 24

Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.,
163 N.E.2d 373 (Ohio 1959) 28

Montana Coalition for Stream Access, Inc. v. Curran,
682 P.2d 163 (Mont. 1984) 25

Muckleshoot Indian Tribe v. FERC,
993 F.2d 1428 (9th Cir. 1993) 24

Nantahala Power & Light Co. v. FERC,
476 U.S. 953 (1986) 35

North Dakota ex rel. Bd. of Univ. & Sch. Lands v. Andrus,
671 F.2d 271 (8th Cir. 1982) 27

North Dakota v. United States,
972 F.2d 235 (8th Cir. 1992) 27

Northwest Steelheaders Ass'n, Inc. v. Simantel,
112 P.3d 383 (Or. App. 2005) 24, 28

Northwestern La. Fish & Game Preserve Comm'n v. United States,
574 F.3d 1386 (Fed. Cir. 2009) 25

Pollard's Lessee v. Hagan,
44 U.S. 212 (1845) 9, 18

Ryals v. Pigott,
580 So. 2d 1140 (Miss. 1991) 25, 28

Shively v. Bowlby,
152 U.S. 1 (1894) 18

Steele v. Donlan,
In Equity No. 950
(D. Mont. July 14, 1910) 10, 35

Stevens v. City of Cannon Beach,
114 S. Ct. 1332 (1994) 37

Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Prot.,
No. 08-1151 (June 17, 2010) 36

The Daniel Ball,
77 U.S. 557 (1870) 18

United States v. Appalachian Elec. Power Co.,
311 U.S. 377 (1940) 21

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 19, 20, 21

United States v. Utah,
283 U.S. 64 (1931) ..... passim

Utah v. United States,
304 F.2d 23 (10th Cir. 1962) 24

Utah v. United States,
403 U.S. 9 (1971) 26

Administrative Cases

Mead Corp.,
72 FERC ¶ 61,027 (1995) 6, 31

Montana Power Co.,
8 F.P.C. 751 (1949) 7

Statutes

16 U.S.C. § 797 ..... 30, 31

16 U.S.C. § 800 30

16 U.S.C. § 801 30

16 U.S.C. § 802 31

16 U.S.C. § 803 ..... 7, 34

28 U.S.C. § 1254(1) 3

Mont. Code Ann. § 77-4-204 32

Mont. Code Ann. § 77-4-206 32

Mont. Code Ann. § 77-4-208 32

Mont. Code Ann. § 77-4-209 32

Rules and Regulations

18 C.F.R. § 2.9 30

18 C.F.R. § 5.18 30

18 C.F.R. § 9.1 30

18 C.F.R. § 9.2 30

18 C.F.R. § 9.3 30

Other Authorities

Attorney General News Release, *Bullock Calls Supreme Court's PPL Decision "A Victory for Generations of Montanans"* (Mar. 30, 2010) 37

U.S. Dep't of Interior, Letter to Montana Dep't of State Lands (dated Aug. 26, 1988) 36

PETITION FOR CERTIORARI

This case offers the Court an opportunity to rectify an enormous uncompensated land grab by state court judges subject to review only by this Court. The method for effectuating this massive land transfer was straightforward: declare that significant stretches of riverbed lands, long thought to belong to private parties and the federal government, in fact have belonged to the State all along. To reach this conclusion, the Montana Supreme Court had to overcome two federal-law obstacles: this Court's precedents on the test for determining when a river is navigable and thus belongs to a state at statehood, and principles of federal preemption. The lower court's erroneous rulings on these two federal questions merit review.

In 1889, at the time of Montana's statehood, it was clear that Fort Benton, Montana, was the head of navigation on the Missouri River. All roads from the west led there because all boats from the east stopped there, for after Fort Benton came the impassable Great Falls. But what is bad for navigation is good for hydropower generation. Hence, in 1891, a predecessor-in-title to petitioner PPL Montana, LLC ("PPL") chose this non-navigable stretch to build a hydroelectric dam. It did so knowing, as owner of the riparian land on both sides, that it owned the riverbeds. This ownership was based on the core federal-law principle that only commercially navigable stretches of a river transfer to a State at the time of statehood—and no one would have suggested that the Great Falls were navigable. Over the years, predecessors to PPL built another six dams on the

Missouri river upstream from Fort Benton, as well as dams and reservoirs on non-navigable sections of the Madison and Clark Fork rivers. With respect to all the river stretches on which PPL's predecessors constructed the dams, letters from the War Department, reports by the U.S. Army Corps of Engineers, and (in one case) even a federal court decree confirmed that the lands were non-navigable and belonged to PPL's predecessors, other private landowners, or the federal government. At no point before the start of this case did Montana ever notify the dams' owners that the State held title to the riverbeds under the dams and reservoirs and was thus entitled to rent.

The Montana Supreme Court ignored these salient facts, and held that all this expert testimony and extensive primary source evidence did not even raise a material dispute. It thus affirmed the trial court's summary judgment ruling that Montana holds title, imposing on PPL $41 million in retroactive liability for back rent and many millions more in expected future rent for use of the riverbeds.

The Takings Clause and basic principles of federal due process would ordinarily provide a backstop against this sort of state-court overreaching. In this case, however, there were two preliminary federal-law obstacles that the Montana Supreme Court had to overcome. *First*, it misapplied this Court's test for determining navigability for title purposes. That error allowed it to ignore historically non-navigable sections of the rivers based on its assertion that the rivers as a whole are now more or less navigable. *Second*, it

failed to recognize that the Federal Power Act preempts the State's attempt to impose retroactive leasing obligations on federally-licensed hydropower projects. Beyond those errors, the lower court's decision reflects the larger drift, confusion, and divisions among the lower courts over these important, recurring federal issues. The Court can and should grant review.

OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 229 P.3d 421 and reproduced at App. 1.

The Montana district court's June 13, 2008 final judgment is reproduced at App. 118. The district court's August 28, 2007 partial summary judgment on navigability issues is reproduced at App. 130. The district court's April 14, 2006 partial summary judgment on preemption issues is reproduced at App. 145.

JURISDICTION

The Montana Supreme Court rendered its decision on March 30, 2010. App. 1. On June 8, 2010, Justice Kennedy extended the time for filing a petition to and including August 12, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution is reproduced at App. 161.

The relevant provisions of the Federal Power Act are reproduced at App. 162.

The relevant provisions of the Montana Hydroelectric Resources Act are reproduced at App. 185.

STATEMENT OF THE CASE

This case raises the question of who owns the riverbeds under more than 500 miles of rivers, including approximately 5,600 acres of riverbeds under dams and reservoirs that are part of two federally licensed hydropower projects on the upper Missouri, Madison, and Clark Fork rivers in Montana. For more than a century, it was undisputed that the riverbeds were owned by either private parties or the federal government. On that basis, appropriate easements were granted, deeds transferred, and extensive payments made for use of the land. All but one of the relevant dams were constructed between 1891 and 1930. In 1949 and 1956, the Federal Power Commission approved the two projects under the Federal Power Act. The projects have since been re-licensed by the Federal Energy Regulatory Commission ("FERC") and, for the last ten years, they have been owned and operated by PPL.

In the proceedings below, the Montana courts held, contrary to settled understandings, that the State of Montana has held title to the riverbeds since statehood and, as a consequence, PPL owes the State tens of millions of dollars in retroactive lease payments and millions more in expected future payments. The lower courts imposed this massive land transfer and resulting liability based on a determination—at the summary judgment stage of proceedings no less—that the Missouri,

Madison, and Clark Fork rivers were navigable for title purposes in 1889 when Montana joined the Union. The courts reached that conclusion notwithstanding more than 500 pages of exhibits and expert witness affidavits provided by PPL disputing the State's claim to title and demonstrating that the relevant stretches of the rivers were not navigable for title purposes at statehood. The court thus deemed all that evidence of ownership to raise no material dispute of fact, and awarded title to Montana to some 500 miles of riverbeds, including federal lands inside Yellowstone National Park. It could do so only by ignoring the clear teachings of this Court's precedents.

A. PPL's Hydropower Projects

1. The two hydropower projects at issue—the Thompson Falls project (FERC No. P-1869) and the Missouri-Madison project (FERC No. P-2188)—consist of one storage dam and nine dams with facilities that have a combined generating capacity of approximately 350 megawatts. The generated energy is sold to wholesale customers, large industrial users, local utilities, and electricity cooperatives in Montana and beyond.

The Thompson Falls project, which began operations in 1915, is located on the Clark Fork River at Thompson Falls, Montana. The project consists of a seven-unit hydroelectric plant with a total generating capacity of 94 megawatts. The project, which was constructed on a naturally occurring waterfall, was first licensed by the

federal government in 1949, and re-licensed in 1979. The license expires in 2025.

The Missouri-Madison project includes nine dams built between 1891 and 1958 on the Missouri and Madison rivers. Because they are designed to generate hydropower, the dams were constructed on sections of the river with the fastest flowing rapids and most precipitous vertical drops. Five dams—Black Eagle (1891), Rainbow (1910), Ryan (1916), Morony (1930), and Cochrane (1958)—are on the Missouri River near Great Falls, Montana where, over a 17-mile stretch with five historic waterfalls, the river drops more than 600 feet. Two dams—Holter (1918) and Hauser (1911)—are on the Stubbs Ferry stretch of the Missouri River, close to Helena, Montana. And two dams—Madison (1906) and Hebgen (1915)—are on the Madison River. The Hebgen dam, which is near the northwestern border of Yellowstone National Park, stores and releases water to regulate flow to the other downstream dams. The project was first licensed in 1956 and, in September 2000, the federal government issued a new license that expires in 2040.

2. The State of Montana participated in the federal licensing proceedings for both the Thompson Falls and the Missouri-Madison projects. As part of those proceedings, the federal government carefully evaluated the relevant public interest factors and undertook a detailed economic analysis to determine whether the projects were economically feasible. *See Mead Corp.*, 72 FERC ¶ 61,027, at 61,068 (1995) (describing economic analysis). PPL and its predecessors demonstrated

that they had obtained all necessary property rights to operate the facilities. And the State offered detailed comments on various aspects of the projects.

The State did not contest the federal agency's finding that PPL's predecessor-in-title, The Montana Power Company ("MPC"), had "submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes" of the license. *Montana Power Co.*, 8 F.P.C. 751, 752 (1949). More to the point, the State never claimed ownership of the riverbeds under the projects or entitlement to significant lease payments that would fundamentally affect the projects' economic feasibility. The riverbeds under the dams and reservoirs were generally understood to be either private lands owned by MPC or other private parties from whom flood easements were granted, or federal lands for which the hydropower producer paid substantial annual use, occupancy, and enjoyment charges to the federal government. 16 U.S.C. § 803(e).

3. In 1999, PPL purchased the two hydropower projects from MPC and, with the federal government's approval, continued to operate them. As part of that transaction, MPC delivered to PPL numerous deeds conveying its acquired fee title, easements, and other interests to lands underlying the projects, including deeds and patents from the State granting MPC (or its predecessors) fee title to certain lands and rights-of-way to flood lands owned by the State. PPL also acquired permits from the U.S. Secretary of the

Interior and the U.S. Department of Agriculture authorizing the use of federal lands. When PPL purchased the hydropower projects, the State never suggested that it held title to the riverbeds or that PPL owed rent for their use.

B. The Trial Court Proceedings

In 2003, two Montana citizens sued PPL and two other hydroelectric companies, Avista Corporation and PacifiCorp, in the United States District Court for the District of Montana, seeking retroactive compensation to the State for the use of riverbeds under hydroelectric facilities in Montana. The lawsuit relied on the novel theory that the riverbeds were state-owned lands that were part of Montana's school trust and that PPL and the other companies owed hundreds of millions in unpaid rent to the State. In 2004, the State intervened as plaintiff. In September 2005, the district court dismissed the case for lack of diversity jurisdiction.

PPL, Avista, and PacifiCorp then filed this case in the Montana First Judicial District Court seeking a declaration that federal law precludes or preempts any claim for compensation. In response, the State filed a counterclaim, contending that it was entitled to compensation under the Montana Hydroelectric Resources Act. Faced with hundreds of millions in potential back rent for use of lands reaching back to the early 1900s, Avista and PacifiCorp settled; as regulated utilities (unlike PPL) their additional costs could be passed through to ratepayers. The litigation then proceeded against PPL with the trial court issuing three key rulings.

1. The Preemption Ruling

The trial court first addressed whether federal law preempts the State's claims. In response to the State's motion for partial summary judgment, PPL contended that the Federal Power Act preempts the Montana Hydroelectric Resources Act, and that any attempt to obtain retroactive compensation would conflict with federal law. In particular, PPL noted that state law lease requirements would interfere with FERC's exclusive jurisdiction over the issuance and transfer of licenses for federal hydropower projects.

On April 14, 2006, the trial court held that at least one provision of the Montana statute impermissibly conflicted with the Federal Power Act. App. 155. Nonetheless, although the Montana statute has no severability provision, the trial court held that nothing in federal law prevented the State from seeking retroactive and future compensation under the statute for the use of the riverbeds. App. 156. The trial court also ruled that PPL's as-applied preemption challenges could not be decided without a factual record and reserved ruling on the issue until after trial. App. 157.

2. The Navigability Ruling

The State then moved for partial summary judgment that the Missouri, Madison, and Clark Fork rivers were navigable in 1889 and, therefore, that Montana held title to the riverbeds under the "equal footing doctrine." *Pollard's Lessee v. Hagan*, 44 U.S. 212, 229 (1845). To carry its burden to prove navigability, the State submitted two non-expert affidavits that relied entirely on hearsay.

The first affidavit, provided by a State Archivist of the Montana Historical Society, attached copies of newspaper articles, books, and journal accounts contained in the Historical Society's collection. The second affidavit, provided by the Minerals Management Bureau Chief for the Montana Department of Natural Resources, summarized a discredited 20-year-old study, commissioned by the State (the "River Study").

In response, PPL argued that, under this Court's precedents, the navigability of a river for title purposes is determined on a section-by-section basis in light of navigability at the time of statehood, not on a river-as-a-whole basis in light of present-day usage. PPL submitted more than 500 pages of exhibits and affidavits from two experts: Dr. David M. Emmons, a Professor of History Emeritus at the University of Montana, and Dr. Stanley A. Schumm, a specialist in the field of fluvial geomorphology. Both experts concluded that the relevant stretches of the three rivers were not navigable in 1889 when Montana joined the Union.

The information cited by PPL's experts included a 1910 federal court decree of non-navigability granting title to the riverbeds where the Thompson Falls project operates to PPL's predecessor and declaring that the relevant stretch of the Clark Fork river "was and is a non-navigable stream." *Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910). Other primary sources relied on by PPL's experts included, for example: (1) an 1891 Army Corps of Engineers Report to Congress noting that the relevant stretch of the Clark Fork

River "is a mountain torrential stream, full of rocks, rapids, and falls" that is "utterly unnavigable, and incapable of being made navigable except at enormous cost," App. 109, 202, 307; (2) a federal War Department declaration stating that PPL's predecessor did not need a permit to build the Black Eagle dam because the Great Falls reach of the Missouri river "was not now navigable and ... in all probability never will be," App. 200, 263; (3) an 1898 Report to Congress by the Army Corps stating that the Great Falls reach was an "unnavigable section, occupied by cataracts and dangerous rapids," App. 114, 200, 218; and (4) with respect to the Madison River, a 1931 Report to Congress by the Army Corps concluding that "commercial navigation ... is entirely out of the question." App. 102, 201, 295.

Moreover, as PPL's experts explained, the rivers have changed significantly since 1889. In the 1800s, the relevant river sections were fraught with torrential rapids and waterfalls, as well as boulder-strewn sections, and were braided or anastomosing. App. 103, 208–215. PPL's hydropower dams have made the post-statehood rivers more susceptible to navigation by significantly altering the rivers' hydrology, including reducing the peak flows, increasing the low flows, and submerging boulders and historic rapids. App. 214–215.

PPL's experts also disputed the accuracy of the materials on which Montana relied. For instance, the conclusions reached in the River Study were unreliable because severe funding constraints prevented the study's authors from preparing a

credible historic account. *See* App. 105–106, 193. Dr. Emmons noted that many of the documents that the State mistakenly attributed to the Army Corps represented the views of undisclosed authors and were in fact not prepared or approved by the Army Corps. App. 111, 195, 269–272. Similarly, although the State had asserted that "[a]s anyone with even a passing knowledge of the Lewis and Clark Expedition must concede, the Missouri River is navigable in fact throughout Montana," Dr. Emmons explained that the Expedition did not navigate the Great Falls reach of the Missouri River "because it was impossible for them to do so"; indeed, the Expedition "engaged in an arduous month-long portage around that reach." App. 197.

Notwithstanding the substantial evidence submitted by PPL, the trial court concluded that there were no disputed issues of material fact and awarded summary judgment in the State's favor. App. 143. The trial court further concluded that navigability need not be determined on a section-by-section basis and that, in light of present-day recreational usage on some parts of the rivers, the entire rivers were navigable nearly 120 years earlier. App. 138, 143.

3. The Final Judgment

The trial court held an 8-day bench trial in October 2007 on the remaining issues and, on June 13, 2008, entered final judgment in the State's favor. The trial court awarded the State $34 million in retroactive back-rent for PPL's use of the riverbeds from 2000 through 2006; an additional $6 million for its use of the riverbeds in 2007; and

whatever future amounts the State Land Board determined in 2008 and going forward. (With statutory interest at a rate of 10% per annum, the amount has grown to approximately $49 million.) App. 81.

The trial court also rejected PPL's claim that the Montana Hydroelectric Resources Act is preempted as applied to PPL's hydropower projects. In the trial court's somewhat cryptic judgment, although the Montana statute may well conflict with PPL's federal licenses and Federal Power Act regulations, that "does not mean that there can be no lease." App. 123.

C. The Montana Supreme Court's Decision

PPL appealed to the Montana Supreme Court and, on March 30, 2010, a divided (5–2) court, over a powerful dissent by Justice Rice, largely affirmed the trial court's rulings.

1. With respect to navigability, the Montana Supreme Court concluded that the State was entitled to summary judgment and that the trial court had properly concluded that the Missouri, Madison, and Clark Fork rivers were navigable for title purposes.

Addressing PPL's assertion that the trial court misapplied precedent, the Montana Supreme Court recognized that "two ... crucial aspects" of the trial court's decision were that (1) non-navigable interruptions in a river do not defeat navigability, so long as the river *as a whole* was "used, or susceptible to being used, as a channel of commerce at the time of statehood"; and (2) present-day usage

is "probative as to navigability of a river at the time of statehood." App. 53. The Montana Supreme Court then explained that its "independent review of the case law" established "unequivocally" that the trial court's "understanding of the navigability for title test was correct." App. 54. The Montana Supreme Court agreed with the trial court's staggering conclusion that PPL's expert testimony based on primary materials (including a federal court decree of non-navigability) was "insufficient to raise a genuine issue of material fact regarding navigability." App. 57.

According to the Montana Supreme Court, the "concept of navigability for title purposes is very liberally construed." App. 54. It therefore made no difference that miles-long stretches of the rivers were impassable when Montana entered the Union. For example, even though the Great Falls reach on the Missouri River was non-navigable, this "17-mile stretch ... is merely a short interruption in the use of the Missouri as a channel for useful commerce, as evidenced by the Lewis and Clark expedition's portage of this area, and the well-documented actual use of the Missouri subsequent thereto." App. 61. Although the Montana Supreme Court recognized that there are "interruptions to unimpeded navigation in the vicinity of PPL's Thompson Fall project," it concluded that the Clark Fork River as a whole is generally navigable. *Id.* Similarly, "PPL's dams on the Madison River are also merely short interruptions in the navigation of this river as well." *Id.*

The Montana Supreme Court further concluded that it was appropriate to consider

present-day circumstances to determine whether a river is navigable for title purposes. According to the court, "it is equally clear that the present-day usage of the Madison, Clark Fork, and Missouri rivers demonstrates that these rivers were susceptible of providing a useful channel of commerce throughout the state of Montana at the time of statehood." *Id.*

2. With respect to federal preemption, the Montana Supreme Court concluded that the "core" purpose of the Montana Hydroelectric Resources Act is "compensatory," not "regulatory," and that the statute's compensatory provisions are not preempted. App. 72. The court further suggested that the non-compensatory provisions could be severed and would not prevent the State from recovering both retroactive and future lease payments under the statute for the use of the riverbeds under PPL's hydropower facilities.

3. Justice Rice, joined by Judge Salvagni (sitting for Justice Morris who was recused), penned a 22-page dissenting opinion. The dissent noted that the majority veered "off track" by failing to undertake the "section-by-section" navigability analysis mandated by *United States v. Utah*, 283 U.S. 64 (1931). App. 96. Justice Rice expressed concern that the majority, in focusing on the navigability of the river as a whole, had "misstat[ed]" PPL's objections to that approach. App. 99. PPL had not claimed that "'virtually every stretch of a river must be 'navigable in fact' and that particular stretches of a river which are non-navigable ... can defeat a finding of navigability with respect to the *whole river*.'" *Id.* (quoting App.

58). Instead, PPL had argued "for certain reaches to be declared non-navigable" consistent with *Utah*'s section-by-section approach. *Id.* Justice Rice criticized the majority for "attempting to avoid the consequences of *Utah*'s application—and of PPL's considerable evidence"—by treating the section-by-section approach "essentially as an anomaly" rather than a general "framework of analysis." App. 97. That interpretation, Justice Rice explained, was an "illogical rendering" that "ignores both" this Court's "approach and the actual result of [*Utah*]," which had found two different titleholders to different sections of the riverbeds. App. 98.

Justice Rice found it "disturbing" that the majority dismissed the disputed sections of the Missouri, Madison, and Clark Fork rivers as "simply too 'short' to matter." App. 99. The majority had failed to explain what made the disputed sections too "short." App. 99, 116. Nor had the majority explained how it could reach any conclusions "without the benefit of the extensive fact-finding done in *Utah*" as to the specific waters' topography, history, impediments, and use and susceptibility to use for commerce purposes. App. 100.

Finally, Justice Rice summarized PPL's "mountain" of evidence, determining on each count, that "genuine material factual conflicts" precluded the "extreme remedy" of summary judgment. App. 100–101. Justice Rice concluded that PPL's evidence, "if accepted after a trial, would lead inevitably to the conclusion that the State did not hold title to the streambeds at issue." App. 100.

And, in any event, the credibility of the State's evidence should have been tested at trial, especially given the questions PPL raised as to whether the State had followed "fundamental tenets of historical analysis." App. 101.

REASONS FOR GRANTING THE PETITION

The decision below effectuates a massive land transfer by ignoring clear federal-law obstacles to its conclusion that riverbeds long thought to be private and federal lands belonged to the State all along. *Certiorari* is warranted for three reasons. *First*, the Montana Supreme Court's decision cannot be squared with this Court's navigability precedents, and it deepens existing divisions and confusion among the lower courts over the proper test for determining who holds title to submerged lands. *Second*, contrary to basic principles of federalism, the court below failed to recognize that the Federal Power Act preempts the State's attempt to assert retroactive title to riverbeds and collect millions in retroactive lease payments. *Third*, the questions presented address important, recurring issues that should be resolved by this Court.

This petition presents an ideal opportunity for the Court to reaffirm the bedrock principles set forth in *United States v. Utah*, 283 U.S. 64 (1931), and to address the disturbing trend of states asserting sovereign ownership of lands long thought to be owned by either private parties or the federal government. The petition thus warrants the Court's exercise of its exclusive authority to review final state court decisions raising important

federal issues. It is hard to imagine a more brazen effort to flout the federal law on navigability than the grant of summary judgment for the State in the face of a federal court decree and a "mountain" of contrary evidence. If left uncorrected, the decision below not only provides a roadmap for other states to circumvent federal law on navigability, but it also threatens to upend the federal regulatory scheme for hydropower facilities and decades of expectations concerning who owns the riverbeds under the Nation's rivers and streams.

I. The Court Should Grant Review To Clarify That *Utah* Remains The Proper Test For Determining Navigability For Title Purposes.

Under the "equal footing" doctrine, title to the beds of rivers within Montana vested in the State when it was admitted to the Union if the rivers were "then navigable." *Utah*, 283 U.S. at 77. If the rivers were not "then navigable," "title to the river beds remained in the United States." *Id.*; *see also Shively v. Bowlby*, 152 U.S. 1, 27 (1894); *Pollard's*, 44 U.S. at 229. This Court's precedents establish that the proper test for navigability is whether the relevant stretches of the rivers were "navigable in fact" when Montana joined the Union in 1889—that is, whether the river stretches were used, or susceptible to use, "as highways for commerce, over which trade and travel" could "be conducted in the customary modes of trade and travel on water." *Utah*, 283 U.S. at 76 (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870)).

The Montana Supreme Court misapplied this test. In particular, the court failed to consider evidence demonstrating navigability on a section-by-section basis. It instead concluded that the Missouri, Madison, and Clark Fork rivers are generally navigable rivers and, therefore, title to the riverbeds passed to the State—even though significant river stretches where PPL's hydropower projects are located were not navigable when Montana joined the Union. The court below also improperly considered evidence of present-day usage as independently sufficient evidence of whether the rivers were navigable in 1889. The extent of the departure from this Court's decisions is dramatically illustrated by the lower court's grant of summary judgment for the State in the face of a 1910 federal court decree finding the relevant stretches of the Clark Fork river non-navigable. The federal court decree could be deemed not to raise an issue of material fact only if non-navigable stretches were irrelevant and modern-day usage trumped evidence of usage at statehood. Both underlying premises of the Montana Supreme Court's decision are inconsistent with this Court's precedent.

A. The Montana Supreme Court's Navigability Analysis Contravenes This Court's Precedents.

Over a century ago in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), the Court indicated that the navigability of a waterway for title purposes must be determined on a section-by-section basis. *Id.* at 698. The Court explained that, even when it is "general knowledge"

that a river is navigable, "it is not so clear ... at what particular place between its mouth and its source navigability ceases." *Id.* The Court thus held that, although the Rio Grande was commonly viewed as navigable, a section of the river "within the limits of the territory of New Mexico" was not a waterway "over which, in its ordinary condition, ... trade and travel [could] be conducted in the customary modes of trade and travel on water." *Id.* at 699. That middle section of an otherwise-navigable river was therefore non-navigable.

The Court has since reaffirmed that, when determining navigability for title purposes, a fact-intensive, section-by-section analysis is required. In *United States v. Utah*, 283 U.S. 64 (1931), the Court focused on the navigability of a 4.35-mile reach of the Colorado River. *Id.* at 89. Citing *Rio Grande*, the Court reiterated that, "[e]ven where the navigability of a river, speaking generally, is a matter of common knowledge ... it may yet be a question, to be determined upon evidence, how far navigability extends." *Utah*, 283 U.S. at 77 & n.9. The Court ultimately concluded that a 4.35-mile section of a larger, 40-mile stretch of the Colorado River—title to which had otherwise vested in the United States—was navigable at statehood and, therefore, title for the 4.35-mile stretch had passed to Utah when it joined the Union. *See id.* at 90–91; *see also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922) (considering stretch of Arkansas River along Osage Reservation).

The Court has also applied a section-by-section approach when employing the more lenient test for determining navigability for purposes of

determining the scope of the federal government's Commerce Clause power. In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Court considered the navigability of a 111-mile stretch of the New River to determine whether the United States could prevent the Appalachian Power Company from constructing a hydroelectric dam. Finding that the river was non-navigable between Allisonia, Virginia and Hinton, West Virginia, the trial court held that the United States lacked that authority. *Id.* at 410-11. This Court reversed. Dividing the river into "three sections"—a 28-mile section, 59-mile section, and 24-mile section—the Court focused on the "middle section" because the evidence of navigability was "much stronger" for the other two sections. *Id.* at 411. After carefully reviewing the evidence, the Court concluded that the relevant portions of the river were navigable for purposes of commerce and, therefore, the United States could require the Appalachian Power Company to comply with federal licensing requirements. *Id.* at 424.

The message from *Rio Grande*, *Utah*, and *Appalachian Electric* is clear: Courts should not assume that certain sections of a river are navigable or non-navigable merely because the river taken as a whole may be characterized as generally navigable or non-navigable.

The Montana Supreme Court's decision did not merely overlook the teachings of this Court's precedents; it rejected them "unequivocally." App. 54. Dismissing PPL's argument that a court should consider navigability "with regard to certain sections of the river, as opposed to the rivers

themselves as a whole," the Montana Supreme Court deemed *Utah*'s section-by-section approach to be both anomalous and inapplicable. App. 59. It was anomalous, in the lower court's view, because the parties in *Utah* elected not to dispute the overall non-navigability of a larger 40-mile stretch, focusing on only 4.35 miles. App. 60. It was inapplicable because *Utah* had not concerned "short interruption[s] of navigability"—and the disputed sections of the Missouri, Madison, and Clark Fork rivers were, in the majority's judgment, "relatively short interruptions." App. 60–61. The Montana Supreme Court thus concluded that "so long as *the river itself* was used, or susceptible of being used, as a channel of commerce at the time of statehood," no further inquiry was required. App. 53 (emphasis added).

The Montana Supreme Court's river-as-a-whole approach to navigability cannot be reconciled with this Court's decisions. As the dissent below recognized, the rejection of a section-by-section analysis "ignores both" this Court's "approach and the actual result of" *Utah*. App. 98 (Rice, J., dissenting). To be sure, in *Utah* the Court noted that it was not concerned with "short interruption[s] of navigability in a stream otherwise navigable"; rather, it was only concerned about "long reaches with particular characteristics of navigability or non-navigability." *Utah*, 283 U.S. at 77. But the Court plainly viewed the 4.35-mile stretch in *Utah* to be sufficiently "long" and emphasized that the "exact point at which navigability may be deemed to end ... should be determined precisely." *Id.* at 90. Determining the

"exact point" is, quite obviously, particularly important when navigability determines title to land.

Against this backdrop, the lower court's characterization of the 17-mile non-navigable stretch of the Missouri River as unduly "short" without any fact-finding is indeed "disturbing." App. 99 (Rice, J., dissenting). As the dissent recognized, *see* App. 101, PPL was not only disputing the navigability of a 17-mile stretch (itself nearly four times the disputed stretch in *Utah*); instead, it challenged the navigability of more than 125 miles of the Missouri River; the entire Madison River (approximately 133 miles); and approximately 235 miles of the Clark Fork River. App. 101, 104, 109–110, 114.

The lower court's decision reflects a particularly egregious example of how *Utah*'s "short interruptions" language, if misapplied, becomes an exception that swallows the rule. Only by eviscerating *Utah* and relying on broad pronouncements about the general navigability of the Missouri, Madison, and Clark Fork rivers was the Montana court able to cast aside expert evidence of non-navigability, including a federal court decree concerning the Clark Fork River and multiple federal reports as to all three rivers. That brazen disregard of this Court's precedents is reason enough for this Court's intervention. But here the consequence of disregarding federal law was to upend the long-settled expectations of private property owners and the federal government.

B. The Montana Supreme Court's Navigability Analysis Conflicts With Decisions From Other Courts.

In addition to contravening this Court's controlling authorities, the Montana Supreme Court's decision exacerbates a long-simmering conflict among the lower courts. While this Court's teachings are clear, the temptation for state courts to err on the side of the states is equally clear.

Numerous federal and state courts have engaged in a proper section-by-section analysis to determine navigability, both for regulatory and title purposes, for specific mileages and geographical segments of rivers. *See Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1432–33 (9th Cir. 1993) ("navigability for the middle segment may not be based on inferences of actual use elsewhere on the river"); *City of Centralia, Wash. v. FERC*, 851 F.2d 278, 279–80 (9th Cir. 1988); *Loving v. Alexander*, 745 F.2d 861, 867 & n.7 (4th Cir. 1984) (affirming that "the Jackson River, from RM 43 to 23.9, meets the federal test of navigability," but expressing "no opinion on the portions of the river above RM 43"); *Utah v. United States*, 304 F.2d 23, 26 (10th Cir. 1962) ("the part of the river in question was in fact and in law non-navigable"); *see also Northwest Steelheaders Ass'n, Inc. v. Simantel*, 112 P.3d 383, 395 (Or. App. 2005).

In contrast, other courts (predominantly state courts) have adopted a different approach that emphasizes the navigability of a river as a whole. These courts have rejected suggestions that navigability "should be tested using short

segments" or that one river could contain "short, intermittent, intermingled navigable and non-navigable sections, contending that such an approach "would introduce considerable confusion and difficulty into the application of the public trust doctrine." *Bauman v. Woodlake Partners, LLC*, 681 S.E.2d 819, 827 (N.C. Ct. App. 2009). Under this approach, navigability disputes concerning "short interruptions" of the navigable waterway have no effect on title. *See Northwestern La. Fish & Game Preserve Comm'n v. United States*, 574 F.3d 1386, 1391 (Fed. Cir. 2009) ("regardless of the navigability of the Saline Bayou, the Red River is a navigable waterway"); *Ryals v. Pigott*, 580 So. 2d 1140, 1152 (Miss. 1991) (finding navigability based on generalized uses of river); *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 166 (Mont. 1984) (rejecting claim to title because the entire river was navigable).

In "unequivocally" rejecting *Utah*'s section-by-section approach as an outlier rather than a general rule, the decision below has gone further than any other court. Its brazen disregard of *Utah*, and dismissal of a 1910 federal court decree as not even raising a material fact, make this case a candidate for summary reversal. Nonetheless, because other courts have committed less egregious variants of the same error, there is a conflict with both *Utah* and other lower court decisions and, hence, plenary review would be appropriate.

C. The Montana Supreme Court's Reliance On Present-Day Navigability Conflicts With Decisions From Other Courts.

The decision below also deepens a split in authority over the relevance of present-day evidence to determining navigability for title purposes, particularly evidence of modern-day recreational usage. Although it is well-settled that navigability for title purposes is determined as of the date a State is admitted to the Union, *see Utah v. United States*, 403 U.S. 9, 9–10 (1971) (*"Utah II"*), the extent to which post-statehood usage may be probative of a waterway's use or susceptibility to use at statehood has generated uncertainty. The decision below is a powerful example of the dangers of giving post-statehood usage undue weight, as the court elevated modern usage over evidence from federal sources at or shortly after statehood.

The Court's decisions have applied a rigorous approach to navigability that has endeavored to tie evidence of navigability to the State's precise date of admission to the Union. For example, in holding that the Great Salt Lake was navigable in 1896—the time of Utah's admission—the Court took pains to explain that facts on which it relied from the 1870s and 1880s had not changed by 1896. *See Utah II*, 403 U.S. at 11–12. The Court's decisions have not, however, categorically shut the door to post-statehood evidence—at least of certain kinds, and under certain conditions. In *Utah*, the Court noted that some post-1896 evidence of actual navigation was "relevant" to the rivers'

"susceptibility" to use as a highway of commerce in 1896. *Utah*, 283 U.S. at 82.

Applying this Court's decisions, several lower courts have concluded that post-statehood evidence of navigability is generally an unreliable indicator of a waterway's condition at statehood. For example, the Eighth Circuit rejected the relevance of modern-day recreational canoe use in considering the navigability of portions of the riverbed of the Little Missouri River. *See North Dakota v. United States*, 972 F.2d 235, 240 (8th Cir. 1992). Although North Dakota argued that "if canoes can travel on the River today, commercial watercraft could have done so in the late 1880s," the Eighth Circuit discounted that evidence, concluding that "modern day canoe use and modern day 'boat-ability' data are not reliable indicators of the River's navigability at statehood." *Id.*; *see also North Dakota ex rel. Bd. of Univ. & Sch. Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982) ("the issue is one of ... navigability at the time of statehood, not in the present day"), *rev'd on other grounds*, 461 U.S. 273 (1983). Other courts have likewise deemed present-day usage irrelevant in distinguishing navigability for *title* purposes—which is determined as of the date of statehood—from navigability for *Commerce Clause* purposes—which "may arise later." *Arkansas River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 (Ark. App. 2003)) ("present-day navigability" may be relevant to navigability for Commerce Clause purposes but not for title purposes).

In contrast, other courts have been more receptive to post-statehood evidence of navigability, albeit to varying degrees. The Oregon Court of Appeals, for example, cited a "variety of post-statehood events" from the 1880s to 1920s to "further corroborate" a stream's susceptibility to navigation in 1859. *Simantel*, 112 P.3d at 487 (quoting *Utah*, 283 U.S. at 82); *see also Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373 (Ohio 1959) (modern-day usage resulting from artificial improvements); *Ryals*, 580 So.2d at 1152 (Bogue Chitto River is navigable because it is "capable in its ordinary condition today of supporting commercial fishing"). Similarly, in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), the Ninth Circuit considered present-day recreational and commercial usage of the lower Gulkana River to conclude that it was susceptible to commercial use when Alaska became a state in 1959. *Id.* at 1405. The Ninth Circuit noted, however, that this conclusion followed from the parties' factual stipulation that "the River's physical characteristics have remained *unchanged since statehood*." *Id.* (emphasis added).

The Montana Supreme Court's decision exacerbates this split in authority and goes one step further: The court concluded that evidence of present-day recreational use "is *sufficient* for purposes of 'commerce'" to establish navigability, even though the State's admission to the Union occurred more than 130 years ago, and the rivers' geology and hydrology have changed significantly in the ensuing years. App. 58 (emphasis added). In an extraordinarily expansive and erroneous

reading of *Utah*, the lower court declared that this Court has "embraced the notion that emerging and newly-discovered forms of commerce can be retroactively applied to considerations of navigability." App. 55. The court acknowledged that historical usage of the waters was "admittedly not well-documented" nor "well-established." App. 54, 56. But the paucity of historical evidence only confirmed the importance of present-day evidence because the concept of navigability is to be "very liberally construed." App. 54.

The dangers of giving modern evidence undue weight could hardly be more starkly illustrated. Among the historical evidence deemed not to raise even a triable issue of fact was a 1910 federal court decree and 1891 and 1898 reports from the Army Corps to Congress. *See* App. 109–110, 114. To make matters worse, the Montana Supreme Court's decision failed to recognize that the post-statehood construction of PPL's dams significantly modified the rivers, making them much more susceptible to navigation and recreational use.

II. The Montana Supreme Court's Decision Misconstrues The Preemptive Reach Of The Federal Power Act.

This Court's review is also warranted because the decision below erred in overcoming the second federal obstacle to this massive land grab: preemption. The court below improperly concluded that federal law does not preempt Montana from imposing massive rental obligations on hydropower producers for use of riverbeds that, as part of federal licensing proceedings, were understood to

be owned by private parties and the federal government.

A. The Montana Statute Under Which The Rental Obligation Purportedly Arises Is Preempted.

The Federal Power Act imposes extensive requirements on companies, like PPL, that seek approval to construct and operate hydropower facilities on the Nation's waterways. *See* 16 U.S.C. § 797(e). The Act imposes a "complete scheme of national regulations." *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180 (1946). Congress's intent was "not merely to prevent obstructions to navigation" but rather to "secure enactment of a comprehensive development of national resources" through control over the "engineering, economic and financial soundness" of hydropower projects. *Id.* at 180–81; *see also California v. FERC*, 495 U.S. 490, 499 (1990).

The statute vests FERC with sole discretion to select the operator of any hydropower site, *see* 16 U.S.C. §§ 797(e), 800(a); *see also id.* § 801 (sole discretion over license transfers); 18 C.F.R. §§ 9.1–9.3, and requires all lands to be held by the licensee "in perpetuity." 18 C.F.R. § 2.9. It also provides that hydropower licenses will be awarded based on an expert analysis of project economics. *See* 16 U.S.C. § 797(b) (FERC shall determine "actual legitimate original cost of and the net investment in a licensed project"); 18 C.F.R. § 5.18(b)(5)(ii)(E). That analysis considers "whether the project will be profitable" and "whether the benefits of project

power outweigh its costs." *Mead Corp.*, 72 FERC ¶ 61,027 (1995).

Although the Federal Power Act contemplates that states and other landowners will receive compensation for use of their lands, the statutory scheme is structured on the premise that these costs will be factored into the economic analysis when the project is federally licensed and that all land rights will be acquired within five years of the first license. The statute likewise provides a mechanism for state participation. In particular, the statute requires an applicant for a hydropower license to provide "notice ... in writing to any State or municipality likely to be interested in or affected by such application" and to "publish notice ... in a daily or weekly newspaper published in the county or counties in which the project ... or the lands affected thereby are situated." 16 U.S.C. § 797(f); *see also id.* § 802 (requiring notice to "[a]ny ... State, municipal or other local governmental agency likely to be interested in or affected by such application"). It requires the applicant to provide "a statement in duplicate showing the actual legitimate original cost of construction of such project, ... and of the price paid for water rights, rights-of-way, lands, or interest in lands". *Id.* § 797(b). And it mandates that the applicant shall provide "satisfactory evidence" demonstrating compliance "with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks." *Id.* § 802.

Against this backdrop of comprehensive federal regulation that invites state participation, the

Montana Hydroelectric Resources Act—the statute that provides the sole asserted basis for the State's compensation claim for the use of the riverbeds—directly and irreconcilably conflicts with federal law. *See Albany Eng'g. Corp. v. FERC*, 548 F.3d 1071, 1075 (D.C. Cir. 2008) (Federal Power Act precludes "dual licensing authority"). Notwithstanding the federal government's exclusive authority over hydropower projects, the statute sets out a comprehensive scheme of state regulation attuned to the economic value and viability of proposed hydropower projects. For example, the Montana statute requires the Montana Land Board to make a "preliminary examination as to the value of the power site, as to the plans of development submitted by the applicant, and of *all other matters* relating to the proposed development as it deems necessary for the proper disposition of the business." Mont. Code Ann. § 77-4-204 (emphasis added). Proposed leases may be debated at public meetings, and the Montana Land Board is granted authority to accept bids from potential operators and to select the bid "most advantageous to the state." *Id.* § 77-4-206(3). The statute includes durational limits, stipulating that the "term of" any "lease shall not exceed 50 years." *Id.* § 77-4-209. Moreover, the statute requires rent to be paid to Montana for no less than the "full market value of the estate or interest disposed of through the granting of the lease or license." *Id.* § 77-4-208. This provision was interpreted here to permit Montana to recover a share of the profits generated by the federally licensed facilities. App. 42, 84.

The Montana Supreme Court recognized what is undeniable: that sizeable parts of the Montana statute irreconcilably conflict with the requirements of the Federal Power Act. *See* App. 71–72. It nonetheless deemed these conflicts to be alleviated by the State's non-binding assurances that it will not seek to apply the statute's regulatory, non-rental provisions to PPL. *Id.* But even though the State may deem the rental provisions severable from the more explicitly regulatory provisions, that does not save the rental provisions from preemption. As originally enacted, these provisions worked hand-in-glove with the concededly preempted regulatory provisions. And to the extent they are shorn of those regulatory provisions, they are just a naked revenue grab that continues to conflict with the federal regulatory regime.

B. The State's Attempts To Impose Rental Obligations On PPL Are Preempted.

Even assuming that the Montana statute is not preempted on its face, the State's attempts to recover lease payments are still preempted as applied here. PPL's hydropower projects were licensed and re-licensed on the unquestioned assumption that the riverbeds were not State lands. The State actively participated in the federal licensing process and raised no objection that it held title to the riverbeds. Moreover, PPL pays annual charges of approximately $500,000 to the federal government for the "use, occupancy, and enjoyment" of federal lands, including lands to which the State now claims title. 16 U.S.C.

§ 803(e). The State's efforts to pull a bait-and-switch at this juncture would defy the whole purpose of the federal regulatory regime.

The State's attempt to impose a retroactive assessment for tens of millions in rent for use of the riverbeds upends baseline assumptions behind PPL's federal licenses and saddles the licensed projects with extreme economic burdens. The suggestion that states can impose such assessments undercuts the federal government's capacity to make informed decisions with respect to proposed hydropower licenses. It also upends the "highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *California*, 495 U.S. at 500. Whatever the precise bounds of permissible state regulation, the Federal Power Act surely preempts a State from retroactively imposing leasing obligations for extended periods of time during which neither the licensee nor FERC had any notice of any claim for compensation—and no reason to believe compensation was owed. As this Court has noted, retroactivity only accentuates serious preemption problems and heightens the threat to the federal regulatory scheme. *See Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 584 (1981) (retroactivity "'only accentuates the danger of conflict'").

Moreover, requiring PPL to pay the State rent for lands that the federal government considers to be federal lands puts PPL in an untenable position. In particular, it subjects PPL to precisely the type of competing, overlapping obligations that this Court has rejected when interpreting other parts of

the Federal Power Act. *Cf. Nantahala Power & Light Co. v. FERC*, 476 U.S. 953, 970 (1986) (preempting state regulation resulting in "trapping" of costs that would occur under dual regulatory scheme).

III. The Montana Supreme Court's Decision Raises Important Federal Issues That Implicate Private Property Rights And Can Only Be Effectively Resolved By This Court.

The decision below clearly conflicts with this Court's decision in *Utah* and would merit this Court's review for that reason alone. But the decision also strips away the private property rights of PPL and thousands of other private property owners. This Court's review is necessary to provide PPL and other private property owners with meaningful relief.

The extent of the State's land grab and its effect on private property rights are hard to overstate. The Montana court's decision purports to determine the property rights along hundreds of miles of three rivers, on stretches where private or federal ownership had long been a given. As noted, the decision directly affects river stretches that have already been determined by a federal court to be non-navigable. *See Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910).

But even that vastly understates the impact of the decision below. The State's key evidence, which the court below believed entitled the State to summary judgment, was the inclusion of the three rivers on the State's 1986 "navigable rivers list,"

which was based on the same flawed River Study discussed above. *See supra* at 10–12. That list goes well beyond the three rivers at issue here. It includes "some 8 million acres of federally-owned surface" and "hundreds of [federal] mineral leases." U.S. Dep't of Interior, Letter to Montana Dep't of State Lands (dated Aug. 26, 1988) (outlining federal government's objections to list). It also includes stretches of rivers on which major federal hydropower and irrigation projects are located, including the Hungry Horse Reservoir, Yellowtail Dam, and Libby Dam—facilities that have been generating power since 1953, 1967, and 1973, respectively. That list now appears to constitute irrebuttable evidence of navigability in the Montana state courts.

The effect on private property owners will be dramatic. As the federal government has recognized, the State's aggressive claims will have a "disquieting effect on the title to thousands of parcels of *private land* through which these streams pass." U.S. Dep't of Interior, Letter to Montana Dep't of State Lands (Aug. 26, 1988) (emphasis added). Because the courts were the operative force behind this land transfer, it remains to be seen whether property owners in general have a Takings Claim or due process objection to the lower courts' land grab. *See Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Prot.*, No. 08-1151 (U.S. June 17, 2010) But, even if private landowners can bring an action, any Takings Claim would be dead on arrival in state court given the Montana Supreme Court's decision that the land has always belonged to the State.

And the Eleventh Amendment stands between those private landowners and any federal court action. Accordingly, even if the Takings Clause and due process principles provide some backstop, for riparian owners the federal issue of navigability and the settled rules of this Court for determining navigability for title provide the primary check on state action. This Court's review is necessary to maintain that check.

The temptation for other states to follow Montana's lead is obvious and real. *Cf.* Attorney General News Release, *Bullock Calls Supreme Court's PPL Decision "A Victory for Generations of Montanans"* (Mar. 30, 2010) (touting the $41 million dollar award to other States as "a victory for generations of Montanans" against "out-of-state corporations"). This Court recognized the dangers long ago, noting that "[s]ome states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so" as "a convenient method of ... control." *Brewer-Elliott*, 260 U.S. at 89, *see also Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring); *Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1334 (1994) (Scalia, J., dissenting from denial of certiorari).

Finally, this Court's review is needed to enforce basic principles of federalism. It is not for "a state by courts or legislature ... to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law." *Brewer-Elliot*, 260 U.S. at 88. Unless the Court grants *certiorari*, there will be effectively no check to prevent state court judges from claiming for the

citizens who elect them ownership of state riverbeds and the economic benefits therefrom—no matter how belated the claim and no matter how otherwise settled the fact that the land belongs to private parties or the federal government.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St, Ste. 1500
Billings, MT 59101
(406) 252-2166

PAUL J. LAWRENCE
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

August 12, 2010 *Counsel for Petitioner*

APPENDIX
Volume I

TABLE OF APPENDICES

Appendix A

Opinion of the Supreme Court of Montana App-1

Appendix B

Memorandum of Decision of the Montana First Judicial District Court, Lewis & Clark County, dated June 13, 2008 ..... App-118

Memorandum and Order on the Navigability of the Missouri, Madison and Clark Fork Rivers of the Montana First Judicial District Court, Lewis & Clark County, dated Aug. 28, 2007 ..... App-130

Memorandum and Order of the Montana First Judicial District Court, Lewis & Clark County, dated Apr. 14, 2006 ..... App-145

Appendix C

U.S. Const., Art. VI, cl. 2 ..... App-161

Relevant Provisions of the Federal Power Act, 16 U.S.C. §§ 791a-823d App-162

16 U.S.C. § 797 ..... App-162

16 U.S.C. § 799 ..... App-168

16 U.S.C. § 800 ..... App-169

16 U.S.C. § 801 ..... App-171

16 U.S.C. § 802 ..... App-172

16 U.S.C. § 803 ..... App-174

Relevant Provisions of the Montana Hydroelectric Resources Act, Title 77, chap. 4, pt. 2, MCA App-185

77-4-201 ..... App-185

77-4-202 ..... App-185

77-4-203 ..... App-185

77-4-204 ..... App-186

77-4-205 ..... App-186

77-4-206 ..... App-186

77-4-207 ..... App-187

77-4-208 ..... App-187

77-4-209 ..... App-188

77-4-210 ..... App-188

77-4-211 ..... App-189

Appendix D

Affidavit of David M. Emmons, dated Nov. 3, 2006 ..... App-190

Affidavit of Stanley A. Schumm, dated Nov. 3, 2006 ..... App-205

Navigation Report by David M. Emmons, dated June, 2007 ..... App-216

Appendix A

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0506

PPL MONTANA, LLC, a Delaware Limited Liability Company,

Plaintiff and Appellant,

v.

STATE OF MONTANA,

Defendant and Appellee.

OPINION OF THE COURT

Justice PATRICIA O. COTTER:

¶ 1 On June 13, 2008, the First Judicial District Court entered findings of fact and conclusions of law in a cause of action between PPL Montana, LLC (PPL), and the State of Montana (State). The District Court ordered PPL to pay the State $40,956,180 for its use of state-owned riverbeds from 2000 through 2007, at PPL hydroelectric power sites on the Missouri, Madison, and Clark Fork rivers. We affirm the District Court's award of damages.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 PPL is a Delaware limited liability company registered to do business in Montana. PPL is a wholesale electric generator[1] and owns and operates a number of federally-licensed hydroelectric facilities, or dams, in Montana. A number of these dams are located on the Missouri, Clark Fork, and Madison rivers. The "Thompson Falls Project" is located on the Clark Fork River and was built in 1915. This facility was initially licensed by the federal government in 1949, and was re-licensed in December 1979 by the Federal Energy Regulatory Commission (FERC), pursuant to its authority under the Federal Power Act (FPA), 16 U.S.C.A. §§ 791a-823d (West 2010). The Ryan, Cochrane, Morony, Rainbow, and Black Eagle dams are located on the Missouri River in Cascade County, Montana. The Black Eagle facility was built in 1891, the Rainbow facility in 1910, the Ryan facility in 1915, the Morony in 1930, and the Cochrane in 1958. The Holter and Hauser dams are located on the Missouri River in Lewis and Clark County, and were completed in 1918 and 1907, respectively. The Madison facility is located on the Madison River in Madison County and was completed in 1906. Additionally, the Hebgen facility, which was completed in 1915, is located on the Madison River in

---

[1] In *State, Dept. of Revenue v. PPL Montana, LLC*, 2007 MT 310, 340 Mont. 124, 172 P.3d 1241, we explained that PPL is an "exempt wholesale generator." This means that PPL is not subject to regulation by state public utility regulatory agencies, and may sell its electricity at whatever price the wholesale market will bear. *PPL Montana, LLC*, ¶ 23.

Gallatin County and provides storage capacity for downstream power generation.[2] The dams on the Madison and Missouri rivers are collectively referred to as the "Missouri-Madison Project" and were relicensed by FERC on September 27, 2000. The Thompson Falls and Missouri-Madison Projects were previously owned by the Montana Power Company (MPC), and sold to PPL on December 17, 1999.

¶ 3 On October 17, 2003, the parents of Montana school children sued PPL[3] in the United States District Court of Montana, seeking compensation for its use of state-owned riverbeds at its hydroelectric generation facilities. The plaintiffs argued that the riverbeds occupied by PPL's dams were part of the school trust lands and that PPL was obligated to compensate the State for their use. In *Montanans for the Responsible Use of the School Trust v. State*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800 (*Montrust*), we defined "school trust lands" as state-owned public

---

[2] A storage facility such as Hebgen Dam is built on the upstream end of a hydroelectric project and has the ability to capture and store water that might otherwise be spilled downstream. This stored water can be released over time and used to generate electricity at downstream facilities in order to maximize productive output.

[3] The federal case, as well as the state case sub judice, also named two other Montana-based hydroelectric companies, Avista and PacifiCorp, as defendants. Both of these companies joined in PPL's challenges to the State's complaint in District Court, but settled with the State prior to trial. Although both of these companies filed numerous motions which were ruled upon by the District Court, because they were dismissed prior to trial and did not have a judgment entered against them, we will refer only to PPL in this Opinion.

lands which the State Land Board (Land Board) is obligated to administer as a trustee for the benefit of the public schools in Montana. *See Montrust*, ¶¶ 13-14. Under Article X of the Montana Constitution, the Land Board's fiduciary obligations include obtaining full market value for the use of school trust lands. *Montrust*, ¶ 17. Prior to this time, neither PPL nor its predecessor MPC had ever paid compensation to the State for the use of the riverbeds associated with its dams.

¶ 4 Although the State had never previously sought compensation for the use of the state-owned riverbeds by MPC or PPL, the State decided to join in the federal suit against PPL and was granted leave to do so on June 18, 2004. The State filed its own complaint requesting compensation from PPL under the school trust theory argued by the original plaintiffs, and also under the Hydroelectric Resources Act (HRA), Title 77, chapter 4, part 2, MCA. Originally enacted by the Legislature in 1931, § 77-4-201, MCA, of the HRA reads as follows:

> It is unlawful to sell or advertise for sale state lands constituting power sites or part of power sites capable of developing hydroelectric energy in commercial quantities. However, the [Land Board] may issue a lease or license to any person, corporation, or municipality for the development of power sites and the distribution, use, and disposition of the electrical energy generated on the sites as specifically provided in this chapter.

¶ 5 The term "power site" is specifically defined in the HRA as follows:

> The words "power site" as used in this part shall mean not only the state-owned land on which the

> dam is constructed, but also each separate tract of such land which will become part of the reservoir and which in and of itself makes an essential contribution to the value of the power site as a whole of not less than 5% of the entire value of such power site.

Section 77-4-202, MCA.

¶ 6 The federal cause of action was eventually dismissed for lack of subject matter jurisdiction. Prior to the dismissal of the federal suit, PPL filed a declaratory judgment action against the State in the First Judicial District Court on November 12, 2004. In its complaint, PPL contested the State's ability to seek compensation for its use of riverbeds at its FERC-licensed dams on the Clark Fork, Missouri, and Madison Rivers. PPL sought a declaration that the State could not seek compensation for its use of the riverbeds because these claims were federally preempted by the FPA as well the "federal navigational servitude."

¶ 7 The "federal navigational servitude" is the power of the United States Congress to ensure that navigable rivers remain open to interstate and foreign commerce. This servitude applies to navigable rivers acquired by states upon their entrance into the Union, and extends to all state-owned lands below the high-water mark. *See Mont. v. United States*, 450 U.S. 544, 551 (1981); *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 312 U.S. 592, 596-97 (1941). PPL argued that the existence of this servitude over the Clark Fork, Missouri, and Madison Rivers preempted the operation of the HRA upon its dams. Additionally, PPL sought declarations regarding several

affirmative defenses, arguing that: (1) it had acquired a prescriptive easement to use the riverbeds at its facilities; (2) the State was equitably estopped from asserting a right to compensation under the HRA; (3) the State's ability to seek payments was barred by laches and the applicable statute of limitations; and (4) the State breached agreements reached with PPL in the course of licensing its hydroelectric facilities.[4]

¶ 8 On November 24, 2004, the State answered, denying that the HRA was preempted by the FPA or by the federal navigational servitude. The State also counterclaimed seeking a declaration that PPL must compensate the State for its use of state lands, and seeking damages for PPL's unlawful past and ongoing use of those lands without compensation to the State. The State asserted that the Missouri, Clark Fork, and Madison Rivers were navigable rivers at the time of statehood, and that it acquired title to the beds and banks of these rivers when it became a state in 1889 under the "equal footing doctrine."[5] The State claimed that its ownership rights in these riverbeds and the HRA gave it the

---

[4] Affirmative defenses are normally asserted in response to a "preceding pleading." *See* M.R. Civ. P. 8(c). In this case, PPL asserted affirmative defenses in its initial complaint. Although this is unusual, it is most likely explained by the fact that the federal suit between PPL and the State involved the same claims which PPL sought to litigate in state court in Montana. Thus, PPL was already aware of the nature of the State's claims and had already formulated its defenses.

[5] The "equal footing doctrine" holds that a state acquires title to the streambeds of navigable rivers within its borders upon entrance to the Union. *See Opinion*, ¶ 22.

right to seek compensation for PPL's use of the occupied or submerged state lands used by its facilities. Additionally, the State argued that it was entitled to an award of damages under the theories of uncompensated use of state land, unjust enrichment, trespass, and negligence.

¶ 9 On the same day it filed its complaint, the State moved for summary judgment on PPL's complaint. The State asserted that neither the FPA nor the federal navigational servitude prevented it from seeking compensation for PPL's use of state lands. The State claimed that both the FPA and the FERC licensing procedures contemplated that landowners should be compensated for the use of their land under state law and affirmatively permitted, rather than preempted, the compensation the State was seeking. Additionally, the State argued that it was not subject to PPL's legal and equitable defenses.

¶ 10 From this point in the proceedings, PPL and the State engaged in an extensive motion practice. With some exceptions, these motions sought summary judgment rulings from the District Court on various aspects of the case. Because the instant appeal stems in large measure from the District Court's rulings on these motions, we will describe them now in chronological order.

Memorandum and Order of April 14, 2006, Regarding the State's Motion for Summary Judgment on PPL's Declaratory Judgment Action

¶ 11 In its April 14, 2006 Memorandum and Order, the District Court granted summary judgment in favor of the State on PPL's declaratory judgment action. First, the District Court concluded that the

State's claims for compensation were not preempted by the federal navigational servitude. As noted above, *see Opinion*, ¶ 7, the federal navigational servitude is the power of Congress to ensure that navigable waters remain open to interstate and foreign commerce. Citing to *Fed. Power Commn. v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954), the District Court observed that the exercise of the federal navigational servitude requires clear authorization from Congress. In Niagara, the Supreme Court held that Congress had not given such clear authorization under the FPA. *See Niagara*, 347 U.S. at 249-51. The District Court noted that federal courts interpreting the FPA have specifically held that it recognizes the property rights of parties whose land is affected by federally-licensed hydroelectric projects, and expressly prohibits the use of private property without proper compensation. *See United States v. Cent. Stockholders' Corp. of Vallejo*, 52 F.2d 322, 331-32 (9th Cir. 1931) (discussing the applicability of the FPA regarding property rights created under state law); *Public Utility Dist. No. 1 of Pend Oreille Co. v. City of Seattle*, 382 F.2d 666, 671-72 (9th Cir. 1967) (same). Accordingly, the District Court concluded that the federal navigational servitude did not preempt the State's claims for compensation.

¶ 12 The District Court also concluded that the FPA did not preempt the State's ability in general to seek compensation for PPL's use of state-owned riverbeds. The District Court noted the three types of federal preemption under Montana law: express, field, and conflict. *See Vitullo v. Int. Bhd. of Elec. Workers, Local 206*, 2003 MT 219, ¶ 14, 317 Mont. 142, 75

P.3d 1250. In *Vitullo*, we described these forms of preemption as follows:

> This Court recognizes three ways in which federal law may preempt state law. The first is by express preemption, wherein Congress includes a preemption clause providing that state law will not apply in the area governed by the federal statute. Absent express preemption, this Court recognizes two types of implied preemption. The first is "field preemption," wherein the scheme of federal regulation is so pervasive or comprehensive that it is reasonable to infer that Congress intended to "occupy the field" and leave no room for supplementary state regulation. The second type of implied preemption is "conflict preemption." Conflict preemption manifests itself as an inability of state law to comply with federal law or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Vitullo*, ¶ 14 (citing *Dukes v. Sirius Constr., Inc.*, 2003 MT 152, ¶ 20, 316 Mont. 226, 73 P.3d 781; *Favel v. Am. Renovation and Constr. Co.*, 2002 MT 266, ¶ 40, 312 Mont. 285, 59 P.3d 412).

¶ 13 The District Court concluded that express preemption did not apply because the FPA did not contain any language expressly preempting state law. The District Court also concluded that neither field preemption nor conflict preemption barred the State's claims under the HRA.

¶ 14 Relying on *First Iowa Hydro Electric Coop. v. Fed. Power Comm'n.*, 328 U.S. 152 (1946), the District Court noted that the FPA establishes a "dual system" of control between the states and the federal

government. *First Iowa*, 328 U.S. at 167-68. The FPA grants FERC the authority to issue licenses for the construction, operation, and maintenance of dams, including the power to regulate regarding the engineering, economic, and financial soundness of such facilities. *First Iowa*, 328 U.S. at 172. However, the FPA also preserves the role of state law within the federal licensing structure. For instance, one section of the FPA requires an applicant for a FERC license to demonstrate that it has complied with the requirements of state law with respect to the "beds and banks and to the appropriation, diversion, and use of water for power purposes" for the state in which the proposed projected is located. *First Iowa*, 328 U.S. at 161 n. 6 (quoting 16 U.S.C. § 802); see *also* 16 U.S.C.A. § 821 (West 2010).

¶ 15 Moreover, federal courts have concluded the FPA recognizes the validity of state property rights and contemplates compensation for property use under state law. For instance, in *Jordan v. Randolph Mills, Inc.*, 716 F.2d 1053 (4th Cir. 1983), the Fourth Circuit recognized that a FERC license "neither transfers nor diminishes any right of possession or enjoyment possessed by" a landowner, and that use of another's property by a FERC-licensee requires either acquisition of the owner's rights or the use of the power of eminent domain. *Jordan*, 716 F.2d at 1055. Additionally, the District Court noted that the FPA specifically requires licensees to notify any party who is an owner of record of any interest covered by a proposed project, including state, federal, and municipal entities. 16 U.S.C.A. § 802(b) (West 2010). The FPA also requires the licensee to submit information about the price paid for water rights, rights-of-way, lands, or interests in lands. 16

U.S.C.A. § 797(b) (West 2010). Further, federal courts have concluded that the FPA itself specifically allows property owners to bring state law tort actions against a licensee for damages caused by a hydroelectric facility pursuant to 16 U.S.C. § 803(c). *See Nez Perce Tribe v. Idaho Power Co.*, 847 F.Supp. 791, 812 (D. Idaho 1994) (stating that under 16 U.S.C. § 803(c) Congress did not preempt property-based state common law claims against FERC licensees); *DiLaura v. Power Auth. of the State of N.Y.*, 982 F.2d 73, 78 (2d Cir. 1992) (same). In other words, while the FPA grants FERC the ultimate authority to license a hydroelectric project in accordance with federal law, it explicitly permits the operation of state law with regard to "proprietary rights" which may be affected by a FERC-licensed facility. *See First Iowa*, 328 U.S. at 175-76. Accordingly, the District Court concluded that the FPA did not preempt the State's compensation claims against PPL.

¶ 16 The District Court also rejected the argument that the HRA was preempted by the FPA. As noted above, the HRA contains a section which authorizes the Land Board to enter into a lease with entities that use "power sites" within Montana for the generation of hydroelectric power. *See Opinion*, ¶¶ 4-5. However, Section 203 of the HRA reads as follows:

> In issuing any lease or license under the provisions of this part, the board shall have the power and it shall be its duty to incorporate in the lease or license such reasonable restrictions and regulations as it finds necessary in order to protect the interest of the state and its people.

Section 77-4-203, MCA.

¶ 17 PPL argued that Section 203 was an impermissible attempt by the State to regulate its FERC-licensed facilities, and that this section rendered the entire HRA preempted. The District Court agreed that Section 203 was preempted by federal law, but concluded that, given the FPA's clear recognition of state property rights, the FPA did not preempt those aspects of the HRA which empowered the State/Land Board to seek compensation. The District Court rejected the argument that the State's efforts to receive compensation through a lease with PPL somehow represented an impermissible infringement upon the federal government's licensing and regulatory authority under the FPA. As stated by the District Court,

> The Utilities take the position that merely asking them to sit down and negotiate a lease with the State constitutes regulation preempted under the Federal Power Act. However, the Court cannot accept this position. It would make no sense to reserve property rights under the Federal Power Act and then hold that any process to vindicate those rights is preempted. The ability to negotiate the terms and conditions of a lease is an incident of ownership all property owners possess. The Utilities cite a number of cases under the doctrines of field or conflict preemption in support of their position. However, none of the cases are property cases, nor do they hold that a state is preempted from enforcing its property rights.

(Citations omitted.)

¶ 18 In sum, the District Court concluded that the FPA did not occupy the field or otherwise conflict with the State's efforts to seek compensation from

PPL. However, the District Court declined to rule to on PPL's "as-applied" challenge to the HRA on federal preemption grounds, concluding that resolution of this question presented factual issues requiring a more developed record.

¶ 19 In this same order, the District Court also granted the State's motion for summary judgment on PPL's affirmative defenses. *See Opinion*, ¶ 7. With respect to PPL's claim for a prescriptive easement, the District Court noted that under Montana law a party cannot obtain title to government property through adverse possession or use. *See, e.g., Roe v. Newman*, 162 Mont. 135, 142, 509 P.2d 844, 848 (1973) (citing *Bode v. Rollwitz*, 60 Mont. 481, 199 P. 688 (1921)). Regarding PPL's equitable estoppel defense, the District Court concluded that the State cannot be estopped by the unauthorized acts or representations of its officers or agents. *See Norman v. State*, 182 Mont. 439, 444, 597 P.2d 715, 718 (1979). Because no state employee would have the authority to make representations about the disposal of trust land in a manner contrary to the State and Land Board's fiduciary duties as trustees, *see* Opinion, ¶ 3, estoppel could not be asserted against the State in this case. The District Court further concluded that the defenses of laches and the statute of limitations were barred for similar reasons. Because the State claimed its efforts to seek compensation were taken in accordance with its trust duties under the Montana Constitution, those efforts "stand on a different plane from an ordinary suit to regain title or remove a cloud upon it." *Norman*, 182 Mont. at 446, 597 P.2d at 719. Thus, the District Court concluded that estoppel, laches,

and the statute of limitations could not be asserted against the State.

¶ 20 Finally, the District Court concluded that PPL could not assert a waiver or breach of agreement defense against the State. The District Court noted that under Montana law, a law established for a public reason cannot be contravened by private agreement. *See Collection Bureau Servs., Inc. v. Morrow*, 2004 MT 84, ¶ 9, 320 Mont. 478, 87 P.3d 1024; *see also Cape-France Enters. v. Est. of Peed*, 2001 MT 139, ¶¶ 33-34, 305 Mont. 513, 29 P.3d 1011. Under these principles, the State could not waive its right to rental payments, nor could it enter into an agreement which would have the effect of prohibiting it from carrying out its trust obligations.

¶ 21 Accordingly, the District Court granted the State's motion for summary judgment, disposing of PPL's preemption arguments and its affirmative defenses.

Memorandum and Order of August 28, 2007, Regarding the Navigability of the Missouri, Madison, and Clark Fork Rivers

¶ 22 The State's ability to seek compensation from PPL was premised on the notion that it owned title to the riverbeds of the Missouri, Madison and Clark Fork rivers. The State sought a summary judgment ruling that title to these riverbeds passed to Montana when it became a state in 1889 pursuant to the "equal footing" doctrine. In *Mont. Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984), we described this doctrine as follows:

> The landmark case dealing with state and

> federal ownership of beds underlying navigable waters is *Martin v. Waddell* (1842), 41 U.S. (16 Pet.) 367, 10 L.Ed. 997. In delivering the opinion of the Court, Mr. Chief Justice Taney stated, "For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Waddell*, supra.
>
> . . .
>
> States admitted to the Union subsequent to the original thirteen succeeded to the same rights on the theory that the lands acquired by the United States from the original thirteen colonies or from foreign governments were held in trust for the new states in order that they might be admitted on an equal footing with the original states. *Pollard's Lessee v. Hagan* (1845), 44 U.S. (3 How.) 212, 11 L.Ed. 565.

Curran, 210 Mont. at 44-45, 682 P.2d at 166-67.

¶ 23 The key inquiry in determining whether a state holds title to riverbeds under the equal footing doctrine is whether a river was "navigable" at the time the state entered the Union. In *United States v. Utah*, 283 U.S. 64 (1931), the Supreme Court described the test for navigability in the following terms:

> "The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they

> are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had-whether by steamboats, sailing vessels or flatboats-nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

Utah, 283 U.S. at 76 (emphasis added) (quoting *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926)); *see also The Daniel Ball*, 10 Wall. 557, 77 U.S. 557 (1870); *The Montello*, 20 Wall. 430, 87 U.S. 430 (1874).

¶ 24 Applying these standards, the District Court granted summary judgment to the State, holding there were no genuine issues of material fact that the Clark Fork, Missouri, and Madison rivers were "navigable in fact" at the time of statehood, and that the State was entitled to summary judgment on this issue as a matter of law.

¶ 25 With respect to the Missouri's navigability, the State presented evidence from the journals of Captains Meriwether Lewis and William Clark in the early 19th century wherein they described their journey from St. Louis, Missouri, to the Pacific Coast and their use of the Missouri River to travel through present-day Montana. The State asserted that after the Lewis and Clark expedition, a long succession of fur trappers plied the upper waters of the Missouri during Montana's territorial days. Other use of the

river was made by miners and settlers from Helena, Montana, to the present-day towns of Great Falls and Fort Benton. The State also cited to a 1986 Montana Navigable River Study (River Study) of the Missouri River indicating commercial use of the river until the advent of the railroad system in the 1880's. Finally, the State referred to a 1974 study conducted by the Army Corps of Engineers, which determined that historical evidence supported the conclusion that the Missouri River was navigable from its headwaters near Three Forks, Montana, to Loma, Montana.

¶ 26 Additionally, the State claimed that the Missouri River had been declared a navigable river in previous administrative and judicial proceedings at both the state and federal level. For instance, in a 1948 decision involving MPC, the Federal Power Commission (the precursor to FERC), concluded that the Missouri River, throughout its entire length, was considered a " navigable water of the United States." *See In re the Mont. Power Co.*, 7 F.P.C. 163, 173, 1948 WL 964 **10 (1948). The Court of Appeals for the District of Columbia subsequently affirmed this decision, holding that the 263 mile stretch of the Missouri from Fort Benton to Three Forks was a navigable water of the United States. *Mont. Power Co. v. Fed. Power Commn.*, 185 F.2d 491, 495 (D.C. Cir. 1950). Likewise, the State claimed that on two occasions this Court considered the Missouri to be a navigable river. *See Gibson v. Kelly*, 15 Mont. 417, 39 P. 517 (1895); *Herrin v. Sutherland*, 74 Mont. 587, 241 P. 328 (1925).

¶ 27 Turning to the navigability of the Madison, the State acknowledged that its early navigation had not been as extensively documented as that of nearby

rivers. The State attributed this to its reputation as a forbidding region due to the alleged hostility of the Blackfeet Tribe during the exploration and trapping decades of the early 19th century. However, the State cited to a historical study of the Madison River which concluded that the Madison had experienced "considerable use historically by explorers, trappers, miners, farmers and loggers, and is generally considered to have high potential for navigation." Furthermore, the State relied upon the recorded observances of Captain Clark, who navigated the nearby Jefferson River and considered the Madison to be navigable as well based on his observations. The State also cited to documented instances in the 20th century of log floats down the middle portion of the Madison River, although the State noted that by that point in the Madison's history, both the Hebgen and Madison dams prevented the free and unobstructed navigation of this river.

¶ 28 The State pointed out that in a previous nuisance suit against MPC regarding landholdings on the Upper Madison River which had been affected by the Madison dam, MPC did not dispute the navigability of the Madison River in court filings. *See Jeffers v. Mont. Power Co.*, 68 Mont. 114, 217 P. 652 (1923). Additionally, the State cited to a study by the Army Corps of Engineers from 1974, where the Corps concluded that in spite of post-statehood obstructions to the Madison River, it recommended that the entire Madison River be considered navigable from its boundary with Yellowstone Park to its confluence with the Missouri. Finally, the State noted that the Madison is heavily used today by commercial fishing guides and their clients, and that this use is also sufficient to support a conclusion that

the Madison River was susceptible to commercial navigation at the time of statehood.

¶ 29 Turning to the Clark Fork River, the State claimed the historical record confirmed its navigation by fur traders from Pend Oreille Lake in present-day Idaho, to the mouth of the Thompson River above Thompson Falls, Montana, and that this same stretch of river was used for steam navigation until the 1860's. Based on a river study and a report by the Corps, the State cited to historical examples of use from the Thompson Falls area to its confluence with the Blackfoot River and beyond which supported a robust mining and timber industry. The State also cited to federal licensing proceedings which it contended established the navigability of the Clark Fork River. *See The Montana Power Co.*, 8 F.P.C. 751, 1949 WL 1102 (1949); *The Washington Water Power Co.* (Project No. 2058), 10 F.P.C. 657, 1951 WL 1856 (1951); *The Washington Water Power Co.* (Project No. 2075), 14 F.P.C. 731, 1955 WL 3030 (1955).

¶ 30 PPL opposed the State's motion, claiming there were genuine issues of fact as to whether the Missouri, Clark Fork, and Madison Rivers were navigable at the time of statehood in 1889. PPL presented an affidavit from Dr. David Emmons (Dr. Emmons), a professor of history at the University of Montana. Dr. Emmons opined, based on his review of the historical evidence, that none of the rivers were navigable at the time of statehood. With respect to the Missouri, Dr. Emmons opined that the "Great Falls Reach," a stretch of river about 32 miles above Fort Benton containing a series of rapids and falls which descend about 520 feet over 17 miles, had never been navigated. *See Mont. Power Co.*, 185 F.2d

at 493 (describing the Great Falls Reach). Dr. Emmons claimed to base this conclusion on historical reports as well as reports from the Army Corps of Engineers from the 19th century, and the Lewis and Clark journals which described efforts to portage the Great Falls Reach. Dr. Emmons also noted that studies conducted by the Army Corps of Engineers determined that this stretch was not navigable and could only be made so at great expense.

¶ 31 Regarding the Madison, Dr. Emmons pointed to a 1931 Army Corps study which concluded that commercial navigation on this river was "entirely out of the question," and that as of 1931 there had never been any navigation on the Madison River. Dr. Emmons concluded these reports and studies presented conclusive evidence of non-navigability. Dr. Emmons discounted the observations of Lewis and Clark regarding the navigability of the Madison by noting that they never actually attempted to ascend this river.

¶ 32 Furthermore, PPL disputed the propriety of relying upon present-day usage of the Madison River in order to prove navigability at the time of statehood. PPL noted that the State relied on *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), in presenting this argument, but asserted that *Ahtna* was inapposite. In *Ahtna*, the Ninth Circuit allowed present-day usage of the Gulkana River in Alaska to be considered in order to determine if it was susceptible to use at the time of Alaska statehood. *Ahtna*, 891 F.2d at 1405. PPL argued *Ahtna* was inapposite because the parties in that case had stipulated that the characteristics of the Gulkana had not changed since statehood. Here, by contrast, PPL presented an affidavit from Dr. Stanley

Schumm, a fluvial geomorphologist, that the characteristics of the Madison had changed since statehood, thus rendering *Ahtna* inapplicable. In particular, Dr. Schumm stated that the Madison and Hebgen dams had altered the seasonal variations in the Madison River from those which were present at the time of statehood. The flow during the highest periods of the year (May to June) had decreased, whereas the flow during the lowest periods of the year (October through November) had increased. This increase was approximately two-thirds of a foot in October, to nine-tenths of a foot in November. PPL argued that this expert analysis established that the Madison was more susceptible now to navigation than at the time of statehood, thus making present-day use, and reliance on the precedent established by *Ahtna*, untenable. Furthermore, Dr. Schumm opined based on his expertise as a fluvial geomorphologist that because of its historic, pre-statehood physical characteristics, the Madison River was not in fact susceptible to navigation at the time of statehood.

¶ 33 Finally, PPL argued that there were genuine issues of material fact regarding the navigability of the Clark Fork River at the time of statehood. Relying again on the opinion of Dr. Emmons, PPL pointed to a 1891 Army Corps report to Congress stating that the reach of the Clark Fork from Lake Pend Oreille to the confluence of the Blackfoot River, roughly 6 miles upstream of Missoula, was a "torrential stream," full of rocks, falls, and rapids, and was "utterly unnavigable" and incapable of being made navigable except at an enormous cost. PPL claimed that the Army Corps reiterated this view into at least the 1940's. Finally, PPL pointed to an unreported federal 1910 decision from the District

Court of Montana wherein the court decreed the portion of the Clark Fork River in Sanders County, Montana, to be "a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation...."[6]

¶ 34 In addition to arguing that material facts precluded summary judgment, PPL also asserted that the State's evidence of historical use of these rivers was neither credible nor appropriately used. For instance, PPL claimed that the River Study relied heavily upon two of the most unreliable sources of historical information from the frontier West: newspaper articles and personal reminiscences. PPL asserted, through the affidavit of Dr. Emmons, that these sources were full of embellishments, and virtually worthless as documentary proof of events. PPL also claimed that the State's "Corps reports" were unreliable because they were not actually studies conducted *by* the Army Corps of Engineers, but were instead studies prepared *for* the Army Corps by some other entity.

¶ 35 Lastly, PPL argued that the State's reliance on previous federal administrative and judicial proceedings regarding the navigability of rivers in Montana was misplaced because those proceedings considered navigability for regulatory purposes, which is a different standard than navigability for title purposes. In particular, PPL noted that navigability for regulatory purposes under the FPA

---

[6] A citation for this case, captioned *Dolan v. Steele*, is not available in the Pacific Reporter, Westlaw, or Lexis. A Xeroxed copy of this decision is contained in the appendix to PPL's briefs.

is established if the rivers were navigable in the past, or if they can be made navigable with reasonable improvements. Navigability for title, by contrast, does not allow navigability to be based on whether the river can be improved to a state of navigability. *See Or. v. Riverfront Prot. Assn.*, 672 F.2d 792, 794 n. 1 (9th Cir. 1982) (discussing the distinctions between navigability for title and navigability for federal regulatory purposes). For all these reasons, PPL urged the District Court to deny the State's motion.

¶ 36 In its analysis, the District Court considered the definitions of "actual use" or "susceptible of being used" as used in the navigability for title test. Citing to *Utah v. United States*, 403 U.S. 9 (1971), the District Court observed that "actual use" does not have to be commercially profitable under the navigability for title test. *See Utah*, 403 U.S. at 11. Similarly, under cases such as *The Montello* and *Holt State Bank*, the United States Supreme Court specifically noted that navigability is not limited to large-scale commercial navigation, nor indeed does it depend on the mode of transportation used on the river. See *The Montello*, 87 U.S. at 441-42; *Holt State Bank*, 270 U.S. at 56. The District Court also opined that navigability could be determined under the log-floating test this Court referenced in *Curran*. *See Curran*, 210 Mont. at 44 (navigability for title can be established by evidence of log floats).

¶ 37 Addressing "susceptibility" of use, the District Court cited to *United States v. Utah*, 283 U.S. 64 (1931), and concluded that the key inquiry was whether the river was susceptible to being used in its ordinary condition, "rather than the mere manner or extent of actual use...." *Utah*, 283 U.S. at 82; *see also*

The Montello, 87 U.S. at 441-42 (stating that "[i]f it be capable in its natural state of being used of purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."). Relying also on *Riverfront Prot. Assn.*, 672 F.2d at 795, the District Court noted that such use "need not be without difficulty, extensive, or long and continuous."

¶ 38 With these legal principles in mind, the District Court evaluated the evidence of navigability presented by the State with respect to each river. Regarding the Missouri, the District Court concluded the State had presented "considerable evidence" of navigability. The District Court stated that the Federal Power Commission had previously determined the Missouri was a navigable river in 1948, and that this decision was subsequently affirmed by the Court of Appeals for the District of Columbia. *See Mont. Power Co.*, 185 F.2d at 494. The District Court discounted an argument advanced by PPL that the "Great Falls Reach" of the Missouri prevented it from being declared a navigable river. Citing to *The Montello*, 87 U.S. at 443, and *Utah*, 283 U.S. at 86-87, the District Court concluded that a river is considered navigable for title purposes even if it contains obstacles to free passage, such as rapids, riffles, or occasional areas of low water requiring portage, so long as the natural navigation of the river itself affords a channel for useful commerce.

¶ 39 For the Clark Fork, the District Court determined that the State had presented historical evidence showing it was navigable in fact, including documents showing that the river had been used for

log drives. The District Court specifically cited to the following finding of fact issued by the FPC in a federal regulatory proceeding in 1949:

> The section of the Clark Fork River between Pend Oreille Lake in Idaho and the mouth of the Jocko River in Montana was used for the transportation of persons and property between areas now constituting the states of Oregon, Idaho, and Montana from 1810 to 1870, such use being canoe and batteaux transportation of furs by the fur traders of the British Northwest Fur Co., the canoe transportation of the original missionaries to the Indian tribes in the Clark Fork basin, and with the use of short portages around the Cabinet Rapids and Rock Island Rapids, by steamboats of the Oregon Steam Navigation Co. and its subsidiary, the Oregon & Montana Navigation Co. in the carriage of substantial numbers of gold miners, their pack animals and supplies, as well as commercial freight consigned to the gold camps in the vicinity of what is now Helena, Mont.

The Mont. Power Co. (Project No. 1869), 8 F.P.C. 751, 753, 1949 WL 1102 **2.

¶ 40 The District Court also noted that the Clark Fork had been declared navigable from Pend Oreille Lake to the Jocko River by the FPC in other proceedings as well. The District Court rejected PPL's argument that the findings of these proceedings could not be relied upon because they involved determinations of navigability for regulatory purposes. The District Court acknowledged differences between the navigability for title and regulatory purposes test, but observed it was not prohibited from relying on the findings

generated by regulatory decisions in evaluating whether a Montana river satisfied the navigability for title test. The District Court noted that obstructions requiring portages do not defeat a finding of navigability for title where the river provides a useful channel for commerce. *See The Montello*, 87 U.S. at 441-42; *Utah*, 283 U.S. at 86-87. Here, the findings of the FPC and the other evidence presented by the State showed that the Clark Fork was used as a channel for commerce and met the navigability for title test.

¶ 41 Turning to the Madison River, the District Court acknowledged there was "little historical documentation" regarding use of this river. However, the 1986 River Study prepared for DNRC did conclude that the Madison River had experienced considerable use by explorers, trappers, miners, farmers, and loggers. The River Study also determined that the Madison had a "high potential for navigation." Furthermore, the River Study referred to at least one recorded example of a log float in 1913 on the middle portion of the Madison, from the mouth of its west fork to present-day Varney, Montana. Additionally, the District Court pointed out that the Madison today experiences "considerable recreational use." Despite the admittedly "sparse" record before it, the District Court concluded that the Madison was a navigable river.

¶ 42 Finally, with respect to each of these determinations, the District Court relied to some extent on the fact that PPL had admitted the navigability of these rivers in its answer to the State's counterclaims. The District Court concluded that PPL was bound by these admissions, and relied

upon this point to help bolster its conclusions. Because the District Court explicitly relied upon PPL's admissions in coming to a decision, we must conclude they carried some weight in its final determination.

¶ 43 We take note of this aspect of the District Court's reasoning because prior to both the issuance of the scheduling order and the District Court's grant of summary judgment on the navigability issues, PPL filed a motion to amend its pleadings to remove any admissions regarding the navigability of the Clark Fork, Madison, and Missouri Rivers. In its brief in support, PPL claimed that its historical research had yielded documents which raised questions about the navigable status of the rivers on which its projects are located. In light of the State's responses to discovery requests and its research, PPL sought to amend its answer to account for this newly discovered information. However, PPL's motion was never properly addressed by the District Court. PPL raises this issue as an error requiring reversal, and we will return to this topic in our analysis of the District Court's decision.

Memorandum and Order of August 28, 2007, Regarding Whether the Streambeds of the Missouri, Madison, and Clark Fork Rivers are School Trust Lands

¶ 44 The State sought summary judgment that Montana's navigable streambeds were part of the school trust lands pursuant to Article X, Section 2 of the 1972 Montana Constitution. This provision was carried forth from Article XI, Section 2, of the 1889 Montana Constitution and reads in pertinent part as follows:

> The public school fund of the state shall consist of:
>
> (1) Proceeds from the school lands which have been or may hereafter be granted by the United States ...
>
> (4) All other grants of land or money made from the United States for general educational purposes or without special purpose....

¶ 45 The State argued that the streambeds were school trust lands subject to fiduciary status under the Montana Constitution, and to the provisions of the HRA. The State asserted that PPL was obligated to present to the Land Board a written application to lease or license a power site under the HRA, and that because it had failed to do so it should be held liable for all rents due under the HRA, and all other damages caused by its unlawful occupancy of state lands.

¶ 46 PPL argued that the riverbeds were not school trust lands, but instead were public trust lands held generally in trust for the benefit and use of all Montanans under the public trust doctrine. *See Curran*, 210 Mont. at 47-48, 682 P.2d at 168 (discussing the public trust doctrine and noting this doctrine "provides that states hold title to navigable waterways in trust for the public benefit and use...."). This distinction was significant for PPL because if the riverbeds were public trust lands, it could possibly have the right to use them without paying the State compensation on the grounds that its use of water was a beneficial public use. By contrast, if the riverbeds were found to be school trust lands, the Land Board would be constitutionally required to charge PPL full market value for their use regardless of its character. *See Montrust*, ¶¶ 13-14.

¶ 47 In its August 28, 2007 memorandum and order, the District Court agreed with the State and concluded that the state-owned riverbeds were school trust lands. The District Court began its analysis with reference to the equal footing doctrine, noting that prior to Montana's admittance into the Union the United States held the riverbeds in trust for the future states. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 3 How. 212, 11 L.Ed. 565 (1845). The District Court noted that most courts have described state lands as "vesting" with a state upon its entrance to the Union. *See e.g., Arizona v. Cal.*, 373 U.S. 546, 597 (1963), *overruled on other grounds by Cal. v. United States*, 438 U.S. 645 (1978); *Or. v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 371 (1977).

¶ 48 Once lands pass to the state under the equal footing doctrine, they are governed by state law. *See Mont.*, 450 U.S. at 551. Thus, it was important for the District Court to determine how lands received by Montana under the equal footing doctrine would be classified under the Montana Constitution. To make this determination, the District Court analyzed the plain meaning of the term "grant" as follows:

> The term "grant" is both a verb and a noun, and it has a number of meanings, depending on how it is used. When used as a verb, BLACK'S LAW DICTIONARY, defines "grant" as "1. To give or confer (something), with or without compensation. 2. To formally transfer (real property) by deed or other writing. 3. To permit or agree to. 4. To approve, warrant, or order." When used as a noun, "grant" means "1. An agreement that creates a right of any description other than the one held by the grantor. 2. The formal transfer of real property. 3. The document by

> which a transfer is effected. 4. The property or property right so transferred." BLACK'S LAW DICTIONARY (8th ed., 1999).

¶ 49 The District Court then considered how the term "grant" was used in each of the relevant provisions of the Montana Constitution. First, the District Court stated that under Article X, Section 2(1), school trust lands are those lands transferred to Montana by the grant of land from Congress under the 1889 Enabling Act. The equal footing lands did not fall into this category. Similarly, the District Court concluded that the term "grants" in Article X, Section 2(4) is used as a noun and refers to the transfer of title to lands owned by the United States. Thus, the equal footing lands did not technically fall into this class, since they were not "owned" by the United States prior to Montana's admission as a state, but instead held in trust for Montana until such time as it became a state. Additionally, the District Court turned to Article X, Section 11(1), which relates to the public trust lands and reads as follows:

> **Section 11. Public land trust, disposition.** (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

¶ 50 The District Court interpreted the term "granted" as used in this section to refer to all the lands transferred to Montana through an action of

Congress. While recognizing that the underlying legal basis for Montana's acquisition of the riverbeds was the equal footing doctrine, the District Court noted that the equal footing doctrine itself was not triggered until passage of the Enabling Act. Because this act was passed by the United States Congress, the District Court concluded that the riverbeds at issue were governed by Article X, Section 11(1), and were public trust lands of the State. As a result, the District Court reasoned, the Land Board had the authority to classify the lands as school trust lands, and had the authority to lease the riverbeds and use the funds for the support of public education.

¶ 51 Finally, at the conclusion of this order, the District Court noted that PPL had moved for summary judgment on the issue that any flooded lands resulting from its operations were not a part of the school trust lands. Without further addressing the merits of this argument, the District Court concluded that there remained genuine issues of material fact on this issue which precluded summary judgment.

¶ 52 In sum, the District Court concluded that the streambeds of the Missouri, Madison, and Clark Fork Rivers are school trust lands, granting summary judgment to the State. The District Court further denied PPL's motion for summary judgment that any flooded lands are not school trust lands.

September 6, 2007 Memorandum and Order Regarding PPL's Motion for Partial Summary Judgment on the Application of the HRA

¶ 53 On October 6, 2006, PPL moved for summary judgment, arguing against application of the HRA. PPL advanced three reasons why it was entitled to

summary judgment. First, PPL argued the HRA does not explicitly state that it applies to the streambeds of navigable rivers, and it therefore could not be applied to PPL's dams. Second, PPL noted that the District Court had already concluded that § 77-4-203, MCA, was federally preempted; this being so, PPL claimed that the remaining, non-preempted parts of the HRA could not be severed without invalidating the entire act. Third, PPL argued that the HRA could not be applied retroactively to those PPL facilities which were built prior to its passage in 1931.

¶ 54 The District Court denied PPL's motion. Addressing PPL's first argument, the District Court relied upon § 77-1-101, MCA (2005), which reads in pertinent part as follows:

> **77-1-101. Definitions.** Unless the context requires otherwise and except for the definition of state land in 77-1-701, in this title, the following definitions apply ...
>
> (6)(a) "State land" or "lands" means:
>
> (i) lands granted to the state by the United States for any purpose, either directly or through exchange for other lands;
>
> (ii) lands deeded or devised to the state from any person; and
>
> (iii) lands that are the property of the state through the operation of law.

¶ 55 The HRA is contained in Title 77, and therefore is governed by this statute. Because the District Court had previously concluded that the riverbeds were "granted" to Montana by the United States, it concluded that the riverbeds were state lands under § 77-1-101(6)(a), MCA (2005), and that the HRA applied. The District Court also noted that the

definition of "power sites" in the HRA contained a specific definition which contemplated that the streambeds are state lands. *See Opinion*, ¶ 5. Thus, the District Court concluded that the HRA applied to the streambeds at issue in this case.

¶ 56 Turning to PPL's second argument, the District Court simply referred back to its order of April 14, 2006, wherein it held that federal law did not preempt the State from seeking compensation from PPL under the HRA. The District Court did not conduct any additional analysis in rejecting this argument.

¶ 57 Finally, the District Court addressed PPL's argument that the HRA could not be applied to dams built before the act's passage in 1931. PPL claimed the application of the HRA in this manner would impose upon it a new licensing process, require bidding for a proposed license or lease, and impose undefined financial obligations on its hydroelectric projects, thus impairing its vested rights. The District Court disagreed. The District Court noted that Article XVIII, Sections 1 and 3, of the 1889 Montana Constitution predated the construction of any of PPL's dams and specifically contained the trust provisions carried forward to the 1972 Montana Constitution. *See Montrust*, ¶ 13. The existence of this constitutional obligation since 1889 prevented the state from selling or conveying interests in public state lands without obtaining full market value for them. Because the 1889 Constitution established the State's interest in the riverbeds of the Missouri, Clark Fork, and Madison Rivers, PPL never in fact held any interests in those streambeds. In this connection, the HRA merely provided a statutory basis for the Land Board to exercise those obligations

originally set forth in the 1889 constitution. "As a result," the District Court concluded, "the [HRA] is not being applied retroactively; rather the State, as trustee of public lands, is complying with its constitutional mandate."

¶ 58 Accordingly, the District Court denied PPL's motion for summary judgment seeking to preclude application of the HRA as a basis for the State to seek compensation in this case.

September 12, 2007 Memorandum and Order Regarding PPL's Motion for Partial Summary Judgment That the Right to Appropriate Water for Beneficial Use of Hydropower Includes the Incidental Right to Use State Land

¶ 59 On October 6, 2006, PPL also moved for summary judgment on its claim that the right to appropriate water for beneficial use, as recognized and confirmed in both the 1889 and 1972 Montana Constitutions, includes the incidental right to use state land. PPL claimed that this right is not contingent upon the payment of rent for its alleged occupation of state land in conjunction with its dams. PPL argued that its rights of appropriation were analogous to those of irrigators, stockmen, miners, and municipalities, and that its dams were no different than ditches, ponds, flumes, or intake pipes used to divert and appropriate water for other forms of beneficial use. PPL argued that under Article IX, Section 3 of the 1972 Montana Constitution, the people of Montana have defined water rights in a manner that includes the incidental use of beds and banks for the apparatus of hydropower use and, as a result, the State was barred from seeking

compensation for the use of beds and banks for those hydropower projects.

¶ 60 The District Court denied PPL's motion for summary judgment on this issue. Citing to Article IX, Section 3(2) of the Montana Constitution, the District Court acknowledged that hydroelectric generation is a beneficial use under Montana law. This provision reads as follows:

> The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.

¶ 61 While hydropower may be a beneficial use of water, the District Court nevertheless concluded that nothing in the Montana Constitution or state law expressly allows a party to use state lands while appropriating water for beneficial use without paying compensation to the State for the occupancy and use of those lands. Furthermore, the District Court noted that it had already concluded that the State held title to the riverbeds, and held those lands in trust for the people of Montana. As a result, the State is under a constitutional obligation to protect those lands, and is specifically prohibited from alienating or disposing of them without obtaining compensation. For these reasons, the District Court denied PPL's motion for summary judgment on this issue.

September 13, 2007 Memorandum and Order Regarding the Parties' Motions to Strike

¶ 62 On October 6, 2006, PPL moved to strike the affidavits submitted by the State in support of its motion for summary judgment regarding the navigability of the Missouri, Clark Fork, and Madison Rivers. In support of its summary judgment motion, the State had submitted affidavits from Monte Mason (Mason), an employee for the DNRC, and State Archivist Jodie Foley (Foley). In his affidavit, Mason rendered his opinion that the Clark Fork, Missouri, and Madison Rivers were navigable at the time of statehood. He based these conclusions on a number of reports and studies attached as exhibits. PPL claimed that in his deposition, Mason admitted he had no personal knowledge of these studies or their preparation. PPL claimed that because Mason lacked personal knowledge of the contents, accuracy, or reliability of the exhibits, they should be stricken from consideration for purposes of summary judgment. Additionally, PPL argued the State failed to show that any of the documents or exhibits upon which Mason relied fell into recognized exceptions to the hearsay rule. For instance, one attached exhibit was the River Study prepared by the Heritage Research Center of Missoula in December 1986. Because Mason had no personal knowledge of how it was prepared, and it was less than 20 years old at the time its admittance was sought in May 2006, it could not be admitted under the Montana Rules of Evidence as an ancient document or through Mason. *See* M.R. Evid. 901(8).

¶ 63 PPL presented a similar argument with respect to another attached exhibit, an undated report on the navigability of the Clark Fork River prepared for the

Army Corps of Engineers. Mason could not personally attest to its contents, and could not demonstrate that it was more than 20 years old. Two other exhibits challenged by PPL were navigability reports on the Madison and Missouri Rivers completed by the Army Corps of Engineers in 1974. While these two reports did appear to meet the prima facie test of being at least 20 years old, PPL argued their admission was barred because they were based on the accounts of others in old newspapers, old books and similar publications regarding matters that reportedly occurred in the late 1800's or early 1900's. Because the State could not establish any first-hand knowledge of these events by authors of these reports, PPL argued they were inadmissible hearsay whose defects could not be cured by admission under the ancient document exception.

¶ 64 PPL asserted that 38 documents attached to Foley's affidavit were inadmissible hearsay for largely the same reasons. PPL noted that the majority of these documents were "excerpts from books or magazine articles written by authors, typically years after the recounted events, and do not provide a basis for any personal knowledge of the matters discussed." PPL argued that all historical evidence, except for sources based on direct, first-hand accounts like the Lewis and Clark Journals, were inadmissible and should be stricken from consideration.

¶ 65 Again, the District Court denied PPL's motion. First, it considered the affidavit of Mason and accompanying exhibits. The District Court observed that Mason averred in his affidavit that DNRC has conducted numerous studies to determine and

document the ownership of state lands, and that it had in fact commissioned the 1986 River Study. Mason averred that the River Study compiled historical evidence for over 43 different rivers in Montana in order to assist DNRC in determining state ownership of streambeds for leases of trust land. Mason also averred that he relied on the reports prepared by the Army Corps in making determinations regarding the navigability of the rivers at issue. Based on an analysis of the affidavit, the District Court concluded that Mason regularly relies upon the River Study and Army Corps reports in carrying out his official duties, and that these documents were relevant to the issues at hand. The District Court concluded that the attachments to Mason's exhibits would likely be admissible at trial. Although the District Court acknowledged the documents were hearsay, it nonetheless concluded that the State would likely be able to lay a foundation for the admission of these exhibits if required to do so.

¶ 66 Employing a similar rationale, the District Court held that the Foley affidavit and accompanying exhibits could be considered on summary judgment as well. The District Court noted that Foley's affidavit simply authenticates the documents listed and attached to her affidavit in accordance with her duties as a state archivist. Although the documents themselves are hearsay, the District Court determined Foley would likely be able to lay a foundation for the admissibility of these documents at trial. For these reasons, the District Court denied PPL's motion to strike.

¶ 67 Upon the resolution of these motions and the District Court's determination that the State was

entitled to seek compensation from PPL for its use of the state-owned riverbeds and streams "occupied" by its dams, the stage was set for a bench trial on the State's counterclaims for compensation. A seven-day bench trial was held from October 22 to 30, 2007, and the District Court received expert testimony and argument from both parties. The primary issues were the amount of compensation the State was entitled to recover from PPL for its use of the riverbeds, and whether the HRA is preempted on an "as applied" basis by the FPA. The District Court was tasked with considering the methodology which should be used to calculate damages, whether the State was entitled to prejudgment interest, and whether the Land Board or the District Court should determine full market value for PPL's use of state-owned land.

¶ 68 On June 13, 2008, the District Court entered a Memorandum of Decision (Memorandum) and a final order containing findings of fact and conclusions of law (Final Order). In its Memorandum the District Court first addressed PPL's "as applied" federal preemption challenge to the operation of the HRA. PPL maintained that the HRA, as applied, was preempted by the FPA because it was impossible for PPL to comply with the mandates of both statutes. PPL noted that § 77-4-209, MCA, of the HRA permits the Land Board to enter into a lease for a term of no greater than 50 years. However, under the FPA's implementing regulations FERC requires a licensee to "acquire title in fee or the right *to use in perpetuity* all lands, other than lands of the United States" within 5 years of the issuance of a license for a hydroelectric facility under Article 5 of a standard FERC license. *See Standardized Conditions for*

Inclusion in Preliminary Permits and Licenses Issued Under Part I of the Federal Power Act, 54 F.P.C. 1792, 1834, 1975 WL 14631 **36 (1975) (emphasis added) (discussing Article 5 of Form L-5). PPL claimed that the 50-year limitation on state leases frustrated the objective of the FPA. Furthermore, PPL argued that the leasing process described in the HRA, *see* §§ 7-4-204 to 207, MCA, also contravened the regulatory purpose of the FPA as well as its FERC licenses.

¶ 69 The District Court determined that the FPA did not preempt the HRA under an "as applied" challenge. The District Court observed that the State's obligation to seek compensation stemmed from its fiduciary duties to administer public trust lands under Article X, Section 11, of the Montana Constitution. Referring to *First Iowa*, the District Court noted that the United States Supreme Court had previously concluded that the FPA does not preempt property rights pursuant to state law, and allows states to seek compensation for the use of state lands by FERC-licensed facilities. Secondly, the District Court determined that FERC had the ability to alter the "in perpetuity" clause in PPL's license, noting that 18 C.F.R. § 2.9(a) (2010), states that "[t]he Commission has approved several sets of standard conditions for normal inclusion in preliminary permits or licenses for hydroelectric developments. In a special situation, of course, the Commission in issuing a permit or license for a project will modify or eliminate a particular article (condition)." Indeed, the District Court observed that FERC permitted just such a modification in *Copper Valley Electric Assn., Inc.*, 4 F.E.R.C. ¶ 61336, 1978 WL 15902 (1978), and allowed a FERC licensee to

hold an interest in land which would be a part of its hydroelectric facility without the requirement that it be "in perpetuity." *See Copper Valley*, 4 F.E.R.C. ¶ 61336 at ¶ 61796, 1978 WL 15902 **1. Thus, the District Court concluded that the Land Board had the authority to enter into a lease under the HRA, provided that such a lease would comply with FERC regulations.

¶ 70 The District Court then considered whether the State could seek rent for affected acreage lying both above and below PPL's dams, or, as argued by PPL, it could seek rent based solely on affected acreage above PPL's dams. To resolve this question, the District Court turned to § 77-4-202, MCA, of the HRA, which defines the term "power site." The District Court concluded that the statute was clear on its face, and it was not necessary to resort to the rules of construction in order to determine if PPL could be assessed for acreage below its dams. The District Court noted again that the State's claim for compensation was based on Article X, Section 11, of the Montana Constitution, in its role as the trustee of state lands. Because the riverbeds below and above PPL's dams were state-owned lands and fell within the HRA's definition of a "power site," the State was required to obtain full market value for the use of those lands under *Montrust*.

¶ 71 The District Court also considered the State's claims for prejudgment interest pursuant to § 27-1-211, MCA. It rejected this claim under the criteria set forth in *Ramsey v. Yellowstone Neurosurgical Assocs.*, 2005 MT 317, ¶ 19, 329 Mont. 489, 125 P.3d 1091, because the amount of compensation was not certain or capable of being made certain when PPL purchased the Thompson Falls and Missouri-

Madison Projects. Furthermore, neither DNRC nor the Land Board had adopted a rule as to how to set rent for the use of a "power site" under the HRA, requiring a trial in order to determine the appropriate methodology for this assessment.

¶ 72 Next, the District Court addressed the question of what methodology should be used in order to assess the amount of compensation due to the State. This issue was the focus of much of the trial. PPL argued that the State was entitled to recover only the value of the estate or interest conveyed by its dams (i.e., an easement for the footprints created by the dam), and that any damages based on its occupation of state-owned riverbeds would be limited to the value of the "flowage easement" from its use. The State, by contrast, argued for a damage assessment based on what it termed the "shared net benefits" methodology.

¶ 73 Under this methodology, net benefits of a project would be determined by calculating the difference between the value of the power produced and the cost of producing that power. The net benefits (i.e., the profits), would then be distributed 50-50 between the project owner and the land owners. In the Memorandum, the District Court noted that § 77-4-208, MCA, of the HRA required the Land Board to obtain full market value for PPL's use of power sites, as "carefully ascertained from all available sources." The District Court observed that riverbeds have unique characteristics which make them valuable for the production of hydropower, and concluded that the "shared net benefits" methodology as presented by the State would best take into consideration the economic contributions the state lands make to hydropower projects. In this

connection, the District Court stated that the Supreme Court of Maine had concluded this methodology was appropriate to apply to the assessment of rents for a hydroelectric facility in *State v. Cent. Me. Power Co.*, 640 A.2d 1067 (Me. 1994), and that it had been applied by FERC to assess hydroelectric facilities in previous regulatory proceedings involving tribal lands.

¶ 74 Lastly, the District Court considered whether it or the Land Board should decide the fair market value of the riverbeds. PPL had argued that under the HRA, the Land Board, and not the District Court, was the proper authority to decide the fair market value rental or lease rate for PPL's use of the power sites. The District Court rejected this argument, and held that it could determine the fair market value for PPL's past use of the state-owned lands. First, the District Court noted that PPL had not raised this issue in the pretrial order. Second, it distinguished *Montanans for the Responsible Use of the Sch. Trust v. Darkenwald*, 2005 MT 190, 328 Mont. 105, 119 P.3d 27, noting that the case sub judice did not involve a challenge to actions taken by the Land Board. *See Darkenwald*, ¶ 6 (noting that the appeal in that case was a direct challenge to the actions of the Land Board). Finally, the District Court held that it would not rule on the terms of a lease between PPL and the Land Board extending into the future, as that matter would be properly left to the discretion of the Land Board.

¶ 75 In its Final Order, the District Court applied the rationale set forth in the Memorandum to the argument and evidence presented by the parties at trial. The District Court noted its previous rulings discussed above, and concluded it would apply the

State's "shared net benefits" method to assess damages. The District Court relied principally upon the State's expert economist, John Duffield, Ph.D. (Dr. Duffield), in order to arrive at damages for PPL's use of the state-owned power sites from 2000 to 2007. The District Court rejected the valuation offered by PPL's expert, Gary Saleba (Saleba), who based his rental assessment on the methodology used by FERC to determine the amounts PPL should pay for using federal lands at its Montana facilities, pursuant to 18 C.F.R. § 11.2 (2010).[7] The District Court noted that Saleba's methodology did not employ the "shared net benefits" methodology, did not include below the dam acreage, and arrived at a much lower figure than that calculated by Dr. Duffield.

¶ 76 To arrive at his calculations, Dr. Duffield utilized documents either produced or publicly filed by PPL to conclude that PPL owed the State past rents, excluding interest, from 2000 to 2006 in the amount of $8,988,436 for Thompson Falls Project. The 2007 rent for this project was $1,950,592. This

---

[7] "Reasonable annual charges for recompensing the United States for the use, occupancy, and enjoyment of its lands (other than lands adjoining or pertaining to Government dams or other structures owned by the United States Government) or its other property, will be fixed by the Commission [i.e., FERC]. In fixing such charges the Commission may take into consideration such factors as commercial value, the most profitable use for which the lands or other property may be suited, the beneficial purpose for which said lands or other property have been or may be used, and such other factors as the Commission may deem pertinent." 18 C.F.R. § 11.2(a) (2010).

figure was based on the calculation that the State owned 54.6 % of the power site, and that the State was entitled to a 27.3% share, or half, of the net benefits of the project. For the Madison-Missouri Project, Dr. Duffield concluded that PPL owed the State past rent, excluding interest, of $25,759,825 for 2000 through 2006. The 2007 rent due for the Madison-Missouri Project was $4,257,327. The percentage shares of state ownership of the lands constituting each separate hydroelectric facility are as follows: Hebgen, 5.7%; Madison, 6.8%; Hauser, 17.6%; Holter, 26.2%; Black Eagle, 96.2%; Rainbow, 63.6%; Cochrane, 79.3%; Ryan, 39.7%; and Morony, 62.9%. With the Hebgen Dam's benefits allocated to downstream facilities,[8] the State's share of the net benefits of each of these facilities is as follows: Madison, 3.3%; Hauser, 8.6%; Holter, 12.8%; Black Eagle, 46.9%; Rainbow, 31.0%; Cochrane, 38.8%; Ryan, 19.4%; and Morony, 30.8%.

¶ 77 Judgment in the amount of $40,956,180 was entered against PPL on August 18, 2008. PPL now appeals from this judgment, as well as the rulings discussed above. We state the issues as follows:

¶ 78 **Issue One:** *Did the District Court err in granting summary judgment regarding the navigability of the Clark Fork, Missouri, and Madison Rivers at the time Montana became a state in 1889?*

---

[8] Because the Hebgen Dam was a storage facility which does not itself produce power, Dr. Duffield allocated its benefits to facilities which were downstream of its location.

¶ 79 **Issue Two:** *Did the District Court err in granting summary judgment to the State on the issue of whether Montana's navigable riverbeds are school trust lands?*

¶ 80 **Issue Three:** *Did the District Court err in granting summary judgment on whether the right to appropriate water for beneficial use of hydropower includes the incidental right to use state land?*

¶ 81 **Issue Four:** *Did the District Court err in granting summary judgment regarding the availability of PPL's affirmative defenses against the State's claims?*

¶ 82 **Issue Five:** *Did the District Court err in concluding that the HRA applied to the Thompson Falls and Missouri-Madison Projects?*

¶ 83 **Issue Six:** *Did the District Court err in its calculation of damages?*

STANDARD OF REVIEW

¶ 84 We review de novo a district court's grant of summary judgment, employing the same standards utilized by the district court pursuant to M.R. Civ. P. 56. *Smith v. Burlington Northern and Santa Fe Ry. Co.*, 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639. The moving party must establish the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Smith*, ¶ 10. Once this burden has been satisfied, the non-moving party must present substantial evidence essential to one or more elements of the case to raise a genuine issue of material fact. *Smith*, ¶ 10. Reliance upon "conclusory statements" lacking specific factual support is not sufficient to raise a genuine issue of material fact. *Smith*, ¶ 10; *see also Tin Cup Co. Water and/or*

Sewer Dist. v. Garden City Plumbing & Heating, Inc., 2008 MT 434, ¶ 54, 347 Mont. 468, 200 P.3d 60 ("[C]onclusory statements and assertions do not constitute facts that are 'material and of a substantial nature' that would prevent summary judgment.").

¶ 85 Because we review a grant of summary judgment de novo, we need not defer to the judgments and decisions of the district court. *See Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 53, 345 Mont. 12, 192 P.3d 186. This rationale applies to evidentiary rulings in the summary judgment context. We review evidentiary rulings going directly towards the propriety of summary judgment de novo, in order to determine whether the evidentiary requirements for summary judgment have been satisfied. *See Smith*, ¶¶ 41-42.

¶ 86 Outside of the summary judgment context, we review a district court's conclusions of law for correctness and its findings of fact under the clearly erroneous standard. *Roe Family, L.L.C. v. Lincoln Co. Bd. of Commrs.*, 2008 MT 70, ¶ 12, 342 Mont. 108, 179 P.3d 514.

DISCUSSION

¶ 87 **Issue One:** Did the District Court err in granting summary judgment regarding the navigability of the Clark Fork, Missouri, and Madison Rivers at the time Montana became a state in 1889?

¶ 88 Analysis of this issue involves the consideration of three key questions. The first is whether the District Court erred in relying upon the Mason and Foley affidavits and attached exhibits for purposes of

summary judgment. The second is whether the District Court correctly interpreted and applied the navigability for title test in granting the State's motion for summary judgment. The third is whether there exist genuine issues of material fact which preclude summary judgment.

A. The District Court's Reliance Upon the Mason and Foley Affidavits and Accompanying Exhibits

¶ 89 PPL filed a motion to strike the affidavits of Mason and Foley, as well as the exhibits attached thereto. *See Opinion,* ¶¶ 62-64. PPL argued these affidavits were based on inadmissible hearsay and should not be considered in the summary judgment context. The District Court denied the motion. While the District Court agreed that the supporting exhibits contained hearsay, it reasoned that they would nonetheless likely be admissible at trial. *See Opinion,* ¶¶ 65-66.

¶ 90 PPL argues the District Court erred in considering the Mason and Foley affidavits and attached exhibits. PPL claims the District Court permitted the State to rely entirely on inadmissible hearsay in order to carry its burden of proof on summary judgment. PPL contends that Mason conceded in deposition testimony that his entire testimony regarding navigability was based upon the reports attached in his affidavit, yet he was not familiar with the preparation of the reports and could not personally testify to their accuracy, reliability, or the methods used to generate them. PPL claims the same is true with respect to the Foley affidavit and exhibits. PPL also claims that its expert Dr. Emmons directly opined that the State's evidence

on summary judgment lacked credibility to prove anything about the historical use of the rivers and was instead based on dubious historical sources. Under these circumstances, PPL argues the State's evidence should not have been considered on summary judgment.

¶ 91 In response, the State first asserts that courts applying the navigability for title test routinely rely on historical evidence. Second, while it admits the historical record in this case is hearsay because there is no one alive today who personally witnessed the condition of Montana's rivers in 1889, the State argues that such evidence is not excluded by the hearsay rule itself. The State contends that the evidence in this case is admissible under several hearsay exceptions contained in M.R. Evid. 802 and 803. The State further posits that because the subject matter of this issue is beyond the recall of living witnesses, the District Court properly allowed the admission of this type of hearsay evidence.

¶ 92 M.R. Civ. P. 56(e) states that supporting and opposing affidavits in the summary judgment context "shall be made on personal knowledge, [and] shall set forth facts as would be admissible in evidence...." In *Smith*, we stated that affidavits made without personal knowledge and based on hearsay should not be considered on summary judgment. *Smith*, ¶ 39. However, we also stated that exhibits may be submitted in support of a summary judgment affidavit so long as a proper foundation can be laid for such exhibits based on any exception to the rule excluding hearsay evidence. *Smith*, ¶ 39. While unauthenticated documents should not be considered on summary judgment, a document can be considered if it is " 'authenticated by and attached to

an affidavit that meets the requirements of [Rule] 56(e) and the affiant [is] a person through whom the exhibits could be admitted into evidence.'" *Smith*, ¶ 47 (quoting *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550-51 (9th Cir. 1990)). Furthermore, self-authenticated documents can be considered on summary judgment pursuant to M.R. Evid. 902. *Smith*, ¶ 49.

¶ 93 Foley is the State Archivist of the Montana Historical Society. In her affidavit, Foley attached a number of historical works and periodicals, and swore under oath that they were true copies of the publications and documents from the collection of the Montana Historical Society. M.R. Evid. 902 contains ten categories of documents for which "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required...." M.R. Evid. 902(4), (5),(6), and (8) read as follows:

> (4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this state.
>
> (5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.
>
> (6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.
>
> . . .

> (8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

¶ 94 All of the documents listed in the Foley affidavit fall into one or more of these categories, and would be admissible as self-authenticating documents under M.R. Evid. 902. Furthermore, many of the documents submitted with the Foley affidavit would be admissible under M.R. Evid. 901(8), which provides for the admission of documents which meet the following requirements:

> Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Additionally, Foley, as the State Archivist, would be able to lay a foundation for these exhibits if required to do so under M.R. Evid. 803(8), the "public records and reports" exception to the hearsay rule. *See Mont. Petroleum Tank Release Compensation Bd. v. Crumleys Inc.*, 2008 MT 2, ¶¶ 79-81, 341 Mont. 33, 174 P.3d 948 (discussing the application of M.R. Evid. 803(8)). The Foley exhibits are clearly admissible under a hearsay exception and the District Court did not err in considering them for purposes of summary judgment.

¶ 95 Mason is the Minerals Management Bureau Chief for DNRC. He states in his affidavit that he is in charge of leasing the minerals in and under the

streambeds of navigable rivers in Montana. In order to discharge these official duties, DNRC has conducted numerous streambed studies to determine and document the state ownership of land in Montana. In 1986, DNRC commissioned the River Study, a historical study of the navigable rivers in Montana. Mason swore that a true copy of this study was attached to his affidavit. The River Study is clearly admissible under M.R. Evid. 803(8) or 902(4). The Mason affidavit references three other documents as well: (1) an Army Corps report on the navigability of the Clark Fork River prepared in or around 1975; (2) an Army Corps navigation study of the Madison River completed in 1974; and (3) another Army Corps study of the Missouri completed in 1974. Mason avers that true copies of each of these documents are attached to his affidavit. Mason's affidavit established that these studies and reports were pulled from the records kept by the DNRC used in pursuance of its official duties. These records are undoubtedly admissible under M.R. Evid. 803(8). *Mont. Petroleum*, ¶ 80 (holding that data pulled from records regularly kept by the Montana Department of Environmental Quality was admissible under the public records exception to the hearsay rule). The Mason affidavit and exhibits were admissible and properly considered by the District Court.

¶ 96 Furthermore, we agree with the State that reliance upon historical works, including newspaper accounts, is well-accepted and proper when applying the navigability for title test. Courts applying this test are often required to arrive at factual determinations regarding matters outside the recall of any living witnesses, thus requiring a higher degree of reliance upon historical material than in

the run of the mill civil dispute. *See Montana Power*, 185 F.2d at 498 ("[I]t is settled that historical works generally considered authentic are admissible in evidence, especially in cases such as this one which must delve into the relatively ancient and obscure origins of commerce on the nation's rivers."); *Conn. Light & Power Co. v. Federal Power Commn.*, 557 F.2d 349, 354-56 (2d Cir. 1977).

B. The District Court's Interpretation and Application of the Navigability for Title Test

¶ 97 The evidence before the District Court having been properly considered, the question remains as to whether this evidence justified a grant of summary judgment in favor of the State. The key inquiry here is whether the District Court's interpretation and application of the navigability for title test was correct, since this test sets forth the legal standard the State must meet for summary judgment and also indicates the type and quantum of evidence PPL must present in order to raise a genuine issue of material fact.

¶ 98 Broadly speaking, the District Court perceived the navigability for title test as somewhat "fluid." For instance, the District Court concluded that the test allowed present-day usage to be probative as to navigability of a river at the time of statehood. The District Court also concluded that portages do not defeat navigability, so long as the river itself was used, or susceptible of being used, as a channel of commerce at the time of statehood. These two points were crucial aspects of the District Court's grant of summary judgment on the navigability question due to the presence of rapids, falls, and obstructions on the Clark Fork and Missouri Rivers, and because the

early usage of the Madison River was admittedly not well-documented.

¶ 99 Our independent review of the caselaw in this area establishes unequivocally that the District Court's understanding of the navigability for title test was correct. The concept of navigability for title purposes is very liberally construed by the United States Supreme Court. A river does not have to experience "actual use" at or before the time of statehood, so long as it was "susceptible" of providing a channel for commerce. " '[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation,' and ... 'it would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.'" *Utah*, 283 U.S. at 76 (quoting *The Montello*, 87 U.S. at 441). Moreover, "carrying places," portages, or other obstructions which require a resort to "artificial means" of navigation, are not sufficient to defeat a finding of navigability. As stated by the United States Supreme Court in *The Montello*:

> Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases ... they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.

The Montello, 87 U.S. at 443.

¶ 100 Additionally, the term "commerce" in the navigability for title context is very broadly construed. For instance, in *Utah*, the United States Supreme Court explicitly embraced the notion that emerging and newly-discovered forms of commerce can be retroactively applied to considerations of navigability.

> [T]he government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a state of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the state either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

Utah, 283 U.S. at 83. Because navigability is based upon a broad definition of commerce combined with an "actual" or "susceptible of use" standard, present-

day usage of a river may be probative of its status as a navigable river at the time of statehood. *See Ahtna*, 891 F.2d at 1404-05.

¶ 101 The evidence presented by the State was clearly sufficient to demonstrate navigability in fact under this test, and entitlement to judgment as a matter of law. Despite the presence of portages along the Clark Fork and Missouri Rivers, the historical evidence establishes that they provided a channel for commerce at the time of statehood, or were susceptible of such use. While the historical usage of the Madison was not as well-established, the evidence of a log float on its middle portion in the 19th century, combined with its present-day usage, demonstrates that this river was susceptible of providing a channel for commerce at the time of statehood.

C. The Existence of Genuine Issues of Material Fact Precluding Summary Judgment on the Navigability of the Clark Fork, Missouri, and Madison Rivers

¶ 102 On appeal, PPL argues it has shown that genuine issues of material fact exist regarding the navigability of each of these rivers. PPL notes that its expert, Dr. Emmons, rendered an expert opinion declaring that each of these rivers were non-navigable at the time of statehood, and based his opinions on the following sources: (1) a 1910 federal court decree declaring portions of the Clark Fork non-navigable; (2) a congressional report based on a 1930's Corps of Engineers survey stating that the Madison river has never been historically navigated and that commercial navigation on this river was "entirely out of the question"; and (3) historic reports

from the Corps of Engineers that the Great Falls Reach of the Missouri is unnavigable, and that Stubbs Ferry Reach could only be made navigable at great cost. Additionally, PPL notes that its fluvial geomorphologist, Dr. Schumm, opined that the presence of PPL's Hebgen and Madison Dams on the Madison in the early 20th century "materially changed the flow characteristics" of this river. Based on historic evidence of river depth, flow histograms, and stage-discharge curves, Dr. Schumm opined that the Madison was not susceptible to navigation at the time of statehood. *See Opinion*, ¶ 32.

¶ 103 Setting aside the fact that PPL relies upon precisely the type of second-hand historical information which it has argued at length is unreliable and inadmissible in the summary judgment context, we hold that this evidence was simply insufficient to raise a genuine issue of material fact regarding navigability on the Clark Fork, Missouri, and Madison Rivers. With respect to the Missouri, the obstructions of the Great Falls Reach were insufficient to defeat a finding of navigability, because they were portaged by the Lewis and Clark expedition, and many others, early in the 19th century, allowing the Missouri to provide a useful channel of commerce. With respect to the Clark Fork and Madison River, PPL's sole evidentiary basis for raising a genuine issue of material fact consists of conclusory statements regarding the navigability of portions of these rivers made by a federal district court in 1910, and Corps of Engineers in the 1930s. Such conclusory statements, without any specific factual support, are insufficient as a matter of law to raise genuine issues of material fact. The fact that these statements were made in

the early 1900's does not somehow cure them of their conclusory nature and lack of specific factual basis. *See Tin Cup*, ¶ 54.

¶ 104 Dr. Schumm's expert opinion regarding the flow changes in the Madison River since the time of statehood likewise does not raise a genuine issue of material fact regarding its susceptibility for commerce at the time Montana became a state. The present-day recreational use is sufficient for purposes of "commerce" under *Utah* and *Ahtna*. The fact that the seasonal variations on the Madison River have been altered to depths of less than 1 foot by the presence of dams, fails to demonstrate that the Madison was not susceptible for use as a channel of commerce at the time of statehood. Indeed, so long as the Madison was susceptible for use during portions of the year, it is considered navigable at the time of statehood under the navigability for title test. *See Utah*, 283 U.S. at 87 (noting that a river can be generally considered navigable unless its use is "exceptional, being practicable only in times of temporary highwater.").

¶ 105 Finally, PPL argues virtually every stretch of a river must be "navigable in fact" and that particular stretches of a river which are non-navigable due to their physical characteristics can defeat a finding of navigability with respect to the whole river, or require a piecemeal classification of navigability-with some stretches declared navigable, and others declared non-navigable. The source for this argument derives from *Utah*. In that case, the United States Supreme Court considered the navigability of rivers within the state of Utah of which the United States government sought title. The United States sought to quiet Utah's title to

certain sections of portions of the Green, Colorado, and San Juan Rivers in Utah. *Utah*, 283 U.S. at 71. A special master had been appointed to enter findings of fact regarding these rivers, some of which contained long stretches of non-navigable waters. Specifically, the special master found that a roughly 40-mile stretch of the Colorado River, beginning at the confluence of the Green and Grand Rivers in Utah, was non-navigable. *Utah*, 283 U.S. at 79. The state of Utah challenged the special master's findings only with respect to the first 4.35 miles of this stretch of the Colorado. *Utah*, 283 U.S. at 80.

¶ 106 The United States Supreme Court did consider the navigability with regard to certain sections of the rivers, as opposed to the rivers themselves as a whole. However, the *Utah* Court also emphasized the limited applicability of its approach in the following terms:

> In the present instance, the controversy relates only to the sections of the rivers which are described in the complaint, and the master has limited his findings and conclusions as to navigability accordingly. The propriety of this course, in view of the physical characteristics of the streams, is apparent. Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends. The question here is not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise nonnavigable. We are concerned with long reaches with particular

> **characteristics of navigability or nonnavigability, which the master's report fully describes.**

Utah, 283 U.S. at 77 (footnotes omitted) (emphasis added). The United States Supreme Court ultimately agreed with the state of Utah that the first 4.35 miles of the disputed stretch were navigable and reversed the findings of the special master on this point. *Utah*, 283 U.S. at 89-90.

¶ 107 PPL urges this Court to rely upon *Utah* and declare certain portions of the rivers at issue in this case-such as the Great Falls Reach of the Missouri River and the rapids and the obstructions to navigation in the vicinity of PPL's Thompson Falls Project on the Clark Fork River-non-navigable. We decline the invitation to do so, and find PPL's reliance on *Utah* misplaced. In *Utah*, the overall non-navigability of the 40-mile stretch of the Colorado River was not disputed by either party, and was never ruled upon by the Supreme Court itself. Instead, the state of Utah merely disputed whether the first 4.35 miles of this stretch were non-navigable. Furthermore, as the *Utah* Court made clear, the "section-by-section" approach does not apply to "short interruption[s] of navigability in a stream otherwise navigable...." *Utah*, 283 at 77. In *Utah* there was no evidence presented that the remaining non-navigable 36-mile stretch of the Colorado was ever successfully portaged, or that it was merely a "short interruption" in the overall navigability of this portion of the Colorado River.

¶ 108 Here, PPL has not put forth any evidence whatsoever of "long reaches of non-navigability" but instead merely points to relatively short

interruptions in the Clark Fork, Missouri, and Madison Rivers which impede uninterrupted navigation, but do not affect the actual use or susceptibility of use of these rivers as channels for commerce in Montana at the time of statehood. The Great Falls Reach, even though a roughly 17-mile stretch of the Missouri River, is merely a short interruption in the use of the Missouri as a channel for useful commerce, as evidenced by the Lewis and Clark expedition's portage of this area, and the well-documented actual use of the Missouri subsequent thereto. *See e.g., Mont. Power Co.*, 185 F.2d at 493-94. The same is true with respect to the Clark Fork River-even though there are interruptions to unimpeded navigation on this river in the vicinity of PPL's Thompson Falls project, the actual use of the Clark Fork is documented from the Pend Oreille Lake at least to this river's confluence with the Blackfoot River. PPL's dams on the Madison River are also merely short interruptions in the navigation of this river as well. The present-day usage of the Madison is probative as to its "susceptibility of use" at the time of statehood, and it is self-evident that any obstructions on the Madison do not defeat its current use as a channel for commerce within the state of Montana.

¶ 109 PPL's evidence of relatively short interruptions of navigability in the rivers at issue is insufficient as a matter of law under *Utah* to declare any portions of these rivers non-navigable. Furthermore, under *Utah*'s expansive definition of the "susceptible of use" standard, it is equally clear that the present-day usage of the Madison, Clark Fork, and Missouri Rivers demonstrates that these rivers were susceptible of providing a useful channel of

commerce throughout the state of Montana at the time of statehood.

D. Conclusion

¶ 110 From the foregoing analysis, we conclude the District Court did not err in granting summary judgment to the State on the issue of whether the Clark Fork, Missouri, and Madison Rivers were "navigable in fact" at the time of Montana statehood 1889. Under the navigability for title test, Montana has held title to these riverbeds beginning in 1889. According to the equal footing doctrine, the disposition, use, and ownership interests in the beds of these rivers has been governed by state law since that time. *Mont.*, 450 U.S. at 551.

¶ 111 One of the issues raised by PPL in this appeal concerns the District Court's failure to rule on its motion to amend, and the extent to which the District Court improperly relied on PPL's admissions in rendering its decision on the navigability question. *See Opinion*, ¶¶ 42-43. The District Court should have ruled upon this motion to amend prior to its summary judgment decision on this issue. However, it is equally true that PPL did not raise this omission until the trial was well underway, long after the final pretrial order had been issued. In any event, we have not relied upon any ostensible admissions made by PPL in our analysis regarding the navigability of these rivers in its responsive pleadings.

¶ 112 In summary, under de novo review, we conclude that the District Court's ultimate ruling on the navigability of the Clark Fork, Missouri, and Madison Rivers at the time of statehood was correct. It is an axiom of Montana law that we will affirm a district court if it reaches the right result, even

though its reasoning may not be entirely correct. *Good Schs. Missoula, Inc. v. Missoula Co. Pub. Sch. Dist. No. 1*, 2008 MT 231, ¶ 24, 344 Mont. 374, 188 P.3d 1013. Thus, we affirm the District Court on this issue.

¶ 113 **Issue Two:** ***Did the District Court err in granting summary judgment to the State on the issue of whether Montana's navigable riverbeds are school trust lands?***

¶ 114 PPL argues that the District Court erred in concluding that the riverbeds at issue are school trust lands. PPL claims that the riverbeds are not lands specifically identified in the Enabling Act, nor are they school trust lands under Article X, Section 2 of the Montana Constitution. Rather, PPL asserts, the riverbeds are public lands subject to the public trust doctrine this Court discussed in *Curran*. *See Curran*, 210 Mont. at 47-48, 682 P.2d at 167-68.

¶ 115 The District Court rejected the argument that the riverbeds fell under the terms of the Enabling Act, or Article X, Section 2 of the Montana Constitution. The District Court then determined, based on the plain meaning of the term "grant" as used in Article X, Section 11(1), that the riverbeds were in fact public trust lands of the State. From this point, the District Court went on to conclude that the riverbeds were school trust lands on the theory that the Land Board had the authority to classify them as such. However, as PPL notes, the Land Board has never taken this action.

¶ 116 We conclude that the District Court was correct in concluding that the riverbeds are public trust lands pursuant to Article X, Section 11(1) of the Montana Constitution. However, the District Court

erred in concluding that the riverbeds were school trust lands on the assumption that the Land Board could, in theory, classify them as such. Even if the Land Board could arguably classify the riverbeds as school trust lands, the simple fact remains that it has not done so.[9]

¶ 117 We reverse the District Court's determination that the riverbeds are school trust lands, and hold instead that they are public trust lands under Article X, Section 11(1) of the Montana Constitution. Although we conclude the riverbeds at issue are not school trust lands, the Land Board is still required to administer these lands in accordance with the trust obligations imposed by Article X, Section 11 of the Montana Constitution. As such, the riverbeds are held "in trust for the people" and shall not "ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state." Mont. Const. Art. X, § 11(2); *See Norman v. State*, 182 Mont. 439, 444, 597 P.2d 715, 718 (1979).

¶ 118 **Issue Three:** ***Did the District Court err in granting summary judgment on whether the right to appropriate water for beneficial use of hydropower includes the incidental right to use state land?***

¶ 119 PPL argues the District Court erred when it concluded that its right to appropriate water for the purposes of hydroelectric power generation did not

---

[9] We express no opinion on whether the Land Board has the legal authority to take such actions.

include the incidental right to use state land. The District Court determined that Montana law did not exempt PPL from paying the State for the use of state lands while appropriating water for a beneficial use. PPL claims that the right to appropriation includes the right to the means of appropriation-in this case, the dams. Thus, PPL asserts it cannot be assessed rent for its occupancy of state lands, as such occupancy is an incident of its lawful right to appropriate water. PPL claims this position is supported by a number of cases, including *Smith v. Denniff*, 24 Mont. 20, 60 P. 398 (1900), *United States v. Conrad Inv. Co.*, 156 F. 123 (D.Mont.1907), *Prentice v. McKay*, 38 Mont. 114, 98 P. 1081 (1909), and more recently *Mattson v. Mont. Power Co.*, 2009 MT 286, 352 Mont. 212, 215 P.3d 675.

¶ 120 In response, the State notes that PPL does not hold title to the riverbeds at issue, and has not acquired an easement over state lands to appropriate water. For this reason, the State argues that PPL's reliance on the cases cited above is misplaced since they involved preexisting easements, or the appropriation of water on federal lands. In short, the State claims that no state law permits the free appropriation of water on state lands, or immunizes PPL from the HRA's requirement to pay compensation.

¶ 121 We affirm the District Court. The cases relied upon by PPL simply do not establish that PPL has a right to make *free* appropriation of waters on and within state-owned lands without paying any compensation to the State. *Denniff* and *Mattson*, for instance, stand for the unremarkable proposition that the right of appropriation includes the right to an appropriate means of diversion. *See Mattson*, ¶¶

37-40 (discussing necessary incidents of use for an easement held by PPL at a dam on Flathead Lake); *Denniff*, 24 Mont. at 28-30, 60 P. at 401-02 (discussing the ability of a valid water appropriator to acquire an easement over private land in order to exercise his right to appropriation). In *Prentice*, this Court observed that while the State recognizes the rights of individuals to acquire the use of water by appropriation, such use is nonetheless subject to the requirements of state law. *Prentice*, 38 Mont. at 117, 98 P. at 1083. Finally, as the State correctly notes, *Conrad Inv.* involved federal, not state land, and has no bearing on the operation of state law in this case.

¶ 122 Simply put, the cases cited do not stand for the proposition that PPL's use and appropriation of the water, and the incidents necessary to enjoy such appropriation, affect or limit the State's ownership interests in the riverbeds, the State's ability to subject such use to the requirements of Montana law, or its ability to seek compensation for an appropriation of water occurring entirely upon public lands. None of these cases demonstrate that PPL's right of appropriation of water and its use of dams to occupy Montana's riverbeds, occurring as it does entirely within the public lands of Montana, is somehow exempted from the operation of the Montana Constitutions of 1889 and 1972, and the HRA. For these reasons, the District Court did not err in concluding that PPL's appropriation of water does not include an incidental right to the *free* use of state land, and that PPL is required to pay the State compensation for the use of the state-owned riverbeds.

¶ 123 Issue Four: *Did the District Court err in granting summary judgment regarding the*

availability of PPL's affirmative defenses against the State's claims?

¶ 124 PPL contends that the District Court erred in granting summary judgment to the State regarding the availability of affirmative defenses against the State's claims for compensation. PPL argues that the State's claims are barred by §§ 27-2-103 and 70-19-302, MCA. Section 27-2-103, MCA, states that the limitations on causes of actions set forth in Title 27, chapter 2, part 2, MCA, "apply to actions brought in the name of the state or for the benefit of the state in the same manner as to actions by private parties." PPL claims that statutes of limitations regarding trespass (§ 27-2-207(1), MCA), negligence (§ 27-2-204(1), MCA), liability created by statute (§ 27-2-211(1)(c), MCA), and action not founded upon contract or promise (§ 27-2-202(3), MCA), variously apply to bar the State's claims for compensation. Furthermore, PPL argues that § 70-19-302, MCA, sets a 10-year statute of limitations on actions brought by the State respecting "real property or the issues or profits thereof by reason of the right or title of the state to the same," and also applies in the instant case.

¶ 125 The State counters that § 70-19-302, MCA, is inapplicable since it applies only to "all lands sold and conveyed before July 1, 1955, by the state of Montana for which a valid consideration was received by the state; provided that the state, at the time of any such sale or conveyance, was not precluded by the constitution of Montana or by the terms of the grant of such lands by the United States from selling and disposing of the same...." Section 70-19-301, MCA. Here, the riverbeds were never sold to PPL, nor could the State have alienated these lands

in violation of the Montana Constitution. Second, the State argues that the statute of limitations defenses must yield in this case to the riverbeds' status as public trust lands. The State claims that the application of statutes of limitation would violate the Montana Constitution under *Norman* and *State ex. rel. Boorman v. State Bd. of Land Commrs.*, 109 Mont. 127, 94 P.2d 201 (1939). For these reasons, the State urges us to affirm the District Court.

¶ 126 We agree with the State that § 70-19-302, MCA, is inapplicable to the case at bar. As § 70-19-301, MCA, makes abundantly clear, this section cannot apply to the riverbeds at issue because they were never, nor could they be, alienated from the public trust. Furthermore, we agree with the District Court and the State that the statute of limitations defenses which are applicable in a normal civil suit do not apply here because the riverbeds are public trust lands under Article X, Section 11 of the Montana Constitution. See Norman, 182 Mont. at 446, 597 P.2d at 719 (noting that the government's efforts to enforce and maintain a policy respecting lands held in the public trust trumps the equitable and legal affirmative defenses which are normally available against State actions); *see also Chennault v. Sager*, 187 Mont. 455, 460, 610 P.2d 173, 176 (1980) (stating that the interests of the general public should not be defeated by the unauthorized or unlawful acts of public agents or officers) (citing *Norman*). The Land Board and the State both have a fiduciary obligation under the Montana Constitution to seek compensation for the use of state-owned lands. The HRA provides the statutory mechanism for assessing this compensation. The State and Land Board's lack of diligence in carrying out these trust

duties cannot be asserted as an affirmative defense against the State's claims. Thus, we affirm the District Court's decision to bar PPL's assertion of affirmative defenses against the State.

¶ 127 **Issue Five:** ***Did the District Court err in concluding that the HRA applied to the Thompson Falls and Missouri-Madison Projects?***

¶ 128 The resolution of this issue involves two distinct inquiries: (1) whether the District Court erred in granting summary judgment to the State on the federal preemption of the HRA and in rejecting PPL's "as-applied" challenged to the HRA; and (2) whether the HRA can be lawfully applied to PPL's hydroelectric facilities.

A. The Federal Preemption and "As-Applied" Challenges to the HRA

¶ 129 In response to summary judgment motions filed by PPL, the District Court ruled that § 77-4-203, MCA, of the HRA was preempted by federal law, *see Opinion*, ¶¶ 16-17, but nonetheless held that the remaining provisions of the HRA were not federally preempted and that the State/Land Board was permitted to seek compensation from PPL. After trial, the District Court also rejected PPL's "as-applied" preemption challenge to the HRA. PPL argues the District Court erred in these rulings. PPL claims that the HRA is in irreconcilable conflict with the FPA and FERC licensing requirements. Specifically, PPL maintains that the HRA's limitation of a 50-year lease in §§ 77-4-201 and-209, MCA, conflicts with the FPA's requirements that the lands affected by a FERC-licensee must be held by that licensee "in perpetuity." *See Opinion*, ¶ 68.

¶ 130 Furthermore, PPL notes that the FPA invests FERC with the sole discretion of choosing the operator for a hydropower site. 16 U.S.C.A. §§ 797(e), 800(a) (West 2010). The FPA's implementing regulations also invest FERC with the sole discretion regarding the transfer of a license. 16 U.S.C.A. § 801 (West 2010); 18 C.F.R. §§ 9.1-9.3 (2010). PPL argues that the HRA contains several provisions, in addition to Section 203-which was stricken by the District Court-that invest the Land Board with precisely the type of licensing discretion reserved solely to FERC. For instance, § 77-4-204, MCA, allows the Land Board to conduct a "preliminary examination as to the value of the power site, as to the plans of development submitted by the applicant, and of all other matters relating to the proposed development as it deems necessary for the proper disposition of the business." Sections 77-4-205 through -207, MCA, describe the bidding process the Land Board is required to follow prior to granting a lease, including a provision to give preferences to municipalities. PPL contends that the application of these provisions is in conflict with the discretion granted to FERC under the FPA. PPL also asserts that the HRA's 50-year lease limitation and bidding/examination provisions stand as an obstacle to the FPA's objectives and are federally preempted.

¶ 131 In this connection, PPL argues that the HRA cannot survive a severability analysis because the core of this act is regulatory in nature. As we stated in *Finke v. State*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576, "[w]hen a law contains both constitutional and unconstitutional provisions, to determine whether the unconstitutional provisions are severable, we examine the law itself for the existence

of a severability clause. If there is no such clause, we must determine whether the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment." *Finke*, ¶ 25. PPL notes that the HRA does not contain a severability clause. It furthers contends that Sections 203 through 207 demonstrate that the core of the HRA is regulatory in nature. As such, the core of the HRA is in direct conflict with the regulatory authority given to FERC under the FPA. For this reason, PPL argues the operation of the HRA is entirely preempted.

¶ 132 The State claims the HRA is not federally preempted by the FPA. In this connection, the State notes that the FPA requires licensees to compensate landowners for the use of their property. Regarding PPL's severability argument, the State contends that the core of the HRA is not regulatory, but rather compensatory in a manner consistent with the Land Board's constitutional obligation to seek recompense for the use of public trust lands.

¶ 133 We agree with the State. The core of the HRA is compensatory, not regulatory. The fundamental purpose of the HRA as stated in § 77-4-201, MCA, is to ensure that the Land Board is able to obtain compensation for the use of state-owned lands which are used by hydroelectric facilities. The FPA permits private landowners, including states, to seek and receive compensation for the use of their land. The core of the HRA is not in conflict with the FPA and survives the federal preemption and severability analyses. While PPL objects that the bidding process described in §§ 77-4-204 through -207, MCA, conflicts with FERC's exclusive jurisdiction to issue and/or transfer licenses, the fact is that the State has never

resorted to such a process. If the bidding process discussed in §§ 77-4-204 -207, MCA, was at some point utilized and ran afoul of FERC requirements, then it would arguably be preempted on an "as applied" basis. However, no such conflict exists at the present. Moreover, even if such further preemption of the HRA were to occur, it would not alter the fact that the core of the HRA is compensatory, not regulatory, in nature.

B. PPL's Challenge to the Application of the HRA

¶ 134 PPL also claims that the HRA is being "retroactively" applied to it in a manner contrary to law. PPL correctly notes that the HRA does not contain a retroactivity clause, and argues that its language indicates it was designed to apply to the development of future power sites. *See* § 77-4-204, MCA (stating that the Land Board examines "matters related to the proposed development...."); § 77-4-206, MCA (stating that the Land Board is to determine whether a lease applicant is "capable of carrying out the proposed development...."). Further, PPL argues that the HRA's application in this case violates principles of Montana law. Citing to *Porter v. Galarneau*, 275 Mont. 174, 911 P.2d 1143 (1996), PPL argues that application of the HRA would violate the prohibition against retroactive application of the law because it "takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already passed." *Porter*, 275 Mont. at 183, 911 P.2d at 1148-49 (quotations omitted). Among these new obligations, PPL argues, is the requirement that PPL pay the State approximately $41 million dollars in

back compensation. The claimed impairment of PPL's vested rights also includes the fact that it may now be subject to competitive bidding proposals and possibly not be granted a lease by the Land Board.

¶ 135 The District Court held that the HRA was not being retroactively applied in this case because Montana acquired title to the riverbeds when it became a state in 1889 and Article XVIII, Sections 1 and 3, of the 1889 Montana Constitution-which predate the construction of any of PPL's dams-specifically prevented the state from selling or conveying interests in public state lands without obtaining full market value for them. Thus, neither PPL nor MPC could claim a vested interest in using the State's riverbeds for free. *See Opinion*, ¶ 57.

¶ 136 We agree with the District Court's reasoning on this point. In providing a statutory basis for leasing state-owned power sites, the HRA codifies an aspect of a constitutional provision which was extant in 1889. MPC and PPL took ownership of the dams subject to the constitutional trust status of these state lands. *See Montrust*, ¶ 19 (citing *Dept. of State Lands v. Pettibone*, 216 Mont. 361, 375, 702 P.2d 948, 956-57 (1985)). While PPL claims that the HRA's bidding process may arguably cause it to lose its ability to operate the dams, that situation is not before the Court in the present appeal, nor is it even remotely probable.[10]

---

[10] In this connection, we note that the State is seeking damages for past due rent and is simply requesting that PPL enter into a leasing agreement with the Land Board-an action which both PacifiCorp and Avista have already taken.

¶ 137 PPL also argues that the HRA was intended to apply only to Section 17 and 36 school trust lands, and not to the non-school trust riverbeds at issue in this case. As support for this contention, PPL points to various legislative and supporting materials which it claims show the Legislature never intended the HRA to apply to dams which were already located on the riverbeds in 1931.

¶ 138 The starting point for statutory construction is the plain language of the statute, and if the plain language is clear and unambiguous no further interpretation is required. *Vader v. Fleetwood Enterprises, Inc.*, 2009 MT 6, ¶ 30, 348 Mont. 344, 201 P.3d 139. As noted above (see Opinion, ¶¶ 54-55), § 77-1-101(6), MCA (2005), states that the provisions in Title 77 apply to "state lands." The riverbeds at issue are state lands within the meaning of § 77-1-101(6), MCA (2005). Thus, as the plain language of the HRA and Title 77 demonstrates that the statute applies to PPL's facilities, resort to other methods of statutory construction is not required.

¶ 139 We accordingly conclude that the District Court did not err in determining that the HRA was not federally preempted by the FPA, and that it could be lawfully applied by the State to seek compensation for PPL's use of state-owned riverbeds at its hydroelectric facilities.

¶ 140 **Issue Six:** *Did the District Court err in its calculation of damages?*

¶ 141 Before turning to the methodology and reasoning employed by the District Court in its calculation of an award of damages, we take note of the legal basis upon which this award was granted. In the District Court's conclusions of law in the Final

Order, it held that: (1) the riverbeds are state school trust lands; (2) the State has a constitutional duty to obtain full market value for their use under the Montana Constitution; (3) under § 77-4-208, MCA, of the HRA, the rental for power sites "shall be not less than full market value ...."; (4) the FPA did not preclude the State from seeking compensation for PPL's use of state-owned lands; and (5) the State was entitled to compensation based on the "shared nets benefits" methodology and the acreage computation presented by its experts. From this, the District Court concluded that the State was entitled to compensation from PPL for the years 2000 through 2007.

¶ 142 PPL argues the District Court committed reversible error by failing to specify the legal basis for the State's damages claim. PPL contends that while the District Court seems to have awarded damages based solely under the HRA, the HRA, by itself, does not provide a cause of action for damages in this case. The State responds by suggesting that its claim is constitutional in nature, but does not provide any direct argument beyond that.

¶ 143 The District Court concluded that the State/Land Board had the constitutional authority to seek compensation for PPL's use of state-owned lands under Article X, Section 11 of the Montana Constitution. The State, in its counterclaims, had sought a declaration to this effect under the Uniform Declaratory Judgment Act (UDJA), Title 27, chapter 8, MCA. Section 27-8-201, MCA, of the UDJA reads as follows:

> Courts of record within their respective jurisdictions shall have power to declare rights,

> status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

¶ 144 By concluding that the riverbeds were state school trust lands and then declaring that the State/Land Board had the constitutional obligation to seek compensation for their use, the District Court essentially declared that the State had a right to seek compensation and PPL was obligated to pay it.[11] This declaration was sufficient to establish the legal obligations between PPL and the State in this case on the question of compensation.

¶ 145 We now turn to the methodology and reasoning in support of the District Court's award of damages. From October 22 to October 30, 2007, a bench trial was held before the District Court, the primary focus of which was to determine how much PPL owed the State for its use of the state-owned riverbeds dating back to 1999, the year PPL acquired the dams. At trial, the methodology to be used by the District Court in calculating the amount of compensation due was vigorously contested. The State claimed that the measure of damages payable by PPL was the full market value of the state-owned

---

[11] Although we conclude that the riverbeds in this case are public trust lands, instead of school trust lands, the Land Board still has a constitutional and statutory duty to seek compensation for their use. *See Opinion*, ¶¶ 116-117.

riverbeds as used for hydroelectric generation, and that the HRA provided a statutory mechanism for classifying and then valuing the riverbeds. The State's expert Dr. Duffield advocated for a valuation approach which he called the "shared net benefits" method. Under this analysis, Dr. Duffield considered the amount of electricity generation at PPL's facilities, and multiplied that figure times the price of power that was being returned, to calculate PPL's gross revenues. From that, Dr. Duffield subtracted PPL's costs in generating power to arrive at a net income, or net revenue figure. Dr. Duffield then apportioned this net income between PPL and the State, based on the State's share of the land associated with each facility.

¶ 146 Dr. Duffield presented several reasons in support of this proposed methodology. First, he opined that it captured the productive value of the state-owned land in a manner analogous to the share crop approach used in agricultural leases. Second, Dr. Duffield opined that a similar method was used by FERC with respect to tribal lands, and had been applied in analogous manner by the Maine Supreme Court in *Maine Central Power*. Third, Dr. Duffield asserted that PPL's status as a non-regulated, wholesale generator of electricity warranted this method in order to prevent PPL from obtaining a "windfall profit" which would not adequately be captured by other methods.[12] Dr. Duffield's approach

---

[12] Because PPL is non-regulated, it does not receive a guaranteed rate of return, but instead relies on the free market to determine what it will receive for its electricity. Thus, PPL could stand to make enormous profits in some years based upon the going price for energy in the deregulated markets. Dr.

was also driven in large measure by his understanding that the State had a fiduciary obligation under the Montana Constitution to obtain full market value for the use of state lands.

¶ 147 PPL's expert Saleba disputed the propriety of Dr. Duffield's methodology and advocated a methodology he termed the "cost method and comparables method in tandem." Under Saleba's "cost method" approach, he used several different methodologies to establish a fair market value for PPL's hydroelectric facilities. Saleba then determined the percentage of the value of the hydroelectric facilities attributable to the land. Based on his analysis, Saleba concluded that 2.23% of the total value of PPL's hydroelectric facilities was "land-related." Saleba then used this percentage, indexed against the cost of the facilities minus depreciation, to arrive at a fair market value of the land occupied by PPL's facilities. From this fair market value figure, Saleba then calculated the annual lease payments. To arrive at a lease figure, Saleba looked to data from the United States Department of Agriculture for annual lease payments for different types of land, as well as currently available commercial lease information for Montana school trust land. From this, Saleba concluded an annual lease rate of 7% of fair market value would be appropriate.

Duffield opined that a fixed lease rate which did not take account of the "profits" generated by PPL would not reflect the productive value of the state-owned lands.

¶ 148 Saleba then applied this figure to the original cost minus depreciation of PPL's facilities and the total acreage of those facilities, to conclude that the fair market value was $28 dollars per acre. Saleba also did an estimate based on the replacement cost of the facilities, which produced a fair market value of $63 dollars per acre. Saleba also ran calculations using state tax assessment data of PPL, to arrive at a fair market value of $26.08 per acre.

¶ 149 To supplement this "cost methods" approach, Saleba also did a "comparables" analysis to determine if there were any comparable state or federal lease rates which could be used to gauge a lease rate for PPL's facilities in Montana. Additionally, Saleba relied upon the lease methodology utilized by FERC for the hydroelectric use of federal lands pursuant to 18 C.F.R. § 11.2 (2010). This methodology sets an annual per-acre charge for federal land flooded by a dam based on the schedule of fees for the use of linear rights-of-way prepared by the U.S. Forest Service. Saleba concluded that the comparables he identified correlated well with the results arrived at by his cost methods approach. Based on his calculations, Saleba concluded that the total annual lease payments to the State for 2006 were $205,230 and $210,476 for 2007.

¶ 150 In its Memorandum, the District Court adopted the State's approach, concluding it was the most appropriate method to determine the full market value of the riverbeds. The District Court noted that the State has a constitutional duty to obtain full market value for the use of state-owned lands, and that the Land Board was specifically directed under § 77-1-202(1)(a), MCA, to "secure the

largest measure of legitimate and reasonable advantage to the state ..." in the administration of state lands. Furthermore, § 77-4-208, MCA, of the HRA, specifically states the full market value use is "to be carefully ascertained from all available sources."

¶ 151 The District Court observed that the "shared net benefits" methodology had been primarily used by FERC in assessments involving tribal lands, but had also been applied in *Central Maine Power Co.* The District Court determined that riverbeds have "unique characteristics" making them valuable for the production of hydropower, and that the "shared net benefits" method best accounted for the economic contributions that the riverbeds make to that production. The District Court also observed that PPL had not cited to any cases where this methodology had been rejected.

¶ 152 In its findings of fact, the District Court defined the "shared net benefits" method in the following terms:

> Under the shared net benefits analysis, the net benefits are determined by calculating the difference between the value of power produced and the cost of producing that power. The net benefits are then shared between the project owner and the land owners. The standard share is fifty percent to the project owner and fifty percent to the land owners.

¶ 153 In applying this method, the District Court relied on data provided by Dr. Duffield. Dr. Duffield utilized documents produced or publicly filed by PPL, and based his net benefits calculations on the basis of state-owned riverbeds both above and below the

dams. For the Thompson Falls Project, Dr. Duffield arrived at a net benefits calculation of $38,521,558 for the years 2000 through 2006. Dr. Duffield concluded that the State's share of this project was 27.3% based on its ownership of the riverbeds. Thus, he concluded the total rents due, excluding interest, to the State for this period was $8,988,436. For 2007, applying this same analysis, Dr. Duffield concluded the rent for the Thompson Falls Project was $1,950,592.

¶ 154 For the Missouri-Madison Project, Dr. Duffield arrived at a total net benefits figure for the 2000 to 2007 timeframe of approximately $122 million dollars. Dr. Duffield then looked at the percentage of state land associated with each separate facility in the Missouri-Madison Project. Because the Hebgen Dam acts as a storage facility and does not directly produce power, Dr. Duffield allocated its benefits to the generation plants which were downstream of it. From this, Dr. Duffield determined a percentage of the State's share for each of the facilities in the Missouri-Madison Project. *See Opinion*, ¶ 76. Dr. Duffield concluded that for the Missouri-Madison Project, PPL owed the State $25,759,825 for the 2000 to 2006 time period, and $4,257,327 for 2007, excluding interest.

¶ 155 PPL argues the District Court erred in relying on Dr. Duffield's methodology. First, PPL contends that damages for rental value cannot be based on profits, citing *Pritchard Petroleum Co. v. Farmers Co-Op Oil & Supply Co.*, 121 Mont. 1, 190 P.2d 55 (1948), and *Goodover v. Lindey's, Inc.*, 255 Mont. 430, 843 P.2d 765 (1992). PPL bases this argument on the notion that damages are being assessed against it in this case for alleged "wrongful occupation" of

property pursuant to § 27-1-318, MCA. Second, PPL claims that Dr. Duffield's methodology represents a sharp departure from the State's long-established practice of valuing riverbeds. PPL claims that the State's previously utilized valuation method for riverbeds consists of the following components: (1) appraise the value of adjacent upland property; (2) take the unit value per acre or square foot; (3) multiply this value by the area that is encumbered or taken under the riverbed easement; and (4) reduce this value by 50%. PPL contends that under principles of agency law, the State is bound to adhere to its former practice in the instance case. Third, PPL claims that the District Court erred in relying on calculations which included "below dam" acreage not actually occupied by PPL's dams. PPL asserts that the "below dam" acreage consists of original riverbeds which have always been covered by water, and that water below its dams is not unlawfully occupying or "trespassing" on state lands.

¶ 156 Finally, PPL asserts that the "shared net benefits" method has been applied by FERC only to tribal lands, and that there are significant differences between state land and tribal land which do not warrant the application of the methodology in this case. Furthermore, PPL claims that the District Court's version of the "shared net benefits" methodology is not currently used by FERC and has, in fact, been rejected for decades. PPL, citing to *Portland Gen. Electric Co.*, 12 F.E.R.C. ¶ 63055, 1980 WL 24161 (1980), claims that under the approved FERC methodology, only profits earned above a company's expected rate of return on equity are shared with the landowners. PPL argues that Dr. Duffield's failure to include its return on

equity/capital costs as a cost of producing power before he arrived at a net benefits figure is contradicted by the caselaw as well as studies by the Government Accountability Office. For these reasons, PPL asserts the District Court's calculation of damages was erroneous, and its damage award must be reversed and remanded.

¶ 157 The State argues the District Court did not err in its calculation of damages and application of the "shared net benefits" methodology in this case. The State asserts that this methodology was used in *Central Maine Power* and applied by FERC and federal courts to tribal lands, *see Portland Gen. Elec. Co.*, 12 F.E.R.C. ¶ 63055, ¶ 65223, 1980 WL 24161 **14-15, and *United States v. Pend Oreille Co. Pub. Util. Dist. No. 1*, 135 F.3d 602 (9th Cir. 1998), and is the most appropriate method to capture the full market value of PPL's use of state lands. The State also contends that this method accurately reflects the general approach of trust land leasing by considering the productive value of the land as used in the determination of agricultural, grazing, geothermal and wind-energy leases. *See* Admin. R.M. § 36.25.110(1) (agricultural leases based on a "crop share rental basis"); Admin. R.M. § 36.25.110(3) (grazing leases based on the "animal-unit-month carrying capacity of the land to be leased or licensed"); and Admin. R.M. § 36.25.406(1)(a)(i) (geothermal lease rates based on percentage of the gross revenues of a project). The State contends that this "income-based leasing" approach is also supported by *State ex. rel. Thompson v. Babcock*, 147 Mont. 46, 409 P.2d 808 (1966), and the purpose of the HRA itself. For these reasons, the State argues that

the District Court's reliance upon Dr. Duffield's calculations and conclusions was not erroneous.

¶ 158 The decision to use the "shared net benefits" methodology in this case was a conclusion of law which we will review for correctness. *Roe Family, L.L.C.*, ¶ 12. The findings in support of the District Court's award of damages will be reviewed for clear error. *Baltrusch v. Baltrusch*, 2008 MT 245, ¶ 44, 344 Mont. 489, 190 P.3d 1034.

¶ 159 Here, the District Court did not err in its decision to rely on the "shared net benefits" methodology presented by Dr. Duffield. First, we agree with the State that it is proper to take account the productive value of the land in this case in order to arrive at a figure for the fair market value of PPL's use of state-owned riverbeds. At trial, the State presented evidence that DNRC already bases the rates for agricultural and wind leases on the productive value of the land. The statutes and administrative regulations concerning agricultural, grazing, and geothermal leases bolster this argument. Second, there is no bar under Montana law for basing an award of damages on the profits made by PPL. As noted repeatedly in this Opinion, the State/Land Board is under a fiduciary duty to obtain full market value for the use of state lands. The HRA specifically provides that the determination of full market value for the hydroelectric use of state lands is to be " carefully ascertained from all available sources." Section 77-4-208, MCA. "Income-based leasing" is an appropriate methodology to use in calculating damages in this case. *See Babcock*, 147 Mont. at 52-54, 409 P.2d at 811-12. *Pritchard* and *Goodover* are inapposite because they involved damages for wrongful

occupation of property, as opposed to damages based on failure to provide the State compensation as required under the Montana Constitution.

¶ 160 In determining the productive value of the state-owned lands for the purposes of calculating damages in this case, it was not erroneous for the District Court to rely on Dr. Duffield's method of taking into account the profits of PPL's hydroelectric projects, and then sharing those profits, or benefits, with the State based on its percentage of ownership of the project sites. Indeed, even though Saleba disagreed with the approach of Dr. Duffield, he conceded at trial that this methodology could be used in this case for purposes of assessing past damages. On direct examination, Saleba testified as follows regarding Dr. Duffield's method which he referred to as the "profitability method":

> Also, on that profitability method I couldn't figure out a way to do this prospectively. It seemed like one of the things that the Court is going to be challenged with for PP&L Montana is the amount break-or going back to 2000, as well as coming up with the charge going forward.
>
> And, you know, **you could arguably use the profitability method to go back and figure out what the profitability was from 2000 to 2006 or 2007.** I don't know how you use the profitability method to go forward.

(Emphasis added.)

¶ 161 Technically speaking, the methodology relied upon by Dr. Duffield is not what is generally termed the "shared nets benefits" analysis. This method was

described in *Portland Gen. Elec. Co.*, 20 F.E.R.C. ¶ 61294, 1982 WL 40297 (1982), working:

> by comparing the cost of producing power at the project being evaluated with the cost of producing an equivalent amount of power *at a hypothetical next-best alternative project.* The difference in costs is referred to as the net benefit of the project being evaluated. The net benefit is then allocated between the parties intended to benefit from the project.

Portland General, 20 F.E.R.C. ¶ 61294, ¶ 61563, 1982 WL 40297 **33; *see also Pend Oreille*, 135 F.3d at 609.

¶ 162 Dr. Duffield did not strictly follow this approach, because he did not consider the "next available alternative" to hydroelectric generation. Instead, Saleba's characterization of Duffield's approach as a "profitability" approach is indeed more accurate. *See Portland Gen. Elec. Co.*, 12 F.E.R.C. ¶ 63055, ¶ 65217, 1980 WL 24161 **5 (discussing the profitability method). However, the approach was appropriate here because the net benefits from PPL's projects for the years 2000 to 2007 are already known and are not based upon speculation. *See Portland Gen. Elec. Co.*, 12 F.E.R.C. ¶ 63055, ¶ 65223, 1980 WL 24161 **14 (noting that the profitability method is appropriate when actual cost figures are available for a given project).

¶ 163 Moreover, we conclude that the District Court's findings of fact in applying this method were not clearly erroneous. Dr. Duffield's profit figures were all provided by PPL or taken from documents which PPL publicly filed. The inclusion of the "below the dam" acreage in this case was not clearly

erroneous because § 77-4-202, MCA, of the HRA specifically defines "power site" as including "each separate tract of [state-owned] land which will become part of the reservoir and which in and of itself makes an essential contribution to the value of the power site as a whole of not less than 5% of the entire value of such power site." The inclusion of the "below the dam" acreage was contemplated within the plain meaning of this statute, and it was not clearly erroneous for the District Court to include it in its calculation of damages.

¶ 164 As PPL notes, Dr. Duffield's approach considered the total profitability of PPL's facilities in Montana, but did not deduct PPL's expected rate of return on equity prior to an accounting of the net profits. PPL argues that under approved FERC methodology only profits earned above a company's expected rate of return on equity should be shared with the landowners. PPL urges this Court to remand this issue to the District Court for a recalculation of damages under *Portland Gen. Elec. Co.*, 12 F.E.R.C. ¶ 63055, 1980 WL 24161 and *Mont. Power Co.*, 38 F.P.C. 766, 1967 WL 113478 (1967), whereby the District Court would only consider sharing those profits over and above PPL's expected rate of return on equity.[13] PPL ARGUES THAT DR. Duffield's metHodoLogy in this regard is not

---

[13] Roughly speaking, PPL's rate of return on equity is calculated by taking the amount of net income for a given year and then dividing that number by the amount of PPL's privately-held equity (i.e., the amount of non-bank, and non-bond financing held by private investors in PPL).

supported by the case law and that it was error for the District Court to rely upon it.

¶ 165 Although PPL is correct in noting that Dr. Duffield's methodology is unique, it has failed to demonstrate how it was incorrect for the District Court to rely upon this methodology as a matter of law. At trial, Dr. Duffield acknowledged that his methodology was singular and unique, but presented a rationale for his departure from the approaches in *Portland Gen. Elec. Co.* and *Mont. Power Co.* The utility companies in both of those cases were regulated entities who were granted monopolies as well as a guaranteed a rate of return by the state's ratepayers. In exchange, the regulated utilities provided energy at a guaranteed rate for the consumers. Dr. Duffield referred to this as a "social contract" between the utilities and the rate-paying public. When considering the shared nets benefits or "profitability" analysis in this type of context, deducting the ratepayer's return on equity was an appropriate consideration because the regulated utilities are not granted a level of profitability above and beyond the guaranteed rate of return.

¶ 166 Here, by contrast, PPL is an unregulated utility and its rate of return is determined by market forces. Although PPL is not guaranteed a rate of return by Montana's ratepayers, there is no ceiling on the amount of profits that PPL can make in the unregulated market. If the return on equity of PPL's private investors is deducted before assessing PPL's "profitability," the private investors are allowed to reap the benefits of any "windfall" profits before sharing a fair portion of them with the State-even though the state-owned land makes the hydroelectric

facilities possible and contributes greatly towards their profitability.

¶ 167 Second, Dr. Duffield explained that the riverbeds' status as " trust lands" required a methodology which properly took into account the State/ Land Board's obligation to administer and dispose of those lands for the benefit of the people of Montana. Dr. Duffield reasoned that allowing private investors to deduct their rate of return prior to assessing PPL's net profits, would run afoul of this principle. For these reasons, Dr. Duffield employed his unique methodology and it was adopted by the District Court.

¶ 168 PPL clearly disagrees with Dr. Duffield's methodology. Yet aside from referring to the *Mont. Power Co.* and *Portland Gen. Elec. Co.* cases and arguing that Dr. Duffield's methodology was unprecedented, PPL does not show why, under the circumstances and evidence presented to the District Court, this methodology was incorrect as a matter of law. Given the unique circumstances before the District Court, and PPL's status as an unregulated utility operating on public trust lands, the District Court did not err as a matter of law in refusing to deduct a rate of return on privately-held equity prior to assessing PPL's profitability. Accordingly, we find no legal basis upon which to reverse the District Court's decision in this regard.

¶ 169 Finally, the District Court held that the terms of any future lease, including the calculation of rent, must be approved by the Land Board. The case sub judice is concerned solely with damages based on PPL's failure to compensate the State/Land Board for the use of public lands; thus, the damages in this

case are past damages. The methodology applied by the Land Board to the terms of a future lease may or may not be the same methodology used by the District Court in calculating damages in this case.

¶ 170 In closing, we take note of the fact that several amici in this case, including the Montana Water Resources Association, the Gallatin Agricultural Irrigators, and the Montana Farm Bureau Federation, have expressed concern that our decision here will have a negative impact on their ability to appropriate water from rivers. While we do conclude that the state-owned riverbeds are public trust lands and that PPL does not have a right to use those riverbeds for free, this does not imply that all other water users will be assessed a fee for usage in the same manner as PPL. As Article X, Section 11(2) of the Montana Constitution makes clear, "[n]o such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state." In other words, the Legislature may pass "general laws" providing for the use of state-owned riverbeds by various users of water. *See e.g. Norman*, 182 Mont. at 444, 597 P.2d at 718. In this case, the HRA was the "general law" which the District Court used to assess damages because it specifically provided for the disposition of state-owned lands occupied by PPL's facilities. Other general laws may (or may not) provide an assessment method for irrigators, stockmen, recreationists, and other water users, in a manner that takes account of the "public trust" with respect to these different classes of usage. While the

Land Board clearly has a fiduciary duty to administer Montana's riverbeds in the public interest, the Court's decision today is cabined to the specific facts of this case and the applicable provisions of the HRA.

CONCLUSION

¶ 171 In general, we affirm the District Court's award of damages. We affirm the District Court's conclusion that title to the riverbeds of the Missouri, Clark Fork, and Madison Rivers passed to Montana when it became a state in 1889. However, we reverse the District Court's conclusion that the riverbeds are "school trust lands," and instead hold that they are public trust lands under Article X, Section 11. Our reversal on this issue does not change the overall conclusions of the District Court, because under the 1889 and 1972 Montana Constitutions the State and Land Board have fiduciary obligations to administer those lands for the benefit of the public.

¶ 172 Further, the HRA provides an appropriate mechanism with which to assess damages owed by PPL to the State. The District Court did not err in adopting a methodology for assessing damages based on the HRA, and its findings of fact in support of its damage award were not clearly erroneous.

¶ 173 Finally, the District Court correctly left to the discretion of the Land Board the terms of any future lease. In arriving at a lease with PPL, the Land Board is not bound to rely upon the methodology adopted by the District Court in calculating past damages in this case. Affirmed.

/S/ PATRICIA O. COTTER

We concur:

/S/ KURT KRUEGER
District Court Judge,
sitting for Chief Justice Mike McGrath

/S/ W. WILLIAM LEAPHART

/S/ JAMES C. NELSON

/S/ EDWARD P. McLEAN
District Court Judge,
sitting for retired Justice John Warner

Justice JIM RICE, dissenting:

¶ 174 I believe the Court has erred in its analysis of the law governing title navigability and also failed to properly apply the tenets of summary judgment by disregarding genuine material factual conflicts.

¶ 175 M.R. Civ. P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment "has the initial burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (citations omitted). "A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Corp. Air v. Edwards Jet Ctr.*, 2008 MT 283, ¶ 24, 345 Mont. 336, 190 P.3d 1111 (quoting *Arnold v. Yellowstone Mt. Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, 100 P.3d 137). After the moving party meets its burden, the nonmoving party then bears the burden to establish that a genuine issue of material fact exists. *Roe*, ¶ 14. This burden is to demonstrate "by more than mere speculation that a genuine issue of fact exists." *Willden v. Neumann*, 2008 MT 236, ¶ 13, 344 Mont. 407, 189 P.3d 610.

¶ 176 To determine whether PPL created a genuine issue of material fact by more than mere speculation, it is first necessary to outline the legal principles which govern the dispute and which establish

entitlement to a judgment as a matter of law. Under the Equal Footing Doctrine, Montana gained title at the time of statehood to all submerged lands under navigable waters. *See Pollard's Lessee v. Hagan,* 44 U.S. 212, 229, 3 How. 212, 11 L.Ed. 565 (1845); *see also* 43 U.S.C. § 1311(a). Navigability is a question of federal law, and in determining whether "rivers are navigable in law," courts must first determine whether rivers are "navigable in fact." *Mont. Coalition for Stream Access, Inc. v. Curran,* 210 Mont. 38, 43, 682 P.2d 163, 166 (1984) (citing *The Daniel Ball,* 10 Wall. 557, 77 U.S. 557, 19 L.Ed. 999 (1870)); *see also U.S. v. Holt State Bank,* 270 U.S. 49, 55-56 (1926). The elements necessary to establish navigability are: "(1) [the river] was used or was susceptible of being used, (2) as a highway of useful commerce, (3) in its natural and ordinary condition, and (4) by the customary modes of trade and travel at the time of statehood." *N.D. ex rel. Bd. of U. and Sch. Lands v. U.S.,* 972 F.2d 235, 238 (8th Cir. 1992) (citing *Holt State Bank,* 270 U.S. at 56). If the facts presented substantiate all of the above elements, then title to the streambeds passed to Montana at statehood. *See Pollard's Lessee,* 44 U.S. at 228-29. If, on the other hand, the facts fail to satisfy one of these elements, then title to the streambeds did not pass to Montana. *See Shively v. Bowlby,* 152 U.S. 1, 26-27 (1894).

¶ 177 While this "navigability for title" test has similarities to navigability as determined for exercise of the federal government's Commerce Clause power, the two tests are nonetheless different-a distinction which the District Court failed to make when relying upon commerce cases, discussed below. It has been explained that "for purposes of establishing title to

land pursuant to the rule of state sovereign ownership, the federal navigability test is in fact both broader and narrower than the navigability test for commerce clause purposes." *Water and Water Rights* vol. II, § 30.01(d)(3) (Robert E. Beck et al. eds., 3d ed., LexisNexis Supp.2009). The navigability for title test is broader because rivers need not accommodate "interstate commerce." *Water and Water Rights* at § 30.01(d)(3); *see also U.S. v. Utah*, 283 U.S. 64, 75 (1931). The rivers instead only need to be susceptible to "[i]ntrastate [c]ommerce" because, for example, "the fact that the Great Salt Lake is not part of a navigable interstate or international commercial highway in no way interferes with the principle of public [i.e., state] ownership of its bed." *Water and Water Rights* at § 30.01(d)(3)(A) (quoting *Utah v. U.S.*, 403 U.S. 9, 10 (1971)).[1] Further, title passes to the states even if there was no "*actual* use for local commerce," as "*susceptibility* to local use" is sufficient. *Water and Water Rights* at § 30.01(d)(3)(A) (citing *The Montello*, 20 Wall. 430, 87 U.S. 430 (1874)) (emphasis in original). The navigability for title test is also narrower because, unlike navigability as analyzed under the Commerce Clause, navigability for title is determined by a specific time period. "[T]he [navigability for title] test is to be applied as of the time of the Revolution, in the case of the original states, and at the time of admission, in the case of the remaining states, rather than at the time of the

---

[1] *Utah v. U.S.*, 403 U.S. 9, cited here, is to be distinguished from *U.S. v. Utah*, 283 U.S. 64. The latter case is the primary authority relied upon herein, and referred to as " *Utah*."

litigation." *Water and Water Rights* at § 30.01(d)(3). Consequently, because Montana entered the Union on November 8, 1889, the courts must apply the navigability for title test at that time, a factual question about which PPL submitted substantial evidence and attacked the State's case for its failure to do so.

¶ 178 Importantly-and I believe the Court begins to get off track in its substantive legal analysis here-in applying the navigability for title test, courts are not to assume an *entire river* is navigable merely because certain reaches of the river are navigable, and likewise, are not to conclude that non-navigable reaches render an entire river non-navigable. *See Utah*, 283 U.S. at 80-81, 89-90. Instead, courts look to relevant portions of a river and, based upon the facts, determine whether particular reaches at issue are navigable or non-navigable. *See Utah*, 283 U.S. at 73-74. In *Utah*, the federal government brought suit to quiet title to "certain portions of the beds of the Green, Colorado, and San Juan rivers within the state of Utah...." *Utah*, 283 U.S. at 71. The Court referred the case to a special master to make findings of fact, conclusions of law, and recommendations for decree. *Utah*, 283 U.S. at 72. After making extensive findings of fact with respect to the "topography of the rivers, their history, impediments to navigation, and the use, and susceptibility to use, of the rivers as highways of commerce," the special master found that *some portions* of the rivers were navigable while others, such as the forty-mile stretch on the Colorado River located above Lees Ferry, were not. *Utah*, 283 U.S. at 73-74.

¶ 179 In its review of the special master's report, the *Utah* Court affirmed the propriety of applying a section-by-section analysis, stating "[e]ven where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, *how far* navigability *extends*." *Utah*, 283 U.S. at 77 (citing *U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899)) (emphasis added). The Court thus analyzed whether a reach of roughly four miles should have been included within the larger reach of water found to be non-navigable, and reversed the special master's conclusion as to the four-mile reach. *Utah*, 283 U.S. at 89-90. The Court thus concluded that the State of Utah owned portions of the river in question which were navigable at statehood, and that the federal government owned the remaining portions. *Utah*, 283 U.S. at 90-91. The Court explained it was not concerned with a "short interruption" or "negligible part" of a stream, but with "long reaches with particular characteristics of navigability or nonnavigability"-which meant a reach of four miles in that case. *Utah*, 283 U.S. at 77.

¶ 180 The Court acknowledges that *Utah* analyzed a roughly four-mile "stretch" of the Colorado River to determine its navigability, but nonetheless concludes that the same section-by-section approach is improper here. Opinion,¶ 107. Apparently attempting to avoid the consequences of *Utah*'s application-and of PPL's considerable evidence-the Court treats *Utah*'s approach, not as a framework for analysis, but essentially as an anomaly which resulted when the State of *Utah* challenged the navigability of only four miles and not the remaining

thirty-six miles within that reach of the Colorado River which the special master had concluded was non-navigable. *See* Opinion, ¶ 107. While it is correct that *Utah* judged only four miles of the River-the reach at issue-to conclude therefrom that *Utah* does not sanction a sectional approach is an illogical rendering which ignores both the Supreme Court's approach and the actual result of that case. *Utah* was a proceeding between Utah and the federal government which ultimately determined that there were two different titleholders to the streambeds of a particular reach of the Colorado River-Utah owned four miles and the federal government owned the remaining thirty-six miles. *Utah*, 283 U.S. at 74, 90-91. Contrary to the Court's view, *Utah* demonstrates the propriety of applying a section-by-section analysis to determine where navigability begins and "how far navigability extends." *Utah*, 283 U.S. at 77 (citation omitted). Recognizing that navigable and non-navigable reaches may coexist on the same river, the Court refrained from making categorical pronouncements about a river's status. This section-by-section approach has been used by many courts. *See e.g. Brewer-Elliott Oil & Gas Co. v. U.S.*, 260 U.S. 77, 86 (1922) ("[T]he Arkansas is and was not navigable *at the place where the river bed lots, here in controversy, are.*" (Emphasis added.)); *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1406 (9th Cir. 1989) (only addressing navigability for the "lower Gulkana [River]"); *Or. v. Riverfront Protec. Assn.*, 672 F.2d 792, 793 (9th Cir. 1982) ("This appeal poses the question whether the McKenzie River between river mile 37 and its confluence with the Willamette River was navigable...."); *Utah v. U.S.*, 304 F.2d 23, 26 (10th Cir. 1962) ("[W]e share with the trial court the

view that the *part* of the river in question was in fact and in law non-navigable at the time Utah was admitted into the Union." (Emphasis added.)); *Northwest Steelheaders Assn., Inc. v. Simantel,* 199 Or.App. 471 (2005) ("[T]he *segments* of the John Day River at issue here...." (Emphasis added.)).

¶ 181 With regard to this substantive issue, PPL argues that "if individual river reaches include non-navigable falls and other obstructions,*those reaches* are not considered navigable for title." (Emphasis added.) The Court misstates PPL's argument on this point, stating that PPL has argued "virtually *every stretch* of a river must be 'navigable in fact' and that particular stretches of a river which are non-navigable due to their physical characteristics can defeat a finding of navigability with respect to the *whole river* ...." Opinion, ¶ 105 (emphasis added). However, PPL does not make such an overreaching argument. It argues only for certain reaches to be declared non-navigable under *Utah*'s approach.

¶ 182 Disturbing to me is that the Court is declaring, as a matter of law, that the reaches claimed by PPL to be non-navigable are simply too "short" to matter. The Court refuses to consider the factual navigability of the disputed reaches of the Missouri, Clark Fork, and Madison Rivers because it deems them to be "relatively short" and presumably, in the words of the *Utah* Court, mere "negligible parts." Opinion, ¶ 108. The Court looks at the disputed reaches, calculates their distance, and decides the significance of these distances in order to legally determine the factual question of navigability on each individual river-all while ignoring or rejecting PPL's evidence that navigability did not, and could not, have existed at the time of statehood. Opinion, ¶ 108. The Court

concludes that all of the challenged reaches of all the rivers are "relatively short" and thus unable, as a matter of law, to be declared non-navigable for title purposes. Opinion, ¶ 108. This is opposite to the approach taken in *Utah* and, critically, is done without the benefit of the extensive factfinding done in *Utah* on the "topography of the rivers, their history, impediments to navigation, and the use, and susceptibility to use, of the rivers as highways of commerce." *Utah*, 283 U.S. at 73.

¶ 183 The nuances of the test for title navigability underscore the critical nature of the facts and circumstances of each case, and why the Supreme Court has described the issue as one requiring a fact-intensive inquiry. *Utah*, 283 U.S. at 87. "Each determination as to navigability must stand on its own facts." *Utah*, 283 U.S. at 87. Recognizing this fact-intensive inquiry, PPL submitted a "mountain"-over 500 pages-of affidavits and exhibits demonstrating that the portions of the Missouri, Madison, and Clark Fork Rivers at issue were non-navigable at the time of statehood. This evidence, if accepted after a trial, would lead inevitably to the conclusion that the State did not hold title to the streambeds at issue and was not entitled to receive compensation for their use. Further, PPL provided evidence and critical analysis challenging the State's position that the relevant portions of the rivers were in fact navigable, summarized by University of Montana Professor David Emmons, who stated that "[h]ad the State been a student of mine at the University of Montana, presenting its brief as a paper on the historical uses of the relevant reaches of the Missouri, Madison and Clark Fork Rivers, it would have received a failing grade for not following

the most fundamental tenets of historical analysis." While the validity and credibility of the State's evidence would have been, or should have been, determined at trial, PPL's double-pronged attack serves to demonstrate the significance of the factual issues which exist in this case.

¶ 184 The law recognizes that "[s]ummary judgment is an extreme remedy that should never be a substitute for a trial on the merits if a controversy exists over a material fact." *Corp. Air*, ¶ 24 (citing *Mary J. Baker Revocable Trust v. Cenex Harvest*, 2007 MT 159, ¶ 17, 338 Mont. 41, 164 P.3d 851). Further, "it is important to note that at the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses." *Andersen v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675. The proper inquiry is not merely whether the State presented sufficient evidence to support a conclusion of navigability as a matter of law; rather, the question is whether PPL created material factual conflicts by way of evidence which was not speculative, thus requiring the navigability question to be decided after trial. I thus turn to the evidence PPL produced for each river in question at the time of statehood.

A. The Madison River

¶ 185 Initially, it should be noted here that although the Court faults PPL for challenging only "relatively short" reaches, in actuality PPL has challenged the navigability of the *entire* Madison River. PPL submitted various historical documents in conjunction with an affidavit by Professor Emmons, including a 1931 Report to Congress prepared by the

Army Corps of Engineers. Addressing the same stretches of the Madison River which are at issue here, the Army Corps of Engineers concluded that "[a]s far as is known there has never been any navigation on these streams, *and commercial navigation on them is entirely out of the question.*" (Emphasis added.) Professor Emmons' analysis brought him to the conclusion, regarding the navigability of the Madison at statehood, that: "It is my opinion as a historian that credible evidence in the form of a report actually prepared by the Corps of Engineers demonstrates that the Madison River was not used or capable of use for commercial navigation." (Emphasis in original.)

¶ 186 One may be inclined to think of the Madison River as currently navigable, and thus PPL asked Dr. Stanley A. Schumm, a fluvial geomorphologist, to evaluate "whether the current physical conditions of the Madison River, with respect to navigability, were the same as or different than the physical conditions at the time of Montana's admission to the Union in 1889." Dr. Schumm summarized his analysis in an affidavit:

> In my expert opinion, the current physical conditions of the Madison River, with respect to navigability, are not the same as the conditions of the river in 1889 when Montana entered the Union. First, the construction and operation of the hydroelectric projects and reservoirs have materially changed the flow characteristics in the river. It is my understanding that the Madison hydroelectric project, including the reservoir known as Ennis Lake, was constructed over a course of years in and around 1906 and that the Hebgen reservoir project, known as Hebgen Lake,

> was constructed over a course of years in and around 1912.... By making the flow lower during periods of high flow and higher during periods of low flow, the operation of the hydroelectric projects and reservoirs have made the river more susceptible now to commercial navigation than it would have been without them. Second, my review of the historical descriptions of the Madison River indicate that the location and number of the river channels have changed since the time of statehood and that relevant portions of the river appear to have been either anastomosing or braided at the time of statehood. *Because reaches of the Madison River appear to have been either anastomosing or braided, my opinion is that it was not susceptible to navigation at the time of statehood.*

(Emphasis added.)[2] PPL thus contested consideration of the current state of the Madison River in determining its navigability at statehood. For purposes of summary judgment, PPL

---

[2] As Dr. Schumm explains later in his affidavit, "An anast [o]mosing river is exemplified by multiple distinct channels. An anastomosing river's flow is split among the various channels and, as a result, the river stage in an anastomosing reach at a given flow is lower than in a single channel reach." Dr. Schumm also explains that "[b]raided rivers, unlike anastomosing rivers with their several distinct channels, are characterized by a single main channel with a series interlocking or tangled network of several, smaller branching and reuniting shallow channels separated from each other by islands or channel bars. Braided rivers have high width to depth ratios and relatively steep gradients. The physical characteristics of braided rivers are not conducive to navigation."

demonstrated that the Madison River today is not the same as it was at the time of statehood, and that, at that time, it was not navigable.

¶ 187 PPL did not quit there. As noted above, for each river in question PPL also offered expert analysis which critiqued and sought to undermine the evidence offered by the State. First, PPL claimed that the State's use of the Lewis and Clark Expedition to prove the navigability of the Madison River at statehood was faulty, asserting that "Lewis and Clark provide no evidence whatsoever regarding the navigability of the Madison River" and that the Expedition proved only "two things: that the Jefferson, Madison and Gallatin Rivers are similar *at their mouths* and that the Expedition chose *not* to try to ascend the Madison." (Emphasis in original.) Second, although the State cited to a single log drive which occurred on a reach of the Madison River, PPL countered that the log drive in question took place between West Fork and Varney-an area which did not encompass the reaches at issue in this case. Further, "[t]he mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river." *N.D. ex rel. Bd. of U. and Sch. Lands,* 972 F.2d at 240 (quoting *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 698). Third, PPL pointed out that the State's claim in this lawsuit was contrary to its past position. The State failed to claim title to the relevant reaches of the Madison River streambed in the early 1980s. The Department of State Lands, for example, published a list of rivers that it claimed were navigable, but claimed only one reach on the Madison River: "Based on historical documentation the Madison River is commercially navigable from

the confluence of its west fork to Varney, Montana. Therefore the state claims ownership of the Madison River between these two points." As with the State's log float evidence, this claimed reach did not cover the current reaches at issue. Because the State's witness could not explain why the State "now claims the entire Madison as navigable at statehood," PPL was able to posit that the State had already, at least implicitly, "[a]dmitted" that it did not own the reaches it now claims.

¶ 188 Fourth, the State relied heavily upon the *current use* of the Madison River as evidence that the river was susceptible to navigation over 100 years ago. PPL's evidence and analysis criticized the State's emphasis of this modern evidence, a position for which there is clear legal support. *See N.D. ex rel. Bd. of U. and Sch. Lands*, 972 F.2d at 240 ("[M]odern day canoe use and modern day 'boatability' data are not reliable indicators of the River's navigability at statehood."). PPL argued the current use of the Madison River was irrelevant because it could not shed light on the navigability of the Madison River at the time of statehood. Finally, the State presented a 1986 Montana Navigable Water Study prepared by the Heritage Research Center in Missoula for the Department of State Lands. Professor Emmons acknowledged the Study, but opined it was untrustworthy due to its budgetary constraints and flawed historical analysis. The Study itself acknowledged that it was incomplete "[d]ue to the funding limitations," and explained that "[b]ecause the approach to documenting navigable waterways for title purposes has been constrained by lack of

funding, efforts have been focused upon generating the most information for the least possible cost."[3] Emmons also pointed to problems in the Study's methodology, noting it was "overly dependent on two of the least trustworthy historical sources to [w]estern historians-frontier-era newspapers and personal memoirs or reminiscences." Emmons found western frontier-era newspapers were suspect because "they were often vehicles used by local communities to promote the community to possible occupants and business investors ... [and][f]rontier-era newspaper editors often acted more as unabashed promoters of economic development than unbiased news reports."[4]

---

[3] Budgetary concerns were exactly why the Historical Research Associates (HRA) refused to submit a bid for the Study. HRA informed the State, that it had

> extensive experience in this type of research, both for Montana waterways and for waterways in other western states. Based on this experience we are familiar with the amount of time required to provide our clients with a solidly researched and defensible product. Unfortunately, we do not think that we could provide the necessary document given the stated project ceiling and the stipulation that no additional costs incurred would be reimbursed. Therefore, given the Department's budgetary constraints, HRA is not able to offer a proposal on this project.

[4] Emmons' analysis is consistent with what he teaches to his students and writes in his books. In class, "[Emmons] taught [his] students in [a class entitled] The Historian's Craft that frontier-era newspapers, because of their promotional nature, should *never* be used as sole primary historical sources as they were used for the [1986 Montana Navigable Water] Study." (Emphasis in original.) Emmons similarly wrote in his book, *Gardens in the Grassland:* "[T]he most representative example

¶ 189 The District Court began by recognizing "[t]here apparently is little historical documentation regarding the navigability of the Madison River." The court then quoted and relied upon the 1986 Montana Navigable Water Study-thereby granting validity and credibility to the very Study which was admittedly incomplete and about which Emmons explained was an unreliable source. The court further reasoned that the 1986 Study had referenced a 1913 log float from the mouth of the West Fork of the Madison to Varney and that Hebgen Lake "has been navigated." As explained above, this log float and the navigability of Hebgen Lake were of no legal consequence because the log drive did not cover the reaches currently at issue and Hebgen Lake did not exist at the time of statehood. *See e.g. Riverfront Protec. Assn.*, 672 F.2d at 794 n. 1 ("Navigability for title ... must exist at the time the State is admitted into the Union. Also it must exist in the river's ordinary condition.... [I]t cannot occur as a result of reasonable improvements.") (citing *Utah*, 283 U.S. at 75-76).

¶ 190 Disregarding the considerable evidence PPL had presented, the District Court chose to accept the State's evidence in concluding no genuine issue of material fact existed about the navigability of the Madison River at statehood. Perhaps most disconcerting is the fact that the Study relied upon by the District Court itself acknowledges its work on the issue was incomplete. The District Court thus

---

of the mood of western boomerism ... was the local newspapers. No one ever doubted the press' commitment to growth or its eagerness to engage in promotional hyperbole."

violated the principles governing summary judgment.

¶ 191 The Court does the same thing. It first claims that the Report prepared by the Corps of Engineers in the 1930s was merely "conclusory" and "insufficient as a matter of law to raise genuine issues of material fact." Opinion, ¶ 103. The Court likewise disregards Dr. Schumm's expert opinion that the current condition of the Madison River is completely different than at the time of statehood. Instead, the Court relies on *Ahtna*, 891 F.2d at 1403-a case where parties had *stipulated* the river in question had remained the same since statehood-and *Utah*, 283 U.S. at 82-83-a case presenting no factual issue about whether the rivers at issue were different at statehood-to hold "[t]he present-day recreational use is sufficient for purposes of 'commerce' under *Utah* and *Ahtna*." Opinion, ¶ 104. The Court, like the District Court, has resorted to weighing, and ultimately discrediting: (1) the evidence and analysis clearly demonstrating for summary judgment purposes that the Madison River was non-navigable at the time of statehood, (2) an expert analysis that the Madison River at the time of statehood was completely different than its current form, and (3) historical evidence generated by a U.S. governmental agency. The Court also necessarily dismisses PPL's analytical attack upon the State's evidence. I believe these evidentiary issues should be tested at trial-including cross-examination, rebuttal, and by application of the proper burden of proof-and resolved there by the factfinder.

B. The Clark Fork River

¶ 192 PPL's evidence concerning the navigability of the Clark Fork River included the 1891 Army Corps of Engineers Report submitted to Congress. After evaluating the Clark Fork River, including the portions at issue here, the Report concluded, "[i]t is a mountain torrential stream, full of rocks, rapids and falls, and *is utterly unnavigable, and incapable of being made navigable except at an enormous cost.*" (Emphasis added.) The Report characterized the idea of transforming the Clark Fork River into a navigable river as an "absurdity." About fifty years later, Major Mark Boatner of the Army Corps of Engineers confirmed the observations of the 1891 Report by responding to a request to determine whether the Clark Fork River was navigable:

> Receipt is acknowledged of your letter of November 14, 1940, in which you request the opinion of this office as to the navigable status of Clark's Fork of the Columbia River between Pend O'Reille [*sic*] Lake, Idaho, and the mouth of the Blackfoot River, a few miles above Missoula, Montana.
>
> For the purpose of administering the laws for the preservation and improvement of navigable waters of the United States, *this Department considers Clark Fork navigable from its mouth in Pend O'Reille [sic] Lake to the Northern Pacific Railroad Bridge, a distance of only about four miles.*

(Emphasis added.) Major Boatner's view was that the entire Clark Fork, with the exception of the referenced four-mile reach, was non-navigable. Thus, PPL's dam, which Professor Emmons explained was

"far downstream" from the four-mile stretch, was in waters the Corps considered non-navigable.[5]

¶ 193 PPL also offered judicial decrees. In 1910, the Federal District Court of Montana concluded the Clark's Fork of the Columbia River in Sanders County, Montana, which PPL asserts is the location of its dam, "was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation" and that Northwestern Development Company, not the State, owned the portions of the streambeds at issue before the federal court. *Steele v. Donlan*, In Equity No. 950 (D.Mont. July 14, 1910).

¶ 194 Reviewing the evidence, Professor Emmons concluded his analysis by stating, "[C]redible evidence from the Corps of Engineers and the Montana federal court, roughly contemporaneous with statehood, leads me to conclude that the Clark Fork River in Sanders County was not a navigable highway for commerce at statehood."

¶ 195 Again, PPL also cast doubt on the evidence offered by the State. The State relied upon a document described as the "Clark Fork Corps Report," despite the fact it did not contain any "title page or other indication of author, date of preparation, or purpose." Professor Emmons first criticized the State's attribution of the Report to the Corps of Engineers:

---

[5] This evidence further undermines the Court's assessment that PPL is only challenging "relatively short" reaches. With the exception of four miles, the reach claimed here to be non-navigable runs from Missoula, Montana, to Sandpoint, Idaho.

> [The] report[ ][was] not prepared *by* the United States Army Corps of Engineers ... as the State contends, but rather [ ][was] prepared *for* the Corps, and thus do[es] not carry any imprimatur of credibility that might be associated with an actual Corps Report. There is no indication in the evidence provided by the State that the Corps ever adopted the conclusions made or concurred in these so-called "Corps Reports."

(Emphasis in original.) Emmons then attacked the substance of the Report, stating that it relied on "untrustworthy historical sources ... to reach conclusions regarding historical use of the rivers." Emmons explained the State's use of the "Clark Fork Corps Report" was "fallacious in three ways: (a) [the State] has taken secondary sources based on less than credible historical evidence; (b) attributed them to the more authoritative Corps of Engineers; and (c) proffered them as historical evidence of the historical use of the rivers." Similarly, the State's reliance on the under-funded 1986 Montana Navigable Water Study was flawed because the Study had mischaracterized an article published in the *Missoulian* on February 24, 1882. The Study claimed logs were floated to Weeksville, Montana, and down the Clark Fork River. However, Emmons quoted the language of the article, which actually stated that Weeksville was "situated near the river in a body of fine timber and when the supply of logs in the immediate neighborhood gives out, they *can* be floated right to the locality down the Missoula and Pend d'Oreille rivers." (Misspelling in original, emphasis added by Emmons.) In pointing out the flawed logic in the Study, Emmons opined that "[t]here is a considerable difference historically

between a frontier-era newspaper claiming that logs*could* be floated down a river and credible evidence that logs were actually floated down the river." (Emphasis in original.) Thus, Emmons concluded that "the State's evidence lacks the credibility to prove *anything* about the historical use" of the Clark Fork River. (Emphasis in original.)

¶ 196 In granting summary judgment to the State, the District Court relied on cases addressing the federal government's power to regulate commerce under the Commerce Clause. *See e.g. Mont. Power Co.*, 8 F.P.C. 751, 1949 WL 1102 (F.P.C.1949); *Wash. Water Power Co.*, 10 F.P.C. 657, 1951 WL 1856 (F.P.C.1951); *Wash. Water Power Co.*, 14 F.P.C. 731, 1955 WL 3030 (F.P.C.1955). While these commercial, non-title cases admittedly held that the Clark Fork River was navigable at the time of statehood for that purpose, these rulings are of no consequence in light of this case's procedural posture. This is a title navigability case at the summary judgment stage. PPL set forth clear evidence of non-navigability, and construing that evidence in its favor, we must assume from that evidence-until a trial-that the navigability of the Clark Fork River is a genuine issue of material fact. Instead, the District Court, and now this Court, has taken upon itself the role of factfinder, weighing PPL's evidence and concluding that it lacks credibility, rendering it mere "conclusory statements." Opinion, ¶ 103.

C. The Missouri River

¶ 197 The State claimed that "[a]s anyone with even a passing knowledge of the Lewis and Clark Expedition must concede, the Missouri River is navigable in fact throughout Montana." PPL begged

to differ. Professor Emmons averred that he had "acquired more than a passing knowledge of the Lewis and Clark Expedition during [his] 35 years as a professional historian in Montana. [He knew] that the Expedition did *not* navigate the Great Falls Reach of the Missouri because it was *impossible* for them to do so." (Emphasis in original.) Emmons explained:

> To my knowledge as a professional historian, there has *never* been any navigation on the Missouri River in the Great Falls Reach because the physical characteristics of the falls prevent it. Captain William Clark prepared a map describing the features of the Great Falls Reach of the Missouri River. On this map, Captain Clark listed fifteen different rapids and nine waterfalls, including the five named waterfalls in this reach: (1) Black Eagle Falls-26 ft. 5 in. descent, (2) Colter Falls (now submerged)-14 ft. 7 in. descent, (3) Beautiful Cascade (now named Rainbow Falls)-47 ft. 8 in. descent, (4) Crooked Falls-9 ft. descent, and (5) the Great Falls of the Missouri-87 ft. 3/4 in. descent.

(Emphasis in original.) Further, Emmons cited to an 1896 inquiry by Samuel Hill, who asked the War Department whether a permit was required for maintenance on the dam constructed immediately above Black Eagle Falls on the Missouri River. J.C. Sanford, Captain of the Corps of Engineers, conducted a Report which stated:

> The dam referred to is located just above the Black Eagle Falls of the Missouri River, and is 3 1/4 miles below the railroad bridge at the town of Great Falls. About 400 feet above this bridge

> begins the series of rapids and falls in which the river falls 412 feet in a distance of 11 miles.... This portion of the river can, in my judgment never be made navigable at a cost that the demands of commerce will ever justify.

Relying upon Captain Sanford's Report, the War Department responded to Mr. Hill's request, informing him that no permit or action of the War Department was required.

¶ 198 PPL also provided a Report from the War Department for the Fiscal Year that ended June 30, 1898. The Report concluded the reach *from Fort Benton to Great Falls* was "an unnavigable section occupied by cataracts and dangerous rapids." It also detailed various navigation improvement projects contemplated for the reach between Great Falls and Stubbs Ferry, within the upper reach of the Missouri, south of Great Falls. The Report estimated that the cost of creating a mere *three-foot deep* channel from Cascade to Great Falls would be $213,646.50 in 1898 dollars.

¶ 199 Based upon his review of the evidence, Professor Emmons opined that "credible historical evidence demonstrates clearly that the Great Falls Reach of the Missouri River is not and has never been navigable and that the reach of the Missouri River between Great Falls and Stubbs Ferry would have required post-statehood improvements to support commercial navigation." *See e.g. Riverfront Protec. Assn.*, 672 F.2d at 794 n. 1 ("Navigability for title ... must exist at the time the State is admitted into the Union. Also it must exist in the river's ordinary condition.... [I]t cannot occur as a result of reasonable improvements.").

¶ 200 Once again, PPL challenged the validity of the State's evidence on this river. The State had cited to the Missouri Corps Report, which claimed that "fur trappers [ ] plied the waters of the Upper Missouri through territorial days," and that "[a]fter the discovery of gold, miners and settlers floated the river to Great Falls and Ft. Benton from the Helena area mining districts." PPL offered Emmons' assessment:

> Besides the fact that the geography of the Great Falls Reach of the Missouri River makes it utterly impossible that these miners actually floated the entire river to Fort Benton, there are considerable historical problems with the source of these reports, Hubert Hugh Bancroft. Bancroft (a nineteenth-century book seller and antiquarian) did not write anything that approaches what the State refers to in its Brief as "historical works generally considered authentic." He is not an authentic source of historical information. One historian, Kevin Starr, referred to Bancroft: "as a historian, [he] was often ludicrous and sometimes dishonest." I know of no professional historian who would use Bancroft as a credible historical source, as the State has done.

Emmons perceived that "[i]nstead of relying on more credible sources such as court records, business records or governmental reports, the State relies exclusively on secondary sources that by their own admission are limited in scope and which rely on untrustworthy primary sources to reach their conclusions." Further, PPL rebutted the State's legal argument that our previous precedent had established navigability for title purposes of the entire Missouri River. The State had relied upon

Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895) and *Herrin v. Sutherland*, 74 Mont. 587, 241 P. 328 (1925), but as PPL correctly pointed out, in neither *Gibson* nor *Herrin* had either party contested the issue of navigability for title. *Gibson*, 15 Mont. at 417, 39 P. at 517; *Herrin*, 74 Mont. at 594, 241 P. at 330. Thus, this issue had never been previously decided by this Court.

¶ 201 The District Court dismissed PPL's evidence and relied upon *Mont. Power Co. v. Fed. Power Commn.*, 185 F.2d 491 (D.C.Cir. 1950), a non-title case, to enter summary judgment in favor of the State. The Court decides similarly, reasoning that PPL has challenged only "relatively short" reaches. Opinion, ¶ 108. In particular, when reviewing the Missouri River, the Court states that "[t]he Great Falls Reach, even though a roughly 17-mile stretch of the Missouri River, is merely a short interruption ..." Opinion, ¶ 108. The Court does not explain why a non-navigable reach running from Fort Benton to Great Falls is too "short," and how it can so declare as a matter of law without factfinding. These determinations necessarily require a factfinder to consider each interruption in the context of the facts about the "topography of the rivers, their history, impediments to navigation, and the use, and susceptibility to use, of the rivers as highways of commerce." *Utah*, 283 U.S. at 73.

¶ 202 I would agree with the Court that, with respect to all the relevant reaches of the Madison, Clark Fork, and Missouri Rivers, the State met its initial burden to prove navigability under the title test. The Court's initial statement is thus correct: "The evidence presented by the State was clearly sufficient to demonstrate navigability in fact under

this test...." Opinion, ¶ 101. But the summary judgment inquiry is not supposed to end there. Without judgment as to weight or credibility, we are to determine whether PPL raised genuine factual issues by more than mere speculation. Clearly, PPL has done so. There is nothing "insufficient" or "conclusory" about PPL's evidence. Rather, its evidence is relevant and material. PPL has satisfied its burden to produce substantial evidence that the disputed reaches of the rivers were, at the time of statehood, non-navigable. The Court's decision to the contrary makes one wonder just what evidence the Court would have considered sufficient for PPL to defeat summary judgment in this case.

¶ 203 Consistent with the legal standards, this Court has steadfastly guarded against depriving a party of the right to trial by the improper entry of summary judgment. Today, I believe we step back from the protection of that right. I would not do so, but would reverse the District Court's entry of summary judgment and remand for trial.

/S/ JIM RICE

Judge Mike Salvagni joins in the dissenting opinion of Justice Rice.

/S/ MIKE SALVAGNI
Honorable Mike Salvagni,
District Judge, sitting in place of
Justice Brian Morris

Appendix B

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

No. CDV-2004-846

PPL MONTANA, LLC, a Delaware Limited Liability Corporation,

Plaintiff,

v.

STATE OF MONTANA,

Defendant.

MEMORANDUM OF DECISION

Plaintiff PPL Montana, LLC (PPL Montana), together with Avista Corporation and PacificCorp, filed this action seeking declaratory relief on whether the State could seek compensation for the use of state owned riverbeds in their hydroelectric facilities. In response, the State filed a counterclaim containing five causes of action: declaratory relief, uncompensated use of state lands, unjust enrichment, trespass, and negligence. Avista and PacificCorp have since settled with the State.

In April 2006, the Court granted the State's motion for summary judgment on all of PPL Montana's claims, but left open the question of whether what is commonly referred to as the Montana Hydroelectric Resources Act, Section 77-4-

201, *et seq.*, MCA, is preempted, as applied, by the Federal Power Act (FPA), 16 U.S.C. § 791a, *et seq.* The Court also entered a number of other Orders which narrowed the issues to be tried.

The primary issues to be decided as framed by the Pretrial Order are the amount of compensation the State is entitled to recover from PPL Montana for its use of the riverbeds and whether the Hydroelectric Resources Act is preempted, as applied, by the FPA. Other issues are the methodology that should be used to determine the amount of compensation; the acreage that should be used in calculating compensation; whether the State is entitled to prejudgment interest for back rent; and whether the Montana Board of Land Commissioners (Land Board) or the Court should determine full market value.

1. Preemption As-Applied Claim

Both of the United States Supreme Court and the Montana Supreme Court disfavor preemption of state law. *Orr v. State*, 2004 MT 354 ¶ 50, 324 Mont. 391, ¶ 50, 106 P.3d 100, ¶ 50. Consequently, in the analysis process there is a "presumption against preemption." *Id.* The presumption "can only be overcome by evidence of a 'clear and manifest' intent of Congress to preempt state law." *Id.* (quoting *Sleath v. W. Mont. Home Health Servs.*, 2000 MT 381, ¶ 61, 304 Mont. 1, ¶ 61, 16 P.3d 1042, ¶ 61).

In addressing whether a federal law preempts state law, including common law causes of action, the Montana Supreme Court looks for evidence of Congressional intent for preemption. *Id.*, ¶ 51. The Montana Supreme Court recognizes three types of preemption: express, filed, and conflict. *Vitullo v.*

IBEW, Local 206, 2003 MT 219, ¶ 14,317 Mont. 142, ¶ 14, 75 P.3d 1250, ¶ 14.

> First, Congress may expressly include a preemption clause in the federal statute Such an express clause would make it clear that state law will not apply in the area governed by the federal status. Second, congressional intent may be implied where it is reasonable to conclude that Congress intended to "occupy the field" by such comprehensive regulation that there is no room for supplementary state regulation. Lastly, federal law may preempt state law when the state and federal law actually conflict with one another. Such a conflict occurs when it is impossible to comply with both the federal and state law, or because "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Orr, ¶ 51 (citations omitted) (emphasis added.).

In its Memorandum and Order entered April 24, 2006, the Court determined that the FPA neither occupies the filed nor conflicts with the State's claims for compensation of the state owned riverbeds under the Hydroelectric Resources Act. (Mem. & Order, at 14 (Apr. 14, 2006.)) The Court did recognize that Section 77-4-203, MCA, conflicts with the FPA, but "is not fatal to the State's claims for compensation." (Id., at 12.) However, the Court left open the possibility that the Hydroelectric Resources Act may be preempted as applied. Id., at 14.)

PPL Montana maintains that the Hydroelectric Resources Act is preempted, as applied, contending that it is impossible for it to comply with the mandates of both the FPA and the Hydroelectric

Resources Act. Section 77-4-201, MCA, provides that the Land Board may issue a lease for a power site. PPL Montana argues that Section 77-4-209, MCA, limits the lease of state land for a hydroelectric facility to fifty years, while FERC requires that within five years of its issuance of a license a licensee must "acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States." 18 C.F.R. § 2.9, Form L-5, "*Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States*," Art. 5 (emphasis added). PPL Montana also argues that the leasing process set forth in the Hydroelectric Resources Act contravenes the FPA and its FERC licenses.

PPL Montana's contentions are based on the implementing procedures for a lease under the Hydroelectric Resources Act, not the State's claim for rental compensation. The State seeks compensation from PPL Montana pursuant to Section 77-4-208, MCA< and the common law theories of uncompensated use of state land, unjust enrichment, and trespass. The State's claim for compensation is found in Article X, sections 11(1) and (2), of the Montana Constitution, which state:

> (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

> (2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.
>
> (Emphasis added.)

The FPA does not preempt the State's property rights in the riverbeds. The FPA establishes a system of dual control between the states and the federal government. *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 167 (1946). Under this system the federal government possesses a superior right to regulate hydroelectric projects, including licenses for the construction, operation, and maintenance of dams. 16 U.S.C. § 797(e). On the other hand, "property rights are within the State." *First Iowa*, at 174 (quoting Rep. William L. LaFollette). A state "can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks. ..." *Id.* Therefore, under the FPA, state property rights "have not been superseded ... [and] they remain as applicable and effective as they were before its passage." *Id.* at 178. In addition, the FPA recognizes the validity of state property rights and compensation for their use. *U.S. v. Cent. Stockholders' Corp.*, 52 F.2d 322, 332 (9th Cir. 1931) ("To put it in another way, the law expressly recognizes all private rights established and determined by the law of the state and expressly requires the permittee, where it interferes with such rights, to compensate the owners therefore."). Accordingly, the unauthorized occupation of the

navigable riverbeds is compensable to the State, the owner of the riverbeds.

Moreover, the fact that the statutes cited by PPL Montana may conflict with its licenses and FERC regulations does not mean that there can be no lease. Significantly, as a condition of its licenses, PPL Montana is required by FERC to obtain the right to use state owned lands, but, with respect to the riverbeds, it has not done so. Furthermore, the requirement that a licensee obtain the right to use land in perpetuity may be modified. 18 C.F.R. § 2.9 lists numerous FERC approved forms. The forms contain standard conditions to be inserted into a license agreement between FERC and the licensee. Form L-5 is the form applicable to PPL Montana, and the conditions set forth in L-5, specifically Article 5, were incorporated into PPL Montana's permits. Notably, section 2.9(a) states in relevant part: "The Commission has approved several sets of standard conditions for normal inclusion in preliminary permits or licenses for hydroelectric developments. In a special situation, of course, the Commission in issuing a permit or license for a project will modify or eliminate a particular article (condition)." Such a situation occurred in *Cooper Valley Elec. Assoc., Inc.*, 4 F.E.R.C. P61, 336 (Sept. 22, 1978).

In *Cooper Valley*, the licensee petitioned FERC to revise the first sentence of Article 5 of the license (the same Article PPL Montana relies on) to allow the licensee to gain an interest in land that would be part of its hydroelectric facility, but not in perpetuity. The lands at issue included those owned by the State of Alaska, the City of Valdez, and certain native villages and regional corporations

under the Native Claims Settlement Act. In granting the licensee's request and deleting the phrase "in perpetuity" FERC reasoned:

> The general purpose of Article 5 is, of course, to require Licensee to obtain all rights necessary or appropriate for the construction, maintenance, and operation of the project. We believe that Licensee's request that it be allowed to obtain these rights from the State of Alaska, the City of Valdez, and various native corporations for a time period less than in perpetuity is reasonable. It is understandable that these entities do not wish to alienate their land in perpetuity where it is not absolutely necessary. ... Thus, it should obtain rights which will last as long as the lands and waters are used for project purposes.

Finally, the Land Board has the authority to enter into a lease under Section 77-1 202, MCA. Any lease, of course, would have to comply with FERC regulations.

2. Acreage Below the Dams

At issue are 290 acres of state owned riverbed located below the dams. Those acres are within the boundaries of the Thompson Falls and the Missouri-Madison Projects.

PPL Montana argues that under Section 77-4-202, MCA, which defines a power site, the State cannot claim rent for the acreage below the dams, while the State argues that it is entitled to compensation for those acres.

Section 77-4-202, MCA, provides:

> The works "power site" as used in this part shall mean not only the state-owned land on which the

> dam is constructed, but also each separate tract of such land which will become part of the reservoir and which in and of itself makes an essential contribution to the value of the power site as a whole of not less than 5% of the entire value of such power site.
>
> (Emphasis added.)

It is not necessary to resort to the rules of grammar to determine whether the State can be compensated for the below dam acreage, nor is it necessary to determine whether the below dam acreage contributes not less than five percent of the value of the dams. The State's claim for compensation is based on Article X, sections 11(1) and (2), of the Montana Constitution. As noted, FERC requires PPL Montana to obtain the right to use all land within the boundaries of a dam project. Because of the riverbeds below the dams, like the riverbeds above the dams, are school trust lands, the State, as trustee of those lands, is required to get full market value for the lands it leases. *Montanans for the Responsible Use of the Schl. Trust v. State (Montrust I)*, 1999 MT 263 ¶ 14, 296 Mont. 402, ¶ 14, 989 P.2d 800, ¶ 14. Thus, the State is entitled to compensation for the acreage of the riverbeds below the dams that is within the boundaries of the projects.

3. Prejudgment Interest

Section 27-1-211, MCA, provided:

> Every person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover which is vested in him upon a particular day is entitled

> also to recover interest thereon from that day except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt.

Three criteria must be satisfied in order for the Court to award prejudgment interest: "(1) the existence of an underlying monetary obligation; (2) the amount of recovery is certain or capable of being made certain by calculation; and (3) the right to recover the obligation vests on a particular day." *Ramsey v. Yellowstone Neurosurgical Assocs.*, 2005 MT 317, ¶ 19, 329 Mont. 489, ¶ 19, 125 P.3d 1091, ¶ 19.

Although PPL Montana's obligation to compensate the State for use of the state owned riverbeds existed when it purchased the Thompson Falls and Missouri-Madison Projects, the amount was not certain or capable of being made certain by calculation at that time. Under Article X, section 11(2), of the Montana Constitution, the full market value of the state lands has to be ascertained in the manner provided by law. Section 77-4-208, MCA, provides that the rental is "to be carefully ascertained from all available sources."

Neither DNRC nor the Land Board has adopted a rule as to how the rent for a power site is to be ste or what sources are to be considered in setting the rent. Indeed, the trial centered on the appropriate methodology to be used in calculating the back rent. Furthermore, although the settlements with Avista and PacificCorp may have been premised on the shared net benefits methodology, those settlements came well after this case was filed, and they cannot be used to support an award of prejudgment interest.

4. Shared Net Benefits Methodology

The State has a constitutional duty to obtain full market value for the use of school trust lands. MONT. CONST., art X, § 11(2); *Montrust I*, ¶ 14. The full market value is to be ascertained in the manner provided by law. In administering the trust, the Land Board must "secure the largest measure of legitimate and reasonable advantage to the state." Section 77-1-202 (1)(a), MCA, *Montrust I*, ¶ 14.

Section 77-4-208, MCA, states that the full market value is "to be carefully ascertained from all available resources." Although the supreme court has never interpreted this section, the language is quite broad.

While the shared net benefits method has been used primarily in proceedings before FERC involving tribal lands, one state court has approved the methodology in a case that did not involve tribal lands but only state lands. *State v. Cent. Me. Power Co.*, 640 A.2d 1067 (Me. 1994). The Court has not been cited to any case where the methodology was rejected.

The riverbeds have unique characteristics which make them valuable for the production of hydropower. Since the value of the riverbeds is directly related to the production of hydropower, the net benefits method best takes into consideration the economic contribution the riverbeds make to that production.

While FERC has a fee schedule to determine annual charges for federal land used in hydropower projects, that schedule does not take into consideration the economic value those lands

contribute to the production of power. Furthermore, using that schedule simply does not establish the full market value required by the Montana Constitution.

For these reasons, the Court concludes that the shared net benefits method is the most appropriate method to meet the State's constitutional and statutory mandate that it obtain the full market value for the use of state school trust lands.

5. Land Board

PPL Montana contends that under the Hydroelectric Resources Act, the Land Board, not the Court, must decide the fair market value of the riverbeds. This contention is not set out in the Pretrial Order. Indeed, PPL Montana's position throughout these proceedings has been that any claim for compensation under the Hydroelectric Resources Act is preempted by the FPA. As set out above, the State's claim is not preempted.

PPL Montana also argues that the Court is precluded from determining the full market value of the rent due the State because the supreme court has held that it will not substitute its opinion for that of the Land Board. *Montanans for Responsible Use of the Sch. Trust v. Darkewald*, 2005 MT 190, ¶ 52, 328 Mont. 105, ¶52, 119 P.3d 27, ¶ 52. That case involved a challenge to the statutory scheme for administering school trust lands and actions taken by the Land Board pursuant to that scheme. This case, however, does not involve a challenge to actions taken by the Land Board. Rather, the State has brought this claim to obtain full market value for the use of the school trust lands as required by the Montana Corporation. The State's claim is based entirely on the fact that PPL Montana has occupied

and continues to occupy state lands without paying rental compensation. Under the Pretrial Order, the full market value of the rent due the State is for the Court to decide.

In addition to seeking compensation for PPL Montana's past use of the riverbeds, the State, in its proposed findings, asked the Court to rule that there should be a lease commencing in 2007 coterminous with PPL Montana's FERC licenses using the 2007 rental rate as the base amount and adjusting that amount annually by the consumer price index, with the recalculation of the base amount every ten years.

Although a lease is required, any lease must be approved by the Land Board, and the Court cannot set the terms of the lease, including provisions for calculating future rents.

DATED this 13th day of June 2008.

/S/

THOMAS C. HONZEL
District Court Judge

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

No. CDV-2004-846

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; and AVISTA CORPORATION, a Washington Corporation,

Plaintiffs,

v.

STATE OF MONTANA,

Defendant.

MEMORANDUM AND ORDER ON THE NAVIGABILITY OF THE MISSOURI, MADISON AND CLARK FORK RIVERS

Defendant and Counterclaimant State of Montana (State) has moved for partial summary judgment on liability and for Rule 37 expenses. The State's motion is in two parts: 1) that the Missouri, Madison and Clark Fork Rivers are navigable rivers and that the State owns the streambeds to those rivers; and 2) that the streambeds are part of the State's school trust lands.

Plaintiff and Counterdefendant Avista Corporation (Avista) has moved for partial summary judgment, contending that the Clark Fork River is not a navigable river and that title did not pass to the State upon statehood. In addition, Avista and Plaintiff and Counterdefendant PPL Montana, LLC

(PPL), have moved for partial summary judgment on the issue of whether the streambeds are school trust lands.

The motions were heard December 14, 2006. This Order addresses only the navigability of the rivers. By separate orders, the Court will address the question of whether the riverbeds are school trust lands and whether the State is entitled to Rule 37 expenses.

BACKGROUND

Avista is a Washington State corporation registered to do business in Montana, with its principal place of business in Spokane, Washington, and PPL is a Delaware limited liability corporation registered to do business in Montana (collectively referred to as "the Utilities"). The Utilities own hydroelectric facilities in Montana.

Avista owns and operates the Noxon Rapids Dam on the Clark Fork River in Montana. PPL owns the Thompson Falls Dam located on the Clark Fork River. It also owns seven dams on the Missouri River and a dam on the Madison River. In addition, PPL owns the Mystic Lake Dam located on the West Rosebud Creek.

In order to operate the facilities the Utilities had to obtain licenses from the Federal Energy Regulatory Commission (FERC). FERC issues the licenses pursuant to the Federal Power Act (FPA), 16 U.S.C. § 791a *et seq.* The Utilities hold the proper licenses for their respective dams.

In October 2003, two resident of Gallatin County initiated an action in U.S. District Court against the Utilities and others. *Dolan v. PPL Mont., LLC*, No.

CV-03-167-M-SWM (D. Mont.). The plaintiffs alleged that state riverbeds are held in the public school trust by the State and that the Utilities have failed to pay rental compensation for their use and occupation of the state lands. The federal court allowed the State to intervene as a plaintiff. Upon motion of the Utilities, all plaintiffs, except the State, were dismissed from that action. *Id.* The Utilities then moved to dismiss the action.

On November 12, 2004, prior to the federal court issuing its order on the motion to dismiss, the Utilities filed this action for declaratory relief. In their complaints the Utilities asked the Court: 1) to declare that Montana's hydroelectric resources statute is preempted by the Federal Power Act; 2) to declare that the State's common-law claims for compensation are preempted by the Federal Power Act and the federal navigational servitude; and 3) to declare that: a) the Plaintiffs have acquired a prescriptive easement to use the riverbeds; b) the State is equitably estopped from asserting a right to lease payments under the hydroelectric resources statute; c) the State has waived any rights to lease payments; d) the State's request for payment is barred by lathes and applicable statutes of limitation; and e) the State breached agreements reached with the Utilities in the course of licensing.

In response, the State filed an answer and counterclaim containing five causes of action: declaratory relief, uncompensated use of state lands, unjust enrichment, trespass, and negligence. The State also filed a motion for summary judgment on the Utilities complaint for a declaratory judgment.

In September 2005, the federal court entered its order adopting Federal Magistrate Judge Erickson's Findings and Recommendation to vacate any rulings that go beyond the issues of standing and jurisdiction, and to dismiss the action because the federal court lacked jurisdiction.

On April 14, 2006, this Court issued its Memorandum and Order on the State's motion for summary judgment. In that decision, the Court addressed two questions of law: 1) whether the State's counterclaim for compensation is preempted by the FPA or the federal navigational servitude, and 2) whether the Utilities can assert any legal or equitable defense against the State in its role as trustee of state lands. In granting the State's motion for summary judgment, this Court determined that neither the FPA nor the federal navigational servitude preempts the State from obtaining compensation under Section 77-4-208, MCA.

The Court further held that the Utilities cannot assert any of their legal or equitable defenses against the State.

STANDARD OR REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P. The moving party has the initial burden of showing that no genuine issues of material fact exist. *Jobe v. City of Poison*, 2004 MT 183, 10, 322 Mont. 157, 10, 94 P.3d 743, 10. Once the moving party establishes no genuine issues of material fact exist, the burden shifts to the non-moving party opposing summary judgment to prove otherwise. *Id.* If the court determines no

genuine issues of material fact exist, the court will determine whether the moving party is entitled to judgment as a matter of law. *Id.*

DISCUSSION

The State asserts two arguments in support of its position that it owns title to the streambeds of the Missouri, Madison and Clark Fork Rivers. First, the State argues that because historical records prove that the rivers at issue are navigable, the State holds title to the riverbeds under the Equal Footing Doctrine. The State further argues that the Utilities are collaterally estopped from re-litigating navigability, as the rivers have been determined navigable by FERC and the Federal Power Commission (FPC), FERC's predecessor. Avista contends that the Clark Fork River is not a navigable river and that title did not pass to the State upon statehood.

Navigability of the Missouri, Madison and Clark Fork Rivers

Under the Equal Footing Doctrine, states admitted to the Union after the original thirteen colonies obtained title to streambeds beneath navigable waters upon statehood. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845). A state's claim to the title of streambeds under the Equal Footing Doctrine rests on a determination of whether the body of water was navigable at the time of the state's admission to the Union. *United States v. Utah*, 283 U.S. 64, 75 (1931). Federal law is the controlling authority used to decide the issue of navigability for title purposes. *Id.*; *Mont. Coalition for Stream Access v. Curran*, 210 Mont. 38, 43, 682 1).2d 163, 166 (1984).

The United States Supreme Court established the test for navigability in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

See also United States v. Utah, at 81-83.

While there is no clearly defined meaning of "actual use" or "susceptible of being used," courts around the country have acknowledged specific uses of rivers which are sufficient to establish navigability, while meeting the standard of "trade and travel . . . conducted in the customary modes of trade and travel on water." With regard to "actual use," the use of the river does not have to be commercially profitable. *See Utah v. United States*, 403 U.S. 9, 11 (1971) ("Hence it is suggested that this was not the use of the lake as a navigable highway in the customary sense of the word. . . .We think that is an irrelevant detail. The lake was used as a highway and that is the gist of the federal test.")

The mode or means of travel is also not limited to large-scale commercial or multiple passenger vessels.

> [The true test of navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties of attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of

> the country over which rafts of lumber of great value are constantly taken to market.
>
> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.

The Montello, 87 U.S. (20 Wall) 430, 441 (1874). *See also United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) ("[N]avigability does not depend on the particular mode in which such use is or may be had -- whether by steamboats, sailing vessels or flatboats."). Furthermore, the floating of timber down rivers may also establish navigability. In *Curran*, the Montana Supreme Court acknowledged that navigability in fact wider federal law can be determined by the log-floating test. *Curran*, 210 Mont. at 44, 682 P.2d at 166.

With regard to assessing navigability under the alternative test, "susceptible of being used," the key inquiry is "susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use." *United States v. Utah*, 283 U.S. at 82. In *The Montello*, the Court explained:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river. . . .If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

The Montello, at 442.

The Ninth Circuit Court of Appeals has stated that "use of the river need not be without difficulty, extensive, or long and continuous." *Or. v. Riverfront Prot. Ass'n.*, 672 F.2d 792, 795 (9th Cir. 1982).

a. Missouri River

The State has presented considerable evidence that based on historical use, the Missouri River is a navigable waterway. The State also directs the Court's attention to the 1948 decision of the FPC, which found that "the Missouri River, throughout its entire length is a navigable water of the United States," *In re Mont. Power Co.. IT-5840, 7* F.P.C. 163 (F.P.C. 1948). In that case, the Montana Power Company, PPL's predecessor, was challenging the Commission's determination that Montana Power was required to apply for licenses for its hydroelectric developments on the Missouri and Madison Rivers.

The Commission's decision was affirmed by the United States Court of Appeals, District of Columbia Circuit. *Mont. Power Co. v. Fed. Power Comm'n*, 185 F.2d 491 (D.C. Cir. 1950), In that case, the court addressed the question of whether the Missouri River from Ft, Benton to its headwaters at Three Forks is a navigable water of the United States. The court held that it was. In reaching its decision, the court specifically referenced the Great Falls of the Missouri which have always presented a natural barrier to navigation. Although the falls have never been navigated, the court noted that there is substantial evidence showing actual use of the river upstream from Ft. Benton to the falls and from above the falls to Three Forks.

The *Mont, Power Co.* case dealt with navigability under the FPA, not with navigability for title purposes. Under the FPA, navigable water is not defeated by reason of interruptions between the navigable parts of streams by falls or rapids. 16 U.S.C. §796(8).

This case does not involve federal power plant licensing and PPL argues that the appropriate analysis to use is to look at the relevant reaches of the river, not the entire stretch of the river. It claims that the Great Falls clearly prevent navigability of those reaches of the Missouri and, therefore, the river is not navigable. The Court concludes otherwise. Navigability based on either actual use or susceptibility to use may be determined, despite the presence of obstacles to free passage, such as rapids, riffles or occasional areas of low water requiring portage, as long as "the natural navigation of the river is such that it affords a channel for useful commerce. *The Montello*, at 441. This was later affirmed in *United States v. Utah*, when the Court stated:

> [T]he mere fact of the *presence* of such sandbars causing impediments to navigation does not make a river non-navigable. It is sufficient to refer to the well-known conditions on the Missouri River and the Mississippi River. The presence of sandbars must be taken in connection with other factors making for navigability. In *The Montello*, the Court said: "Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities

> for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact although its navigation may be encompassed with difficulties by reason of natural barriers such as rapids and sandbars."

United States v. Utah, 283 U.S. at 86-87 (quoting *The Montello*, 87 U.S. (20 Wall) at 443) (emphasis added).

The history of this case and the pleadings filed by PPL also leave the Court to conclude that the Missouri River is navigable for title purposes. As noted this case originated in U.S. District Court for Montana. In its answer to the amended complaint in federal court, PPL admitted that the Missouri River is navigable. When it filed its complaint in this Court, it alleged that the Missouri River is navigable and its answer to the State's counterclaim, it admitted that the Missouri River is navigable.

The rule in Montana is that parties are bound by admissions made in their pleadings. *Fey v. A. A. Oil Corp.*, 129 Mont. 300, 323, 285 P.2d 578, 590 (1955); *Audit Servs. v. Frontier-West, Inc.*, 252 Mont. 142, 148-49, 827 P.2d 1242 (1992) (citations omitted). The entire focus of this case since its inception has been whether the State is entitled to compensation because of the Utilities occupancy of the State owned streambeds. PPL has admitted that the Missouri River is navigable and is bound by its admissions.

b. Clark Fork River

The State has submitted historical documents showing that the Clark Fork River is navigable in

fact, including documents showing that the river was used for log drives.

In a proceeding for the licensing of the Thompson Falls Dam, the FPC found:

> The section of the Clark Fork River between Pend Oreille Lake in Idaho and the mouth of the Jocko River in Montana was used for the transportation of persons and property between areas now constituting the states of Oregon, Idaho, and Montana from 1810 to 1870, such use being canoe and bateaux transportation of furs by the fur traders of the British Northwest Fur Co., the canoe transportation of the original missionaries to the Indian tribes in the Clark Fork basin, and with the use of short portages around the Cabinet Rapids *and* Rock Island Rapids, by steamboats of the Oregon Steam Navigation Co. and its subsidiary, the Oregon & Montana Navigation Co. in the carriage of substantial numbers of gold miners, their pack animals and supplies, as well as commercial freight consigned to the gold camps in the vicinity of what is now Helena, Mont.
>
> *The Mont. Power Co., Project No. 1869*, 8 F.P.C. 751, at Finding 13 (F.P.C. 1949).

The Montana Power Company, PPL's predecessor, did not contest that finding.

The FPC also found that the Clark Fork was navigable when it licensed the Cabinet Gorge in Noxon Rapids Projects in Montana. *Wash. Water Power Co. Project No. 2058*, 10 F.P.C. 657 (F.P,C. 1951) ("[T]he Clark Fork River is navigable water of the United States at least from the Pend Oreille Lake

in the state of Idaho to the mouth of the Joao River in the state of Montana."); *Wash, Water Power Co, Project No. 2075*, 14 F.P.C. 731 (F.P.C. 1955) ("Clark Fork is a navigable water of the United States, at least from Pend Oreille Lake in Idaho to the mouth of the Jocko River in Montana, within which stretch proposed Project No. 2075 is to be located") (citations omitted).

Although neither the Montana Power Company nor the Washington Water Power Company, Avista's predecessor, challenged the FPC's findings, the Utilities contend they are not estopped from contesting the navigability of the Clark Fork River in this preceding since the test for navigability before the FPC is different from the test for navigability in determining title.

The differences between navigability for title and navigability for proceedings before the FPC is succinctly set forth by the Ninth Circuit Court:

> Navigability for title to riverbeds differs in three important respects from navigability for federal regulatory jurisdiction over power plants under the Commerce Clause. The former must exist at the time the State is admitted into the Union. Also it must exist in the river's ordinary condition. . . .it cannot occur as a result of reasonable improvements. . .Finally to support federal regulatory jurisdiction over power plants the river must by statute be, or have been, "suitable for use for the transportation of persons or property in the interstate or foreign commerce." 16 U.S.C. § 796(8) (1976). No such "in interstate or foreign commerce" requirement exists when the issue is navigability for title.

Riverfront Prot. Ass'n, 672 F.2d at 794, n. 1 (citations omitted).

After reviewing the cases relied on by the parties and the various documents which have been submitted, the Court concludes that the Clark Fork River is navigable: In licensing the dams, the FPC, of course, was proceeding under its regulatory jurisdiction over power plants. That, however, does not mean that this Court cannot rely on the FPC's findings in a case involving navigability for title. As discussed above, obstructions which require portages do not defeat a finding of navigability for title where the river provides a channel for commerce. Here, the record shows that the Clark Fork River was used for the transportation of persons and property and that use meets *The Daniel Ball* test for navigability.

Furthermore, like the Missouri River, both PPL and Avista have admitted in pleadings in the federal action and in this action that the Clark Fork River is navigable. In its answer to the State's counterclaim in this action, Avista denied that the Clark Fork River is navigable. However, paragraph 18 of the Utilities' complaint specifically states that Avista's Clark Fork projects are "on the Clark Fork River, a navigable river." The Court concludes that PPL and Avista are bound by their admissions.

c. Madison River

PPL's Madison Dam and the related Hebgen Dam Storage Facility operate under the same federal license as the Missouri River dams. However, during the 1948 licensing proceeding, the FPC did not need to address the issue of the Madison River's navigability because those projects also occupy federal lands.

There apparently is little historical documentation regarding the navigability of the Madison River. In 1986, the Heritage Research Center in Missoula prepared the "Montana Navigable Water Study" for the Montana Department of State Lands. That study states: "The Madison River has experienced considerable use historically by explorers, trappers, miners, farmers, and loggers, and is generally considered to have high potential for navigation. However, recorded entrances of commercial navigation are few." (Mason Aff., Ex. A, at 52 ("Montana Navigable Water Study")).

The study does note that in 1913 the Madison River was used to float logs from the mouth of the West Fork of the Madison to Varney, a distance of 55 miles and that Hebgen Lake has been navigated. (*Id.*) Today, the Madison River experiences considerable recreational use.

Despite the sparse historical record, the Court concludes the Madison River is navigable. As with the Missouri and Clark Fork Rivers, PPL has admitted in its pleadings that the Madison River is navigable, and PPL is bound by its admissions.

For the foregoing reasons, the Court concludes that the State's motion for partial summary judgment on the navigability of the Missouri, Madison and Clark Fork Rivers should be granted, and Avista's motion should be denied.

IT IS SO ORDERED.

DATED this 28th day of August 2007.

/S/
THOMAS C. HONZEL
District Court Judge

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

No. CDV-2004-846

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; and AVISTA CORPORATION, a Washington Corporation; PACIFICORP, an Oregon Corporation,

Plaintiffs,

v.

STATE OF MONTANA,

Defendant.

MEMORANDUM AND ORDER

The State of Montana has moved for summary judgment on the complaint for declaratory relief filed by the Plaintiffs. The Plaintiffs have moved for a Rule 56(f) continuance. The motions were heard June 28, 2005.

BACKGROUND

In October 2003, two residents of Gallatin County initiated an action in U.S. District Court against PPL Montana, PPL Services Corporation, Avista Corporation, and Pacificorp (the Utilities) to obtain compensation for the use of riverbeds for hydroelectric facilities. The plaintiffs alleged that state riverbeds are part of the school trust and that the Utilities have failed to pay any compensation for their use. The state of Montana, Great Falls Public

School Elementary School District No. 1 and High School District No. 1A later joined as plaintiffs. In response, the Utilities filed a motion to dismiss, arguing that the Federal Power Act and the federal navigational servitude preempted any claims for compensation, that the plaintiffs lacked standing, and that the riverbeds are not school trust lands.

On September 27, 2004, the federal court issues its order denying the Utilities' motion to dismiss the State and granting the motion to dismiss the other plaintiffs. The court initially held that neither the federal navigational servitude nor the Federal Power Act preempted the plaintiffs' claims for compensation. However, the court ruled that all plaintiffs except the State lacked standing because the alleged injury as not fairly traceable to the Utilities' conduct. In contrast, the court held that the State's allegations were sufficient to show that it had been injured by the utilities' failure to pay for the use of State-owned riverbeds.

After the federal court issued its order to dismiss, the utilities moved to dismiss the State's complaint for lack of subject matter jurisdiction. In January 2005, Federal Magistrate Judge Erickson issued his findings and recommendation to vacate any rulings that go beyond the issues of standing and jurisdiction. Judge Erickson reasoned the court should vacate part of its order because the federal court lacks jurisdiction over the State. By order entered September 27, 2005, the federal court entered its order adopting Judge Erickson's recommendation.

On November 2, 2004, the Utilities (except PPL Services Corporation) filed this action for declaratory relief. The Utilities ask the Court:

1) to declare Montana's hydroelectric resources statute is preempted by the Federal Power Act;

2) to declare the State's common-law claims for compensation are preempted by the Federal Power Act and with navigational servitude; and

3) to declare

a. The Plaintiffs have acquired a prescriptive easement to sue the riverbeds;

b. the State is equitably estopped from asserting a right to lease payments under the hydroelectric resources statute;

c. the State has waived any rights to lease payments;

d. the State's request for payment is barred by laches and applicable statutes of limitations; and

e. the State breached agreements reached with the Utilities in the course of licensing

In response, the State filed an answer and counterclaim containing five causes of action: declaratory relief, uncompensated use of state lands, unjust enrichment, trespass, and negligence. On the same day, the State filed its motion for summary judgment. Shortly after, Richard Dolan, Denise Hayman, Great Falls Public School Elementary School District No. 1 and High School District No. 1A, and MEA-MFT (the Applicants) moved to intervene in this litigation. By Memorandum and

Order entered April 15, 2005, the Court denied the Applicants' motion.

STANDARD

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P. The moving party has the initial burden of showing that no genuine issues of material fact exist. *Jobe v. City of Polson*, 2004 MT 183, ¶ 10, 322 Mont. 157, ¶ 10, 94 P.3d 743, ¶ 10. Once the moving party establishes that no genuine issues of material fact exist, the burden shifts to the non-moving party opposing summary judgment to prove otherwise. *Id.* If the court determines no genuine issues of material fact exist, the court will determine whether the moving party is entitled to judgment as a matter of law. *Id.*

DISCUSSION

The State seeks summary judgment on whether the Federal Power Act or the federal navigational servitude preempts the State's claims for compensation. In addition, he State seeks summary judgment on the issue of whether the Utilities can assert any of their legal or equitable defenses against the State. In addition to responding to the State's motion, the utilities have moved for a Rule 56(f) continuance.

I. PLAINTIFFS' RULE 56(F) MOTION

Rule 56(f), M.R.Civ.P., provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition,

> the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The Utilities argue the Court should grant their motion because they need additional time for discovery. Rule 56, however, does not require a court to delay a decision on a motion for summary judgment until after the parties complete discovery. *Konitz v. Claver*, 1998 MT 27, ¶ 38, 287 Mont. 301, ¶ 38, 954 P.2d 1138, ¶ 38. The "purpose of summary judgment is to eliminate the burden and expense of . . . unnecessary . . . trial preparation, including such things as discovery." *Id.*

Furthermore, under Rule 56(f), the party opposing summary judgment must establish "how the proposed discovery could preclude summary judgment." *Environmental contractors, LLC v. Moon*, 1999 MT 178, ¶ 19, 295 Mont. 268, ¶ 19, 983 P.2d 390, ¶ 19.

While summary judgment is not appropriate if questions of fact exist, nothing precludes the court from deciding portions of a motion for summary judgment when the issues presented are strictly questions of law. Deciding issues that present only questions of law helps streamline the case and reduces the burden and expense of unnecessary discovery. Therefore, the Court concludes that the Utilities' Rule 56(f) motion should be denied.

II. STATE'S MOTION FOR SUMMARY JUDGMENT

A. PREEMPTION

The State seeks compensation under both the Montana statutes relating to hydroelectric resources, Section 77-4-201, MCA, et seq., and the common-law theories of negligence and trespass. Section 77-4-201, MCA, provides that the state land board "may issue a lease or license to any person, corporation, or municipality for the development of power sites and the distribution, use, and disposition of the electrical energy generated on the sites . . . ." Section 77-4-208, MCA, provides that a licensee must pay rent "annually or semiannually and such rental shall not be less than the full market value of the estate or interest disposed of through the granting of the lease or license, such value to be carefully ascertained from all available sources."

The State's claim under those statutes is solely for "compensation under these state land leasing provisions, and nothing more." (State's Mot. Summ. J. at 13.) The State does not claim to "restrict or regulate the Dam Corporations' power sites . . . or on any other matters within the scope of the FPA and already controlled by the Dam Corporations' FERC licenses." *Id.* Instead, the State is "asserting the same rights as any other landowner whose property is used by the licensee of a hydroelectric project." *Id.* at 14. Accordingly, the Court will only consider the issue of whether the State's claims for compensation are preempted by the federal Power Act or navigational servitude.

1. Navigational Servitude

When Montana entered the Union in 1889 the United States conveyed title to the beds of navigable waters to the State under the Equal Footing Doctrine. *Montana v. United States*, 450 US. 544, 551 (1981). However, the State's authority over the beds of navigable rivers is subject to one limitation: the federal navigational servitude. *Id.* The federal navigational servitude is the power of Congress to ensure navigable waters remain open to interstate and foreign commerce. *Id.* The navigational servitude extends to all lands below the high water mark. *U.S. v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 312 U.S. 592, 596-597 (1941). When Congress exercises the navigational servitude, it is not required to pay compensation. Id. at 597. In light of these principles, the Utilities argue that he federal navigational servitude precludes the State from obtaining rental payments.

The exercise of the navigational servitude requires clear authorization from Congress. *Fed. Power Comm'n v. Niagara Mohawk Power Comm'n*, 347 U.S. 239, 249 (1954). In some circumstances, the "legislative history and construction of particular enactments may lead to the conclusion that congress exercised less than its constitutional power . . . . *United States v. Twin City Power Co.*, 350 U.S. 222, 225 (1956). The Federal Power Act does not contain an express assertion of he navigational servitude. *Niagara Mohawk*, 347 U.S. at 251. "On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties." *Id.*

When Congress enacted the Federal Power Act, it was not its intention to vest the navigational servitude in a licensee. *U.S. v. Cent. Stockholders' Corp.*, 52 F.2d 322, 332 (9th Cir. 1931). "(T)he general purpose of the act was to permit what would otherwise be an infringement of the rights of the federal government and an interference with navigation . . . *Id.* The Federal Power Act "recognizes all private rights' and expressly requires a licensee to compensate a land owner for their use. *Id.* "The servitude . . . is not in the nature of a right to take or acquire property without the giving of compensation." *Public Util. Dist. v. Seattle*, 382 F.2d 666, 671-72 (1967). Therefore, the Utilities cannot invoke the federal navigational servitude to preempt the State's claims for compensation.

2. Federal Power Act

The Montana Supreme Court recognizes three types of preemption: express, field, and conflict. *Vitullo v. IBEW*, 2003 MT 219, ¶ 14, 317 Mont. 142, ¶ 14, 75 P.3d 1250, ¶ 14. Express preemption occurs when Congress includes a preemption clause in a federal statute providing that state law does not apply. *Id.* Field preemption occurs when Congress creates a regulatory scheme "so pervasive or comprehensive that it is reasonable to infer that Congress intended to 'occupy the field' and leave no room for supplementary state regulation." *Id.* Conflict preemption exists if it is impossible to comply with both state and federal law or if the state law frustrates the goals and objectives the federal statute seeks to promote. *Id.*

Whether the Federal Power Act preempts the State's claims for compensation on their face is a

question of law. In this case, the Federal Power Act does not expressly preempt state law. Therefore, the Court will address only whether field or conflict preemption exists.

a. Preemption on its Face

The Federal Power Act establishes a system of dual control between the .states and the federal government. *First Iowa Hydro-Electric Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 167 (1946). Each sovereign has final authority in its own jurisdiction. *Id.* However, where the federal government's power supersedes state power, the state does not have authority. *Id.* at 167-168. The purpose of the Federal Power Act is to avoid a "dual system of futile duplication of two authorities over the same subject matter." *Id.* at 171.

Under the dual system, the federal government possesses a superior right to regulate hydroelectric projects, while leaving sates their traditional jurisdiction over property. The Federal Power Act grants the Federal Electric Regulatory Commission (FERC) the power to issue licenses for the construction, operation, and maintenance of dams. 16 U.S.C. § 797(e). This power extends to issues regarding the "engineering, economic and financial soundness" of hydroelectric projects. *First Iowa*, 328 U.S. at 172. On the other hand, "property rights are within the State." *Id.* at 174 (quoting Rep. William L. LaFollette). A state "can dispose of the beds, or parts of them, regardless of the riparian ownership of the banks . . . ." *Id.* Therefore, under the Federal Power Act, state property rights "have not been superseded . . . [and] they remain as applicable and effective as they were before its passage." *Id.* at 178.

The Federal power Act contains several provisions that recognize the validity of state property rights and contemplate compensation for their use. *See Central Stockholders' Corp.*, 52 F.2d at 332 (stating that the Federal Power Act expressly recognizes property rights and requires compensation for their use). A FERC license "neither transfers nor diminishes any right of possession or enjoyment possessed by" a landowner. *Jordan v. Randolph Mills, Inc.*, 716 F.2d 1053, 1055 (4th Cir. 1983). A licensee must notify "[a]ny person who is an owner of record of any interest in the property with the bounds of the project" and "[a]ny Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application." 16 U.S.C. § 802(b). If a licensee wishes to use the property of another, the licensee must either acquire the owner's rights or use the power of eminent domain found in 16 U.S.C. § 814 to obtain them. *Jordan*, 716 F. 2d at 1055. Furthermore, a licensee is required to submit information about the "price paid for water rights, rights-of-way, lands, or interests in lands." 16 U.S.C. § 797(b).

Not only does the Federal Power Act save state property rights, it also preserves the right of a property owner to bring a state law tort action against a licensee for damages caused by a hydroelectric facility. 16 U.S.C. § 803(c). "Congress . . . made it clear by the enactment of 16 U.S.C. § 803(c) that it did not intend to preempt state common law property rights." *Nez Perce Tribe v. Idaho Power Co.*, 847 F.Supp. 791, 812 (D. Idaho 1993). 16 U.S.C. § 803(c) allows a property owner to bring an action in state court under the principles of

traditional state tort law. *DiLaura v. Power Auth. of N.Y.*, 982 F.2d 73, 78 (2d Cir. 1992). Here, the State has brought several common-law claims fro compensation against the Utilities. Under 16 U.S.C. § 803(c), the State's common-law claims are preserved and saved from preemption.

The Utilities argue that the State's claims for compensation are preempted because the hydroelectric resources statutes allow the State to regulate FERC-licensed hydro-electric projects. They place particular emphasis on Section 77-4-203, MCA, which authorizes the state land board "to incorporate in the lease or license such reasonable restrictions and regulations as it finds necessary in order to protect the interest of the state and its people." Although Section 77-4-203 conflicts with the Federal Power Act and is preempted, this is not fatal to the State's claims for compensation. Here, the State is not attempting to impose any additional regulation upon the Utilities. Nor does the State quarrel with the well-established rule that it cannot regulate environmental, recreational, aesthetic, archaeological, or cultural matters. *See Sayles Hydro Ass'n v. Maughan*, 985 F.2d 451, 453-54 (9th Cir. 1993) (listing a number of fields where state action is preempted). Instead, the state is only seeking compensation for the use of state land under Section 77-4-208. As previously noted, the State's rights of ownership and possession are saved from preemption. Although the State cannot regulate a hydroelectric project, nothing prevents the State from obtaining rental compensation under Section 77-4-208.

The Utilities take the position that merely asking them to sit down and negotiate a lease with the State

constitutes regulation preempted under the Federal Power Act. However, the Court cannot accept this position. It would make no sense to reserve property rights under the Federal Power Act. However, the Court cannot accept this position. It would make no sense to reserve property rights under the Federal Power Act and then hold that any process to vindicate those rights is preempted. The ability to negotiate the terms and conditions of a lease is an incident of ownership all property owners possess. *See Jordan*, 716 F.2d at 155 (stating that when a landowner and licensee **cannot agree**, the licensee may use the power of eminent domain (emphasis added). The Utilities cite a number of cases under the doctrines of field or conflict preemption in support of their position. However, none of the cases are property cases, no do they hold that a state is preempted from enforcing its property rights. *See Sayles Hydro*, 985 F.2d at 456 (holding that a licensee is not required to submit any reports and studies to a state licensing commission on environmental matters).

In conclusion, the Federal Power Act neither occupies the field nor conflicts with the State's claims for compensation. The Federal Power Act does not preempt the State from obtaining rental compensation under Section 77-4-208. Nor does the Federal power Act bar the State from bringing any common-law claims for damages. Therefore, the State's motion for summary judgment should be granted.

b. Preemption As-Applied

Whether the Federal Power Act preempts the State's claims for compensation as-applied is a

question of fact, and the Court is not in a position to decide this issue without the appropriate factual record. Therefore, the Court will not address it.

B. OTHER DEFENSES

All lands owned by the State are public lands held in trust for the people. Mont. Const. art. X, § 11(1); Mont. const. of 1889, art. XVII, § 1. No land shall be disposed of except according to laws fro the disposition of state land or until full market value is obtained. *Id.* The State argues the Utilities cannot assert any of their legal or equitable defenses against the Sate in its role as trustee of state lands. The Utilities argue that several questions of material fact preclude summary judgment and that the State's arguments fail as a matter of law. First, the utilities argue a question of fact exists over whether the Sate owns the riverbed. Second the Utilities assert a question of fact exists over whether the land is school trust land.

The issue before the Court is whether a private party can assert any legal or equitable defense against the State in its role as trustee of state lands. This issue does not present a question of material fact and is strictly a question of law. By examining this issue now, the Court is not relieving the State of its obligation to prove that it actually owns the riverbeds or that the land is part of school trust found in Article X, Section 2 of the Montana Constitution. Instead, the Court will simply examine the threshold question of whether the Utilities are even entitled to assert any of their legal or equitable defenses against the State as a matter of law.

1. Prescriptive Easement

The Utilities seek a declaratory judgment holding they have obtained a prescriptive easement against the State to use riverbeds. In Montana, a private party cannot obtain a prescriptive easement across school trust land). The Utilities, citing *Jackson v. State*, 181 Mont. 257, 593 P.2d 432 (1979), argue that state land can be adversely possessed. However, Montana law clearly holds that no party can obtain title to government property through adverse possession or use. *Bode v. Rollwitz*, 60 Mont. 481, 493, 199 P. 688, 692 (1921). Therefore, the Utilities cannot obtain a prescriptive easement to use state riverbeds.

2. Estoppel

The Utilities seek a declaratory judgment that the State is equitably estopped from asserting any right to lease payments. The State cannot be estopped by the unauthorized acts or representations of its officers or agents. *Norman v. State*, 182 Mont. 439, 444, 597 P.2d 715, 718 (1979). The utilities argue a question of fact exists over whether the actions of any state employees were authorized. However, no state employee has authority to make representations about the disposal of trust lands. Estoppel may not be asserted where it would interfere with the protection of state trust lands. *Id.* at 446, 597 P.2d at 719. The Utilities argue *Brady v. State*, 163 Mont. 416, 517 P.2d 738 (1973), allows them to assert estoppel against the State. However, *Brady* is neither a trust land case nor did it hold that estoppel ran against the State. *Id.* at 423, 517 P.2d at 742. Therefore, the utilities cannot assert estoppel against the State.

3. Laches and Statutes of Limitations

The Utilities seek a declaratory judgment that the State is barred from obtaining rental payments by the doctrine of laches or the applicable statutes of limitation. However, neither can be asserted in an action involving the protection of state trust lands. *State ex rel. Boorman v. State Bd. of Land Comm'rs*, 09 Mont. 127, 133, 94 P.2d 201, 204 (1939). "Any equities involved must give precedence to the more vital question of observance of constitutional provisions, and from that standpoint alone this controversy must be determined." *Id.* Moreover, "the government's efforts to enforce and maintain a policy respecting lands held in trust for the people stand on a different plane from an ordinary suit to regain title or remove a cloud upon it." *Norman v. State*, 182 Mont. 439, 446, 597 P.2d 715, 719 (1979). Therefore, the Court concludes that the Utilities cannot assert the defense of laches or any statute of limitation against the State.

4. Waiver and Breach Arguments

The Utilities assert the State has either waived its right to rental payments or breached agreements reached in the course of licensing. "[A] law established for a public reason cannot be contravened by private agreement." Section 1-3-204, MCA; *see also Collection Bureau Servs. v. Morrow*, 2004 MT 84, ¶ 10, 320 Mont. 478, ¶ 10, 87 P.3d 1024, ¶ 10 ("statutes creating rights for a public benefit are not subject to waiver"). Likewise, a court cannot enforce an unlawful agreement. *Cape-France Enterprises v. Estate of Peed*, 2001 MT 1139, ¶¶ 33-34, 305 Mont. 513, ¶¶ 33-34, 29 P.3d 1011, ¶¶ 33-34. Under these principles, the State cannot waive its

right to rental payments. Nor can it enter into an agreement prohibiting he State from enforcing its trust obligations. Therefore, the Utilities cannot assert either waiver or breach of agreement claims against the State.

For the foregoing reasons,

IT IS ORDERED:

1. The Utilities' Rule 56(f) motion IS DENIED.

2. The State's motion for summary judgment IS GRANTED.

DATED this 14th day of April, 2006.

/S/
Thomas C. Honzel
District Court Judge

Appendix C

U.S. CONST., ART. VI, CL. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

RELEVANT PROVISIONS OF THE FEDERAL POWER ACT, 16 U.S.C. §§ 791a-823d

16 U.S.C. § 797 — General powers of Commission

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licensees in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or

to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished Commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such conditions. All disputed issues of material fact

raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of August 8, 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission. *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, that upon the filing of any application for a license which has not been preceded by a preliminary

permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public

lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

16 U.S.C. § 799 — License; duration, conditions, revocation, alteration, or surrender

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

16 U.S.C. § 800 — Issuance of preliminary permits or licenses

(a) Preference

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

16 U.S.C. § 801 — Transfer of license; obligations of transferee

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

16 U.S.C. § 802 — Information to accompany application for license; landowner notification

(a) Each applicant for a license under this chapter shall submit to the commission--

(1) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(2) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.

(3) Such additional information as the commission may require.

(b) Upon the filing of any application for a license (other than a license under section 808 of this title) the applicant shall make a good faith effort to notify each of the following by certified mail:

(1) Any person who is an owner of record of any interest in the property within the bounds of the project.

(2) Any Federal, State, municipal or other local governmental agency likely to be interested in or affected by such application.

16 U.S.C. § 803. Conditions of license generally

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by--

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) the State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an

installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied

from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees; maximum rates; application; review and report to Congress

(1) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter, including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That, subject to annual appropriations Acts, the portion of such annual charges imposed by the Commission under this subsection to cover the

reasonable and necessary costs of such agencies shall be available to such agencies (in addition to other funds appropriated for such purposes) solely for carrying out such studies and reviews and shall remain available until expended: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25, fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations;

but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission: *Provided however*, That no charge shall be assessed for the use of any Government dam or structure by any licensee if, before January 1, 1985, the Secretary of the Interior has entered into a contract with such licensee that meets each of the following requirements:

(A) The contract covers one or more projects for which a license was issued by the Commission before January 1, 1985.

(B) The contract contains provisions specifically providing each of the following:

(i) A powerplant may be built by the licensee utilizing irrigation facilities constructed by the United States.

(ii) The powerplant shall remain in the exclusive control, possession, and ownership of the licensee concerned.

(iii) All revenue from the powerplant and from the use, sale, or disposal of electric energy from the powerplant shall be, and remain, the property of such licensee.

(C) The contract is an amendatory, supplemental and replacement contract between the United States and: (i) the Quincy-Columbia Basin Irrigation District (Contract No. 14-06-100-6418); (ii) the East Columbia Basin Irrigation District (Contract No. 14-06-100-6419); or, (iii) the South Columbia Basin Irrigation District (Contract No. 14-06-100-6420).

This paragraph shall apply to any project covered by a contract referred to in this paragraph only during the term of such contract unless otherwise provided by subsequent Act of Congress. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(2) In the case of licenses involving the use of Government dams or other structures owned by the United States, the charges fixed (or readjusted) by the Commission under paragraph (1) for the use of such dams or structures shall not exceed 1 mill per kilowatt-hour for the first 40 gigawatt-hours of energy a project produces in any year, 1 1/2 mills per kilowatt-hour for over 40 up to and including 80 gigawatt-hours in any year, and 2 mills per kilowatt-hour for any energy the project produces over 80 gigawatt-hours in any year. Except as provided in subsection (f) of this section, such charge shall be the only charge assessed by any agency of the United States for the use of such dams or structures.

(3) The provisions of paragraph (2) shall apply with respect to--

(A) all licenses issued after October 16, 1986; and

(B) all licenses issued before October 16, 1986, which--

(i) did not fix a specific charge for the use of the Government dam or structure involved; and

(ii) did not specify that no charge would be fixed for the use of such dam or structure.

(4) Every 5 years, the Commission shall review the appropriateness of the annual charge limitations

provided for in this subsection and report to Congress concerning its recommendations thereon.

(f) Reimbursement by licensee of other licensees, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits,

or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of Commission

Such other conditions not inconsistent with the provisions of this chapter as the Commission may require.

(h) Monopolistic combinations; prevention or minimization of anticompetitive conduct; action by Commission regarding license and operation and maintenance of project

(1) Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(2) That conduct under the license that: (A) results in the contravention of the policies expressed in the antitrust laws; and (B) is not otherwise justified by the public interest considering regulatory policies expressed in other applicable law (including but not limited to those contained in subchapter II of this chapter) shall be prevented or adequately minimized by means of conditions included in the license prior to its issuance. In the event it is impossible to prevent or adequately minimize the contravention, the Commission shall refuse to issue any license to the applicant for the project and, in the case of an existing project, shall take appropriate action to provide thereafter for the operation and maintenance of the affected project and for the issuing of a new license in accordance with section 808 of this title.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project, or for a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) [16 U.S.C.A. § 661 et seq.] from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory

responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

RELEVANT PROVISIONS OF THE MONTANA HYDROELECTRIC RESOURCES ACT, TITLE 77, CHAP. 4, PT. 2, MCA

(text as of the time of trial; subsequent amendment described in footnote)

77-4-201 — Lease or license of power sites.

It is unlawful to sell or advertise for sale state lands constituting power sites or part of power sites capable of developing hydroelectric energy in commercial quantities. However, the board may issue a lease or license to any person, corporation, or municipality for the development of power sites and the distribution, use, and disposition of the electrical energy generated on the sites as specifically provided in this chapter.

77-4-202 — Power site defined.

The words "power site" as used in this part shall mean not only the state-owned land on which the dam is constructed, but also each separate tract of such land which will become part of the reservoir and which in and of itself makes an essential contribution to the value of the power site as a whole of not less than 5% of the entire value of such power site.

77-4-203 — Restrictions and regulations.

In issuing any lease or license under the provisions of this part, the board shall have the power and it shall be its duty to incorporate in the lease or license such reasonable restrictions and regulations as it finds necessary in order to protect the interest of the state and its people.

77-4-204 — Examination of power sites.

Whenever an application in writing has been presented to the board for lease or license on a power site on state lands, the board shall make such preliminary examination as to the value of the power site, as to the plans of development submitted by the applicant, and of all other matters relating to the proposed development as it deems necessary for the proper disposition of the business.

77-4-205 — Notice of proposed lease or license.

If these preliminary investigations and the offer made for lease or license are such that the board deems further proceedings on the application to be justified, it shall cause notice of the proposed lease or license to be published not less than once each week during not less than 6 weeks previous to the meeting at which further consideration will be given to the application in two newspapers of general circulation throughout the state, one of such newspapers to be published in the neighborhood of the location of the power site.

77-4-206 — Meeting of board on proposed lease or license.

(1) At this meeting all other applications which may have been received for lease or license to such power sites shall be duly considered together with the application originally filed.

(2) The board shall have the right to reject any or all bids.

(3) If, however, the board finds that any of the bids submitted offers to pay adequate rental for such power site, shows to the satisfaction of the board that it is capable of carrying out the proposed

development and of rendering efficient service to the customers that will be served from such power development, and intends in good faith without any unnecessary delay to proceed with the development, then the board shall accept such bid. If more than one such acceptable bid is received, then the lease or license shall be awarded to the person, corporation, or municipality whose offer, considered in its totality, is the most advantageous to the state.

77-4-207 — Preference to bid of municipality.

In case one of the applicants is a municipality, its bid shall have preference provided that it is in all respects as advantageous to the state as the bid which has been submitted by any person or corporation.

77-4-208 — Rental for power sites.[1]

The rental to the state must be paid annually or semiannually and such rental shall not be less than the full market value of the estate or interest disposed of through the granting of the lease or

---

[1] In April 2009, the Montana State Legislature amended MCA 77-4-208 to state:

(1) The rental payment to the state for power sites must be paid annually or semiannually, and the rental may not be less than the full market value of the estate or interest disposed of through the granting of the lease or license. The value must be carefully ascertained from all available sources.

(2) Ninety-five percent of all rental payments received under this section must be deposited in the school facility and technology account provided for in 20-9-516. The remaining 5% of the rental payments received must be deposited annually in the public school permanent fund provided for in 20-9- 621.

license, such value to be carefully ascertained from all available sources.

77-4-209 — Duration of lease.

The term of the lease shall not exceed 50 years.

77-4-210 — Joint development with United States.

(1) If the state land constituting a power site is part of a larger power site owned or controlled by the government of the United States, then the board may grant a joint lease or license with the United States for the development of the power site and the distribution, use, and disposition of the electrical energy generated at the power site under the laws of the United States and regulations issued pursuant to those laws.

(2) The lease or license may be granted for a term not exceeding 50 years.

(3) The share or percentage of ownership of the state in the joint power site must be in proportion to the total contribution that the lands of the state make to the value of the entire power site. Before the share of the state in the power site is advertised for lease or license, the percentage of the state's share in the entire power site must be calculated and agreed upon between the state and the United States.

(4) The fee or compensation to be paid to the state under the lease or license must be calculated on the basis of the state's share of ownership in the entire power site as calculated and agreed to. However, the fee or compensation may not be less than the full market value of the estate or interest disposed of in the lands through the granting of the lease or license to be carefully ascertained from all available sources.

(5) Before the lease or license is issued, notice of the lease or license must be given in the same manner as required in this chapter for the issuance of a separate lease or license by the state.

77-4-211 — Amortization of investment.

(1) In all cases where the lease or license issued by the United States requires the amortization of the investment made in dams, machinery, equipment, and appurtenant works, such amortization requirement shall also apply to that portion of the investment representing the state's part or share in the power site so that the state will at all times retain its full share of ownership in the power site and in the dams, machinery, equipment, and appurtenant works.

(2) If the state lands constitute a separate power site wholly owned by the state and independently developed, the lease or license issued by the state may provide for the amortization of the capital invested in the dam, machinery, equipment, and appurtenant works, not including the distribution system, so that ultimately the state will become the owner of the power site including the dam, machinery, equipment, and appurtenant works, not including the distribution system.

APPENDIX
VOL. II

Supreme Court, U.S.
FILED
RECEIVED
AUG
DOCKETED

10-218 AUG 12 201

No. ____ OFFICE OF THE CLERK

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

---

PETITIONER'S APPENDIX — VOLUME II

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St, Ste. 1500
Billings, MT 59101
(406) 252-2166

PAUL J. LAWRENCE
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for Petitioner

August 12, 2010

Library of Congress

TABLE OF APPENDICES

Appendix A

Opinion of the Supreme Court of Montana App-1

Appendix B

Memorandum of Decision of the Montana First Judicial District Court, Lewis & Clark County, dated June 13, 2008 ..... App-118

Memorandum and Order on the Navigability of the Missouri, Madison and Clark Fork Rivers of the Montana First Judicial District Court, Lewis & Clark County, dated Aug. 28, 2007 ..... App-130

Memorandum and Order of the Montana First Judicial District Court, Lewis & Clark County, dated Apr. 14, 2006 ..... App-145

Appendix C

U.S. Const., Art. VI, cl. 2 ..... App-161

Relevant Provisions of the Federal Power Act, 16 U.S.C. §§ 791a-823d App-162

16 U.S.C. § 797 ..... App-162

16 U.S.C. § 799 ..... App-168

16 U.S.C. § 800 ..... App-169

16 U.S.C. § 801 ..... App-171

16 U.S.C. § 802 ..... App-172

16 U.S.C. § 803 ..... App-174

Relevant Provisions of the Montana Hydroelectric Resources Act, Title 77, chap. 4, pt. 2, MCA App-185

77-4-201 ..... App-185

77-4-202 ..... App-185

77-4-203 ..... App-185

77-4-204 ..... App-186

77-4-205 ..... App-186

77-4-206 ..... App-186

77-4-207 ..... App-187

77-4-208 ..... App-187

77-4-209 ..... App-188

77-4-210 ..... App-188

77-4-211 ..... App-189

Appendix D

Affidavit of David M. Emmons, dated Nov. 3, 2006 ..... App-190

Affidavit of Stanley A. Schumm, dated Nov. 3, 2006 ..... App-205

Navigation Report by David M. Emmons, dated June, 2007 ..... App-216

Appendix D

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

No. CDV-2004-846

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; and AVISTA CORPORATION, a Washington Corporation; PACIFICORP, an Oregon Corporation,

Plaintiffs,

v.

STATE OF MONTANA,

Defendant.

AFFIDAVIT OF DAVID M. EMMONS IN SUPPORT OF PPL MONTANA'S OPPOSITION TO THE STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RULE 37(c) EXPENSES

I, DAVID M. EMMONS, being first duly sworn upon oath, depose and state the following:

1. Education and Credentials as Historian. I am a Professor of History Emeritus at the University of Montana. I began my professional career at the University of Montana in 1967 as an Instructor of History. I was subsequently promoted to Assist Professor in 1970, Associate Professor in 1973 and,

finally, to Full Professor in 1976. A copy of my curriculum vitae is attached as Exhibit A.

2. I received from the University of Colorado my Bachelor of Arts degree in history in 1961, my Masters of Arts in history in 1963, and my Ph.D. in history in 1969. I have published two books: *Garden in the Grasslands: The Boomer Literature of the Central Plains* (Lincoln: University of Nebraska Press, 1971) and *The Butte Irish: Class and Ethnicity in an American Mining Town* (Urbana and Chicago: University of Illinois Press, 1989). A joint committee of the American Historical Association and the Organization of American Historians awarded *The Butte Irish* the Ellis Island/Statue of Liberty Centennial Prize in 1989. The *Butte Irish* also received the 1990 Robert G. Athern Prize from the Western Historical Association, given every other year to the best book on Western history. I have published more than twenty articles in historical journals, and I have served as referee for articles published by the University of Illinois Press, the University Press of Kansas, Oxford University Press, *The Western Historical Quarterly, Montana: The Magazine of Western History, Labor History, American Quarterly, The Journal of American History,* and *The Journal of American Ethnic History.*

3. I have been a member of the following professional organizations: American Historical Association, Organization of American Historians, Western Historical Association (past chair and member of the W. Turrentine Jackson Prize Committee), American Conference for Irish Studies, Catholic Historical Association, Irish-American Cultural Institute, Immigration and Ethnic History

Society (member of the Executive Board), and the Montana Historical Association (member of the Editorial Board for *Montana: The Magazine of Western History*.)

4. During my tenure as professor at the University of Montana, I taught numerous courses focusing on the development of the United States in the late nineteenth and early twentieth centuries. I also taught a course entitled "The Historian's Craft," a required course for history majors. During the course, students were instructed on what would be required of them as professional historians, including how to assess the creditability of various historical sources, and the care with which sources must be evaluated and used.

5. Review of State's Navigability Brief. I have read the State's Brief in Support of State's Rule 56(c) Motion for Partial Summary Judgment on Liability and Rule 37(c) Expenses, the Affidavits of Jodie Foley, Monte Mason and Bob McFarland and the Exhibits thereto. It is based upon these documents that I formed my opinion regarding the adequacy and credibility of the State's historical evidence.

6. Summary of Opinions. In my expert opinion, the State's evidence of historical use of the relevant reaches of the Missouri, Madison and Clark Fork rivers is unreliable from a historical perspective. The State relies on secondary sources that are inappropriate for the purposes for which the State attempts to use them. Further, these secondary sources appear to rely for their conclusions on primary sources, such as frontier-era newspapers and personal reminiscences, that are either unreliable, misread or misused. By contrast, credible

sources of evidence indicate that the relevant reaches of the rivers at issue were non-navigable.

7. The State's Use of Secondary Sources. The State's Brief relies on the following secondary sources to support its assertions that relevant reaches of the Missouri, Madison and Clark Fort rivers are navigable: (a) the 1986 Montana Navigable Water Study ("Study"); and (b) what it refers to as "Corps Reports" for the Clark Fork, Madison and Missouri Rivers. The Study was provided as Exhibit A to the Affidavit of Monte Mason ("Mason Aff.") and relevant portions of the Study are attached as Exhibit B. The "Corps Reports" were provided as Exhibits B, C and D to the Mason Aff. And relevant portions are attached as Exhibit C, Exhibit D, and Exhibit E, respectively. The State places far more credence in the conclusions made in these secondary sources than is warranted by the circumstances of their preparation.

8. The Study itself highlights its limitations. In the discussion of the methodology used in preparing the Study, its author (Heritage Research Center) warns the State that: "Due to funding limitations, several exclusions were made from the research." Study, p.3. County Courthouse records and a thorough review of all local newspapers were excluded because of the associated costs. Study, p. 4. The author continued: "Because the approach to documenting navigable waterways for title purposes has been constrained by lack of funding, efforts have been focused upon generating the most information for the least possible cost." *Id.* The funding limitations did not permit the Study's authors to conduct the research necessary to prepare a credible historical account.

9. That the budgetary constrains imposed by the State limited severely the adequacy of the Study is confirmed by Historical Research Associates ("HRA"). HRA was the other historical research firm invited by the State to bid on the Study preparation, but it refused to submit a bid because of its experience with similar projects. HRA wrote to the State: "Based on this experience we are familiar with the amount of time required to provide our clients with a solidly researched and defensible product. Unfortunately, we do not think that we could provide the necessary document given the stated project ceiling and the stipulation that no additional costs incurred would be reimbursed." A copy of that letter is attached as Exhibit F.

10. Not only is the historical value of the Study limited by the budgetary constraints, it is overly dependent on two of the least trustworthy historical sources known to Western historians - frontier-era newspapers and personal memoirs or reminiscences. Western frontier-era newspaper are suspect as they were often vehicles used by local communities to promote the community to possible occupants and business investors. As I stated in *Gardens in the Grassland,* "the most representative example of the mood of western boomerism . . . was the local newspapers. No one ever doubted the [western] press' commitment to growth or its eagerness to engage in promotional hyperbole." Frontier-era newspaper editors often acted more as unabashed promoters of economic development that unbiased news reporters. One frontier-era newspaper editor stated that many newspapers of that time "represented things that had not yet gone through the formality of taking place." I taught my students

in The Historian's Craft that frontier-era newspapers, because of their promotional nature, should never be used as sole primary historical sources as they were used for the Study.

11. Similarly, I found problems with the State's use of the "Corps Reports" as credible historical evidence. First, the Clark Fork Corps Report contains no title page or other indication of author, date of preparation, or purpose. Perhaps most important, these reports were not prepared by the United States Army Corps of Engineers (the "Corps") as the State contends, but rather they were prepared for the Corps, and thus do not carry any imprimatur of credibility that might be associated with an actual Corps Report. There is no indication in the evidence provided by the State that the Corps ever adopted the conclusions made or concurred in these so-called "Corps Reports."

12. The submitted "Corps Reports" rely on the same types of untrustworthy historical sources as a Study to reach conclusions regarding historical use of the rivers. As such, they are not themselves historically credible. Despite these shortcomings, the State uses these reports to argue that the Corps of Engineers itself has made determinations that the relevant reaches of the Madison, Missouri and Clark Fork Rivers are navigable. In fact, the opposite is true, as described in paragraphs 22-29 below.

13. The State's sue of the "Corps Reports" is fallacious in three ways: (a) it has taken secondary sources based on less than credible historical evidence; (b) attributed them to the more authoritative Corps of Engineers; and (c) proffered them as historical evidence of the historical use of

the rivers. In my opinion as a historian, the State's evidence lacks the credibility to prove anything about the historical use of these rivers.

14. I found numerous examples of the State's reliance on non-credible evidence of historical use. For example, the State cites to the Study and the Missouri Corps Report for historical accounts of gold miners floating down river from the Helena area to Fort Benton as evidence that the Missouri River between the historic Stubbs Ferry and Fort Benton was navigated. Brief, p. 5. Beside the fact that the geography of the Great Falls Reach of the Missouri River makes it utterly impossible that these miners actually floated the entire river to Fort Benton, there are considerable historical problems with the source of these reports, Hubert Hugh Bancroft. Bancroft (a nineteenth-century book seller and antiquarian) did not write anything that approaches what the State refers to in its Brief as "historical works generally considered authentic." He is not an authentic source of historical information. One historian, Kevin Starr, referred to Bancroft: "as historian, [he] was often ludicrous and sometimes dishonest." I know of no professional historian who would use Bancroft as a credible historical source, as the State has done.

15. Another example of the State's use of unreliable secondary sources for historical evidence is found in the Study section on the Clark Fork River. The Study cites an article from the *Missoulan* published on February 24, 1882 that, according to the Study's author, demonstrated that logs were floated to Weeksville, Montana down the Missoula River and Pend Oreille River [other names for segments of the Clark Fork River]. However, that article actually states that Weeksville was "situated

near the river in a body of fine timber and when the supply of logs in the immediate neighborhood gives out, the *can* be floated right to the locality down the Missoula and Pend d'Oreille rivers." (misspelling in original). This article as provided as part of Exhibit 12 to Jodie Foley's Affidavit, a copy of which is attached as Exhibit G. There is a considerable difference historically between a frontier-era newspaper claiming that logs could be floated down a river and credible evidence that logs were actually floated down the river.

16. In summary, my opinion as a historian is that the State's reliance on these secondary sources is inappropriate, and they should be disregarded as containing any actual evidence of the historical navigability of the rivers in question.

17. Evidence Regarding the Great Falls Reach of the Missouri River and the Madison River From the Lewis and Clark Expedition. The State makes the bold claim that "[a]s anyone with even a passing knowledge of the Lewis and Clark Expedition must concede, the Missouri River is navigable in fact throughout Montana." Brief, p. 5. I have acquired more than a passing knowledge of the Lewis and Clark Expedition during my 35 years as a professional historian in Montana. I know that the Expedition did not navigate the Great Falls Reach of the Missouri because it was impossible for them to do so. Instead, they engaged in an arduous month-long portage around that reach. An except of the Journals of the Lewis and Clark Expedition describing the portage around the Great Falls Reach is attached as Exhibit H.

18. To my knowledge as a professional historian, there has never been any navigation on the Missouri River in the Great Falls Reach because the physical characteristics of the falls prevent it. Captain William Clark prepared a map describing the features of the Great Falls Reach of the Missouri River. On this map, Captain Clark listed fifteen different rapids and nine waterfalls, including the five named waterfalls in this reach: (1) Black Eagle Falls - 26 ft. 5 in. descent, (2) Colter Falls (non submerged) - 14 ft. 7 in. descent, (3) Beautiful Cascade (now named Rainbow Falls) - 47 ft. 8 in descent, (4) Crooked Falls - 9 ft. descent, and (5) the Great Falls of the Missouri - 87 ft. ¾ in. descent. A copy of Captain Clark's map, identifying the locations of the various features and indicating which features remain visible today, is attached as Exhibit I. This version of Captain Clark's map was found on the Discovering Lewis & Clark website (www.lewis-clark.org) at http://www.lewis-clark.org/content/content-article.asp?ArticleID=833. Through my work as a professional historian, I am acquainted with those responsible for the production of this website and am confident based on my review of the website and its contents that the website is accurate.

19. Lewis and Clark observed the conditions of the Madison River at its mouth near the current city of Three Forks, Montana. The Expedition chose not to ascend the Madison River, but instead proceeded up the Jefferson River. The Expedition's travels up the Jefferson were difficult, as Captain William Clark noted in his journal: "the method we are compelled to take to get on is fatigueing & laborious in the extreen, haul the Canoes over the rapids, which

Suckceed each other every two or three hundred yards and between the water rapid oblige to towe & walke on Stones the whole day except when we have poleing men wet all day Sore feet &c." (misspellings in the original). This portion of the Lewis and Clark Journals gives no reason to think that the Madison River would have been navigable. A copy of the portion of the Journals of the Lewis and Clark Expedition describing the ascent up the Jefferson River is attached as Exhibit J.

20. In summary, my opinion as a historian is that the actual activities of the Lewis and Clark Expedition do not support the State's claims about the navigability of the rivers. In addition, in my years as a historian in Montana, I have seen no evidence of any navigation of the Great Falls Reach.

21. Other Credible Evidence of Non-Navigability. In reviewing the historical documentation produced in this case, I found several credible pieces of evidence that indicate that the relevant reaches of the Missouri, Madison and Clark Fork Rivers should be considered non-navigable at the time Montana entered the Union. This evidence includes governmental reports, including those actually prepared -navigable at the time Montana entered the Union. This evidence includes governmental reports, including those actually prepared by the Corps of Engineers, and court documents. These sources are far more credible for establishing historical conditions that the secondary reports, newspaper articles, advertisements and personal reminiscences upon which the State relies.

22. Missouri River. In 1896, Samuel Hill asked the War Department whether a permit was required

for maintenance on the dam constructed immediately above Black Eagle Falls. (Until the formation of the Department of the Army in 1947, the United States Army Corps of Engineers was part of the War Department.) The War Department informed Mr. Hill in a November 2, 1896 letter that, based on an October 24, 1896 report by Captain J.C. Sanford of the Corps of engineers, no permit was required. The Sanford report, after describing the physical characteristics of the Great Falls Reach, stated: "this portion of the river can, in my judgment never be made navigable at a cost that the demands of commerce will ever justify. While the dam is in a stream which in the greater portion of its length is a 'navigable stream' it is situated in a portion of this stream that is not now navigable and which in all probability never will be." A copy of the War Department's November 2, 1896 letter and the October 24, 1896 report are attached as Exhibit K.

23. Additionally, in the Annual Report of the War Department for the Fiscal Year Ended June 30, 1898 ("1898 Annual Report"), the Corps of Engineers reported to Congress that the reach from Fort Benton to Great Falls was "an unnavigable section, occupied by cataracts and dangerous rapids." The report also described the various navigation improvement projects that had been contemplated for the reach between Great Falls and the historic Stubbs Ferry. According to the 1898 Annual Report, the cost of creating a three-foot-deep channel from Great Falls to Cascade was in 1898 dollars, estimated at $213,646.50. A copy of the relevant excerpts of the 1898 Annual Report is attached as Exhibit L.

24. In summary, my opinion as a historian is that credible historical evidence demonstrates clearly that the Great Falls Reach of the Missouri River is not and has never been navigable and that the reach of the Missouri River between Great Falls and Stubbs Ferry would have required post-statehood improvements to support commercial navigation.

25. Madison River. In 1931, the Corps of Engineers submitted to Congress a "Report from the Chief of Engineers on the Jefferson, Madison, and Gallatin Rivers Covering Navigation, Flood Control, Power Development and Irrigation," House Document No. 193, 72nd Congress, First Session ("Madison Congressional Report"). The Corps of Engineers concluded that "[a]s far as is known there has never been any navigation on these streams, and commercial navigation on them is entirely out of the question." Madison Congressional Report, p. 66. Further, in discussing the impact of the Hebgen and Ennis Reservoirs, which are located upstream from the Madison Hydroelectric Project, the Corps concluded that their operations "results in a regulated flow during low-water periods that is generally greater than the natural low water discharge . . . The operation of power reservoirs, therefore tends to improve the low-water flow." *Id.* Thus, the Corps of Engineers concluded that the Madison River was not capable of commercial navigation, even with the increase in low-water flow resulting from the operation of the post-statehood reservoirs. A copy of the Madison Congressional Report is attached as Exhibit M.

26. It is my opinion as a historian that credible evidence in the form of a report actually prepared by the Corps of Engineers demonstrates that the

Madison River *was* not used or capable for use for commercial navigation.

27. Clark Fork River. The Corps of Engineers evaluated the navigability of the Clark Fork River. In 1891, two years after Montana's statehood, the "Preliminary Examination of the Clark Fork of the Columbia River (By Whatever Name Called) from the International Boundary Line to the Mouth of the Big Blackfoot River, in the State of Montana" ("Clark Fork Examination") (misspelling in original) was submitted to Congress. The report concluded that the river in the surveyed reach, which includes the location of PPL Montana's Thompson Falls Project, "is a mountain torrential stream, full of rocks, rapids and falls, and is utterly unnavigable, and incapable of being made navigable except at an enormous cost." The author of the report interviewed the mayor and other prominent citizens of Missoula, who informed him that the idea of making the river navigable was "an absurdity." A true and correct copy of the Clark Fork Examination is attached as Exhibit N.

28. The Corps' conclusions that the Clark Fork River is not navigable was reinforced in a 1940 letter from Major Mark Boatner stating that the Corps considers the Clark Fork navigable only from its mouth in Pend Oreille Lake to the Northern Pacific Railroad Bridge, a total distance of about four miles, far downstream from PPL Montana's Thompson Falls hydro project. A copy of the November 22, 1940 letter from Major Boatner is attached as Exhibit O.

29. Finally, a 1910 court decree from *Steele v. Donlan*, a case in the Federal District Court, District of Montana, concluded that "the Clark's Fork of the Columbia River in Sanders County, Montana [the

county where the Thompson Falls Project is located] was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation . . . that said stream [the Clark Fork] is a non-navigable stream, and that said defendant Northwestern Development Company [which I am informed was a predecessor in title to PPL Montana] owns the bed thereof and both banks thereof at all points up stream from the north and wet lines of section seven (7) in township twenty-one (21) north of range twenty-nine (29) west, Montana Principal Meridian, eastward continuously to the Thompson Falls and for one-quarter of a mile above said stream . . ." A copy of the *Steele v. Donlan* decree is attached as Exhibit P.

30. In summary, credible evidence from the Corps of engineers and the Montana federal court, roughly contemporaneous with statehood, leads me to conclude that the Clark Fork River in Sanders County was not a navigable highway for commerce at statehood.

31. Conclusion. The State's claims regarding the historical uses of the relevant rivers are not credible and not supported by adequate historical evidence. Instead of relying on more credible sources such as court records, business records or governmental reports, the State relies exclusively on secondary sources that by their own admission are limited in scope and which rely on untrustworthy primary sources to reach their conclusions. Had the State been a student of mine at the University of Montana, presenting its brief as a paper on the historical uses of the relevant reaches of the Missouri, Madison and Clark Fork Rivers, it would have received a failing grade for not following the most fundamental tenets

of historical analysis. This is buttressed by the credible evidence of non-navigability that is readily obtainable regarding the rivers in question.

I declare under penalty of perjury under the laws of the State of Montana that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Dated this 1st day of November, 2006.

/S/
David M. Emmons

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

No. CDV-2004-846

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; and AVISTA CORPORATION, a Washington Corporation; PACIFICORP, an Oregon Corporation,

Plaintiffs,

v.

STATE OF MONTANA,

Defendant.

AFFIDAVIT OF STANLEY A. SCHUMM IN SUPPORT OF PPL MONTANA'S OPPOSITION TO THE STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RULE 37(c) EXPENSES

I, STANLEY A. SCHUMM, being first duly sworn upon oath, depose and state the following:

1. Education and Credentials as a Fluvial Geomorphologist. I am the Vice President and Principal Geomorphologist at Mussetter Engineering, Inc. in Fort Collins, Colorado. I have held this position since 1994 I began my professional career in 1954 as a geologist in the Water Resources Division of the United States Geology survey. In 1967, I began my teaching career at Colorado State University as an Associate Professor of Geology. I was

subsequently promoted to Professor in 1970 and to University Distinguished Professor in 1986. I also served as the Vice President and Principal Geomorphologist at Water Engineering & Technology from 1979 to 1990 and as a Senior Associate at Resource Consultants & Engineers from 1991 to 1994. A copy of mu curriculum vitae is attached as Exhibit A.

2. I received by Bachelor of Arts degree in Geology from Upsala College in 1950 and my Ph.D in geomorphology from Columbia University in 1955. i have published thirteen books including, most recently, *River Variability and Complexity* (Cambridge: Cambridge University Press, 2005). I have also published over one hundred and fifty articles in various professional publications. I received the 1982 David Linton Award from the Briticsh Geomorphological Research Group, the 1986 G.K. Warren Prize from the National Academy of Sciences and the Distinguished Career Award fromt eh Geological Society of America in 1997. In 1999, I presented the Frost lecture at the University of Hull in the United Kingdom.

3. I am a member of the following professional organizations: American Geophyiscal Union, American Association for the Advancement of Science (Fellow), Geological Society of America (Fellow), American Quaternary Association, American Society of Civil Engineers, British Geomorphological Research Group and the Japanese Geomorphological Union.

4. During my career, I have focused on the field of fluvial geomorphology. Simply put, fluvial geomorphology is the study of the physical

characteristics of a river and the manner in which river systems change over time. As a fluvial geomorphologist, I am familiar with the mechanisms through which river channel depth and width change over time. These mechanisms include forces of nature such as sedimentation, erosion, accretion and avulsion as well as man-made causes such as water withdrawals and the operation of hydroelectric power plants and reservoirs. One of the fundamental truths of my field is that, regardless of the specific mechanism, rivers are constantly changing.

5. Previous Experience with Navigability Determinations. I served as expert witness before the Arizona Navigable Streams Adjudication Commission during their determinations on the navigability of the Gila River, the Verde River and the Upper and Lower Salt Rived. During my research for those proceedings I focused extensively on the physical characteristics of a river that impact its navigability: flow, depth, width, drop, structures and sedimentation patterns to name a few. As a result of my experience as a witness in those proceedings, I understand that the critical question in determining whether a particular stream is navigable for title purposes is whether the stream was used or capable of being used as a channel for useful commerce at the time of statehood.

6. Summary, of Research on the Madison River. I was retained by PPL Montana to conduct research and form an opinion on whether the current physical conditions of the Madison River, with respect to navigability, were the same as or different than the physical conditions at the time of Montana's admission to the Union in 1889. In conducting this research I reviewed historical maps and surveys of the Madison River basin, current topographical maps of

the Madison River basin, and historical flow data for the Madison River. As far as possible, I have evaluated the current physical conditions of the Madison as compared to the historical conditions at the time of statehood. Based on my review of these sources, I have formed my opinion.

7. Summary of Opinions. In my expert opinion, the current physical conditions of the Madison River, with respect to navigability, are not the same as the conditions of the river in 1889 when Montana entered the Union . First, the construction and operation of the hydroelectric projects and reservoirs have materially changed the flow characteristics in the river. It is my understanding that the Madison hydroelectric project, including the reservoir known as Ennis Lake, was constructed over a course of years in and around 1906 and that the Hebgen reservoir project, known as Hebgen Lake, was constructed over a course of years in and around 1912. Hereafter, both the Madison and Hebgen projects are collectively referred to as the "Projects." By making the flow lower during periods of high flow and higher during periods of low flow, the operation of the hydroelectric projects and reservoirs have made the river more susceptible now to commercial navigation than it would have been without them. Second, my review of the historical descriptions of the Madison River indicate that the location and number of the river channels have changed since the time of statehood and that relevant portions of the river appear to have been either anastomosing or braided at the time of statehood. Because reaches of the Madison River appear to have been either anastomosing or braided, my opinion is that it was not susceptible to navigation at the time of statehood.

8. Change in the Madison River's Flow Characteristics. The flow characteristics of a typical stream in the higher elevations of the Rocky Mountains varies widely with the season. Flows in these streams are highest during the late spring months when the streams are heavily influenced by the melt of the previous winter's snowpack. Stream flows tend to decrease steadily over the course of the summer as the influence of the snowmelt wanes and there is limited precipitation to augment flow. Flows reach their lowest points in the fall, but remain low through the remainder of the year until the next snowmelt.

9. Typically, the existence and operation of a large reservoir, part of a coordinated hydroelectric power system, on the mountain stream described above would impact the flow characteristics of the stream by limiting the difference in flow between high and low flow periods. Flows during the high flow periods would be decreased as water that is excess to amounts needed for power development is stored in the reservoir. Flows during low flow periods would increase as water is released from the reservoir to meet power demands.

10. I have reviewed available flow data for the Madison River, from both before and after the Projects were constructed. In my expert opinion, the construction and operation of the Projects changed the flow characteristics of the Madison River. As would be expected, the construction and operation of the Projects resulted in lower flows during the high flow period (late spring/early summer) and higher flows during the low flow period (fall). These changes produce a mode level year-round flow and make the river more susceptible to navigation, During the high

flow periods in late spring, less torrential flows make the river easier to navigate. Similarly, the increased flows during the low flow periods of the fall make the river more susceptible to navigation.

11. These changes can be demonstrated graphically. Average monthly flow histograms for the Madison River demonstrate, on a month by month basis, the impact that the operation of the Projects have on the flow characteristics of the river. Flow data for these histograms was obtained from gauging stations located immediately downstream of the location of the Madison Project. Flow data was not available for the years 1905-1937. Average discharge for a given month is plotted along the Y-axis of this graph and the year is plotted along the X-axis. The graphs show that post-construction flows in the Madison River are lower during the period each year of highest flow (May, June and July) and are higher during the period of lowest flow (October and November). Copies of the average monthly flow histograms for the Madison River are attached as Exhibit B.

12. The increase in average flow during low flow periods corresponds to an increase in water depth immediately downstream of the Madison Project of approximately two-thirds of a foot in October (an increase of approximately 25%) and nine-tenths of a foot in November (an increase of approximately 40%). This calculation was made using the stage-discharge relationship curves developed for the Madison River immediately downstream of the Madison Project. This curve shows the river "stage," or water depth, for a particular "discharge," or flow, at this particular point in the river. By comparing the river stage for this location at the pre-construction low flow values

with the river stage for the same location at the higher post-construction low flow values, I determined the approximate increase in river stage during low flow periods that resulted from the construction and operation of the Projects. The stage-discharge curves used in calculating the change in river stage for the Madison River are attached as Exhibit C.

13. Based on these calculations, my expert opinion is that because of the construction and operation of the Projects, especially the Hebgen Reservoir, the current flow characteristics of the Madison River are not the same as they were at the time Montana entered the Union in 1889. Because the operation of the hydroelectric facilities has resulted in higher flows during the low flow period, a corresponding increase in low flow period water depth of approximately two-thirds of a foot in October and nine-tenths of a foot in November and a decrease in flow during high flow periods, it is my opinion that these changes in the river resulting from the Projects make the Madison River more susceptible to use for navigation now than it was at the line of statehood.

14. Physical Changes in the River Channel. Not only have the flow characteristics of the Madison River changed since Montana entered the Union, but the physical characteristics of the river channel have changed as well. As part of my research, I reviewed a series of historical maps of the Madison River basin, including Government Land Office survey maps. I then compared the historical maps with current maps of the Madison Basin.

15. Based on my review of these historical maps and a comparison of the historical maps to

contemporary maps of the basin, it is my opinion that the location and channel pattern of the Madison River have changed over time. Near its mouth, the Madison River is an anastomosing river. An anastamosing river is exemplified by multiple distinct channels. An anastomosing river's flow is split among the various channels and, as a result, the river stage in an anastomosing reach at a given flow is lower than in a single channel reach. Channels in an anastomosing river often shift over time and can become closed off with sediment. In the historical maps there appears to be two distinct river channels and four smaller channels near the confluence with the Jefferson River and, currently, there exist only two short channels. In addition, historical maps of the area that is now submerged by Ennis Lake indicated that the Madison River in that area was also an anastomosing river.

16. Elsewhere, reaches of the Madison River are properly classified as braided. Braided rivers, unlike anastomosing rivers with their several distinct channels, are characterized by a single main channel with a series interlocking or tangled network of several, smaller branching and reuniting shallow channels separated from each other by islands or channel bars. Braided rivers have high width to depth ratios and relatively steep gradients. The physical characteristics of braided rivers are not conducive to navigation. Channels and bars in a braided river shift over time and, in my professional opinion, even without the creation of Ennis Lake, the Madison River in this reach would be different now than it was at statehood. That the river appears to have been a braided river at statehood leads me to

conclude that significant reaches of the Madison River were not susceptible to navigation at that time.

17. During my research I found the following maps to provide both the clearest indication of the past condition of the Madison River and how the river has changed since Montana entered the Union in 1889:

1. Three Forks, 1985, U.S. Geological survey topographical map - This map shows the anastomosing reaches of the Madison River above its junction with the Jefferson River and downstream of Ennis. The multiple channels would produce a lower stage in each channel, as compared to single channel reaches.

2. Eight Mile Creek, 1988, U.S. Geological Survey topographical map - This map shows the 1988 anastomosing and braided reaches of the river.

3. Ennis, 1988, U.S. Geological Survey topographical map - This map shows a braided river, very different from reaches upstream of this point.

4. General land Office map of T5S, R1W, 1868 This map shows the anastomosing reach of the river downstream of Ennis. This is a similar river pattern to that shown on the 1895 Three Forks map.

5. Ennis Lake, 1988, U.S. Geological Survey topographical map - This map shows the deltaic pattern upstream of Ennis Lake. Compare with the Three Forks I 895 map and the 1868 General Land Office map to show river changes. Also, multiple channels

would have reduced the river's stage in each channel.

6. Manhattan SW, 1987, U.S. Geological Survey topographical map -This map shows the braided reach upstream of Three Forks.

7. Three Forks SE, 1987, U.S. Geological Survey topographical map – This map shows the braided reach, which is very different from the single-channel reaches upstream.

8. Three Forks, 1987, U.S. Geological Survey topographical map – This map shows the junction of the Jefferson and Madison Rivers. The pattern is very different from that shown on the 1895 Three Forks map.

I selected these maps to illustrate the changes in the Madison River through time. They are important because they reflect different river behavior from reach to reach. Copies of these maps are attached as Exhibit D.

18. In summary, my expert opinion is that the physical characteristics of the Madison River important to the ability to navigate the stream are different now then they were at statehood. The number of channels in the river and the location of those channels have shifted over time. Further, the fact that significant reaches of the river appear to have been braided near the time of statehood indicates that the river would not have been susceptible to navigation at that time. I base this opinion on my experience in the field of fluvial geomorphology and my review of historical survey maps and current maps of the Madison River basin.

19. Conclusion. The Madison River is not the same river now that it was in 1889 when Montana entered the Union. The post-statehood construction and operation of the Projects, particularly the Hebgen Reservoir, have provided additional flows during low flow periods and reduced flow during the torrential high flow periods. This results in a marked increase in water depth during low flow periods, making the river more susceptible to navigation now than at the time of statehood. The nature of the river itself and a comparison of historical survey maps and current conditions also show that number of river channels and their location has changed since the time of statehood. In addition, the fact that the Madison River, at statehood, appears to have been braided or anastomosing in some reaches leads me to conclude that it was not susceptible to navigation at that time.

I declare under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Dated this 23rd day of October, 2006.

/S/
Stanley A. Schumm

NAVIGATION REPORT: A STUDY OF THE HISTORIC USES OF THE MISSOURI, MADISON, AND CLARK FORK RIVERS IN MONTANA

By David Emmons, Ph.D.

June, 2007

I. MY CREDENTIALS

My name is David M. Emmons. I earned my Ph.D. in history from the University of Colorado, Boulder. As I explained in some detail in my previous affidavit in this matter, I am a Professor of History Emeritus at the University of Montana. Over the course of my forty-year career as a professional historian I have published two books and numerous articles on various aspects of Western American history. My attached curriculum vitae gives the details to this brief sketch of why I was hired to be an expert witness in this matter regarding historical uses in Montana of the Missouri, Madison and Clark Fork Rivers. (CV attached as Exhibit A).

II. FOCUS OF MY REPORT

I was asked by PPL Montana to research and prepare a report on the topic of historical navigation on several reaches of the Missouri, Madison and Clark Fork of the Columbia rivers in Montana. The issue of river navigation and use is of major importance to historians. Multiple volumes have been written, for example, regarding the importance of the Hudson river in the development of colonial America. Indeed, the historical significance of river transportation was a question asked of me in my

doctoral dissertation exams, as I earned my Ph.D. I remember asking at the time I was approached regarding this report, what sections of these rivers were at issue. When told by PPL that these rivers were to be divided into stretches or reaches, I accepted this task. To a historian that is the only sensible way to proceed. To speak of rivers as if each was a single unitary system distorts the historical record and makes impossible any comprehensive or even comprehensible analysis of how the rivers were used historically. A prime example is the Missouri River, which has a length of some 2,500 miles, with a colorful and varied history along all of its sections.

The reaches I focused my research on are those reaches where the ten dams at issue are located, as shown on the maps attached as Exhibits B-F: 1) the approximately 49 miles from Fort Benton to the confluence of the Sun River (slightly above the City of Great Falls; *see* Ex. C); 2) the approximately 76 miles on the Upper Missouri River from Cascade to the historic Stubbs Ferry (some 13 miles northeast of Helena; *see* Ex. D); 3) the approximately 60 miles on the Madison River from Three Forks to Varney (*see* Ex. E); 4) the approximately 30 miles from Varney to the West Fork (*see* Ex. E); 5) the approximately 45 miles on the Madison from the West Fork to the Wyoming border, (*see* Ex. E); 6) the approximately 35 miles on the Clark Fork River from the confluence of the Flathead River in the vicinity of Paradise, to the Thompson Falls, and also the Clark Fork River from Deer Lodge, the point where the State claims the Clark Fork becomes navigable, to Thompson Falls (*see* Ex. F).

It is my opinion that these reaches are appropriate for historical reasons, as well as for the

physical characteristics of the rivers themselves. For the Missouri, the Army Corps of Engineers historically broke the river above the Falls into several "distinct portions," including the section from "Stubbs Ferry to just below the town of Cascade," based on its shallow channel and "numerous rapids and rock obstructions." The Army Corps called the 49 mile reach of the upper Missouri between Great Falls (the city) and Fort Benton a single section "occupied by cataracts and dangerous rapids." (As a point of definition, when I use the term upper Missouri or upper river I am referring to the Missouri from Fort Benton to Three Forks.) For the Clark Fork, the reach between Paradise and the Thompson Falls is another natural division because the falls cut off the river below them, and the confluence of the Flathead River substantially increases the Clark Fork's flow. Historically, this stretch seems always to have been called the Clark's (or Clarke's) Fork by inhabitants; other reaches were often called by other names. As for the Madison, I have examined the entire river, but have used the natural divisions chosen by the State from the Wyoming border to the confluence of the West Fork with its larger flow, to Varney, where the river starts to heavily braid, then to Three Forks where the Madison, Jefferson and Gallatin become the Missouri.[1]

---

[1] MDH013725, Sanford, "Improvement of Missouri River at and Above Sioux City Iowa, and at Yellowstone River, Montana and North Dakota," in *Annual Reports of the War Department for the Fiscal Year Ended June 30, 1898.* Report of the Chief of Engineers, Part 1, (Washington D.C.: GPO 1898) pp. 323-24; Thomas Symons, U.S. Army Corp. of Engineers, *Preliminary*

III. HISTORICAL SOURCES I USED

I was also asked to investigate these river use patterns in historically specific times, essentially from the first written and extant record of use to 1889 when Montana entered the Union or to when the relevant sections of the rivers were altered substantially by changes in their character occasioned by improvement projects, natural events such as earthquakes, or the construction of dams and the impoundment of the rivers' waters. That meant that in the case of these three rivers I was dealing with material from the time of the Lewis and Clark Expedition, 1803-1806, to about 1920, or some thirty years after statehood. Specifically, I was asked to study material, both secondary and primary, dealing with the important question of the historic use of sections of these waterways upon which hydroelectric facilities are now located.

A. Sources for the Missouri River

The history of the use, attempted use, and non-use of the upper Missouri for navigation has generated an enormous amount of primary documents as well as a voluminous number of

---

Examination of Clark Fork of the Columbia River (By Whatever Name Called, 1891, Washington: D.C. GPO 1891, MDH 013736 "Preliminary Examination of Clarke Fork of the Columbia River" from the International Boundary Line to the Mouth of the Big Blackfoot River, in the State of Montana" in *Report of the Chief Engineers U.S. Army*, U.S. House of Representatives, Ex. Doc. 52nd Congress, 1st Session 1891-92 (Washington D.C. GPO 1892) p. 3250; also State's navigable rivers list which is found at *http://dnrc.mt.gov./trust/MMB/navwaterslist2 connie.pdf.*

secondary accounts. Finding them was eased considerably by the indefatigable work of researchers during the long and contentious hearings and trial on the Federal Power Commission's insistence, in the 1940s, that the Montana Power Company license nine of its dams. Eight of those were hydroelectric, one was built for the storage of water; seven were on the Missouri above Fort Benton; two were on the Madison. The FPC made its initial "request" in 1942; MPC lost its final appeal in 1950. What makes this source so invaluable was that the FPC's lead counsel promised the hearing officer and the court that he and his team were going to provide every bit of evidence they could find whether it served to support or to refute the FPC's contention that it had regulatory authority. He didn't quite do that, but he forced MPC to match his bold promise. The result was that this legal controversy between the Commission and Montana Power generated thousands of pages of hearing and trial testimony and many hundreds of pages of exhibits regarding river navigation or the lack thereof. I reviewed them all, and will subsequently refer to this material as being from the FPC/MPC matter. Other sources I used are enumerated below in roughly sequential order.

1. *The Journals of Lewis and Clark.* Lewis and Clark came up in the FPC/MPC case. At that time the best edition of their journals was that edited by Ruben Gold Thwaites. I used the more recent and far more complete 12 volume edition of the journals edited by Gary Moulton, who during his visiting professorship at UM, was a colleague of mine.

2. I also researched secondary sources on Lewis and Clark. These were sources known to me before

my investigation in this matter. I would mention in particular John Logan Allen's splendid *Passage Through the Garden* (1975), Russell Cutwright's *Lewis and Clark: Pioneering Naturalists* (1969), and Richard White's *It's Your Misfortune and None of My Own: A New History of the American West* (1991).

3. I read all of the material on those who, like Lewis and Clark, were not trained engineers, and who followed the two captains in investigating the Missouri River. I would call specific attention to those sources listed in Jodie Foley's Affidavit, the FPC/MPC record, and the citations in the River Studies–about which more later. These sources included but are not limited to H.H. Bancroft's histories, Thomas James, *Three Years Among the Indians and Mexicans*, and, as a secondary source, my own book, *Garden in the Grasslands: the Boomer Literature of the Central Plains*.

4. I turned next to the engineers, particularly those from the Army Corps but including as well Thomas Roberts, an engineer working for the Northern Pacific Railroad, whose 1872 report was available in the UM library and which I read in its entirety. I also read the Reports of John Mullan and William Ludlow. Both were Army officers and trained engineers. Mullan, already known to me, built a road to bypass the upper Missouri; Ludlow, a new acquaintance, investigated a road already in place, the so-called Carroll Cutoff from Carroll, Montana, some 170 miles below Fort Benton, to Helena. I also reviewed the excerpts from the Reports of the Army Corps of Engineers from 1868 to 1974 provided to me, and followed up in the UM Documents Library, and read the entire reports as well as reports not provided, finding some material

that others had not consulted. This does not quite exhaust the list of engineers. Four qualified and experienced engineers were called by MPC as expert witnesses in the FPC/MPC matter. I read the testimony of all of them, concentrating in particular on the comments of Malcolm Elliott, Hans Kramer, and Max Tyler. I also investigated the full report of the private engineer, Samuel Barker, who conducted a survey of part of the Missouri above the Great Falls in 1916.

5. I also read thoroughly and critically what I call the River Studies. These were reports attached to the affidavit of Monte Mason. I used these as background material only since, as I explained in my earlier Affidavit, I do not consider these underfunded, secondary studies to be of much use other than as a roadmap to more useful sources.

6. Finally, I reviewed contemporary newspaper accounts of various activities on the Missouri. I generated one of these newspaper stories–an account of the Carroll Road that led me to the Ludlow Report. The rest came from FPC/MPC material, the Foley Affidavit, and the River Studies. Newspapers have to be used with great care, particularly newspapers from the early years of a region's history. They tend to be excessively optimistic and promotional in their reportage–a point I made in my previous Affidavit. Frequently, however, they are the only sources of information the historian has. But they must always be used in context, in combination with other more reliable sources, when such are available, with appropriate caution, and with an understanding of their limitations.

B. Sources for the Madison River

The documentation for the uses of the Madison River is sketchy at best. There is nothing from the voluminous record assembled in the FPC/MPC case. Instead, both FPC and MPC reached rare agreement–the Madison was "concededly non-navigable."[2] There are, however, Army Corps of Engineer Reports on the Madison which I consulted along with the Madison River Study, one of the River Studies mentioned above. The Foley Affidavit included material from the Lewis and Clark Expedition, but since the Corps of Discovery did not ascend the Madison, it was of scant relevance to me. I also consulted records provided me by PPL Montana on the Hebgen Lake project as well as the Affidavit of Professor Stanley Shumm, a fluvial geomorphologist who is serving as an expert witness for PPL in this case. I located several old maps of the Madison River, and my graduate assistant searched the UM Library's holdings for secondary accounts of the historical uses of the Madison. Those searches, however, turned up nothing of importance. There is no surprise there; rivers that were not used historically do not generate a great deal of historical attention.

C. Sources for the Clark Fork River

The sources on the uses of the Clark Fork are considerably more numerous. There was a long correspondence in the early 1940s between Montana

---

[2] 1950 opinion of the DC Circuit Court in *Montana Power Co. v. Federal Power Commission*, found in volume 185 of the Federal Reports (Second) at p. 493, MDH000431.

Power officials and the Washington D.C. engineering firm of Leighton and Gamble regarding the hydroelectric facility at Thompson Falls, built by a predecessor of Montana Power. There was an important legal decision in 1910 in which the Montana federal court found the river in Sanders County to be non-navigable under the federal navigability for title test discussed in more detail, below. I also reviewed a significant amount of newspaper reportage (as always, of questionable veracity), as well as Army Corps of Engineer Reports. Since the basic contention on the uses of the Clark Fork center around alleged log drives, I also consulted the corporate records of Western Montana logging and lumber companies looking for references to log drives on the Clark Fork River. I found numerous references to moving logs by rail and one reference to using the river immediately adjacent to a mill as a holding area for logs, but not a single mention of driving logs downstream. For what it was worth, I also reviewed the River Study of the Clark Fork, the author of which is unnamed and unknown; the agency for which it was prepared unidentified. As with the other Studies, it was of value only as it led me to more dependable sources.

This is a partial list of the sources I consulted and a cursory look at my research methods. I literally spent many hundreds of hours reading and interpreting the thousands of pages of documentation that I had either uncovered on my own or that had been provided me by PPL. I am confident that this research forms a solid base for my conclusions.

IV. THE NAVIGABILITY TEST

My last and most important task before beginning to write my report was to find a satisfactory definition of navigability that I might apply it to the identified sections of these rivers. This required a working definition of navigability–working in the sense that it was useful to a historical analysis. The test I was asked to consider was whether the given reaches were used, or were susceptible of being used, in their ordinary condition, at statehood, as highways for useful commerce, in the customary modes of trade and travel on water. There was nothing alien or arcane in this definition. Questions of "useful commerce" and "customary modes of trade and travel" are right up an historian's alley.

I took some guidance from a brief prepared by the State of Montana in a case from the late 1980s–and relied upon by Judge Jeffrey Sherlock in deciding that a reach of the Milk River was not navigable–which offered this helpful explanation: "[N]avigability of a water way under the federal title test depends on the conditions of the waterway in its *unimproved*, or natural condition at the time of statehood." The State's Milk River brief stressed that commerce alone is not enough, the waterway must have been used (or been susceptible for use) as "a channel for *useful commerce,*" and proof of "occasional," "sporadic" or "ineffective" uses would not do.[3] As a historian, I found this explanation

---

[3] *Drugge v. State of Montana*, Cause No. BDV 89-952, Montana First Judicial District Court, Lewis and Clark County; State of Montana's Memorandum of Law Concerning the Navigability of

immensely helpful, both because of its source–the Montana Attorney General's office–and because it directed my attention to precisely what I find historically useful, namely, what kind of commerce, if any, traveled on a river; what goods went from where to where; how often; and finally, did they make it to where they were going. That is what was important to our predecessors who either made actual use of rivers as highways of useful commerce, or chose not to use them in such a manner because they found trying to navigate them not to be useful.

V. CUSTOMARY MODES OF TRADE AND TRAVEL ON WATER

By the time Montana became a state in 1889, the customary mode of commercial trade and travel on water was steamboats. As discussed in more detail later, throughout the 1860s, 1870s, and 1880s, steamers moved immense amounts of cargo and passengers on the Missouri to and from Fort Benton. Steamboats of small draft and great maneuverability plied the inland rivers of the young United States, and could hope to navigate in channels as shallow as three feet or less. These steamers carried cargo not only down but upstream as well, and turned rivers that could be used by them into what can truly be called "highways of useful commerce." From Mark Twain to Steamboat Willie, steamers are writ large in American history and culture from the mid-1800s forward, only to fade slowly into the background when the railroads came calling somewhat later. It

---

the Milk River, September 20, 1991; Order on Issue of Navigability, Hon. Jeffrey Sherlock, Dec. 11, 1991.

is my opinion that by 1889, vessels other than steamboats would simply not have been considered either customary or useful for commercial trade on an inland river like the upper Missouri.[4]

Prior to the advent of steamships, sailing vessels used the rivers in the east and west. Indeed, in 1792 Captain Robert Gray sailed his three-masted sloop–in which he had circumnavigated the globe–into the estuary of the Columbia and up the river some miles. In smaller inland rivers, keelboats seem to have been the customary trade vessel. Lewis and Clark used such a boat on the wider, more easily floated stretches of the Missouri. To my knowledge, no one has ever suggested that keelboats could have traveled the Missouri above Fort Benton, or the Madison or Clark Fork in Montana. There is some discussion in the historical record of smaller vessels like pirogues and bateaux, but these seem to have been used mostly for exploration. I found no credible evidence in the historical record of the use of such vessels for commercial navigation on the river reaches I studied for this report.[5]

There is also mention in the historical record of Mackinaw boats. These do seem to have been used on the Missouri between Fort Benton and points east prior to, and even during, the steamboat era. But there is no credible evidence that they were used for

---

[4] 48th Congress 1st Session House of Representative Ex. Doc. 1, pt. 2, Vol. II, *Annual Report of Engineers, U.S. Army, to the Secretary of War for 1883.* Appendix V, pp. 1343-1344.

[5] OTH01674; Moulton (ed.), *The Journals of Lewis and Clark*, Vol. 4, p. 1; http://www.mt.blm.gov/ldo/um/docs/ftbenton.htm.

commercial navigation on the Upper Missouri, much less the Madison or the Clark Fork above Thompson Falls. Thus, like the Army Corps of Engineers has done for over a century, this report on navigation will focus on steamers, but with discussion of canoes, rafts and the like where relevant to the question of whether commercial navigation occurred on the reaches of the rivers at issue.

VI. MY CONCLUSIONS

The opinions I developed are as follows:

1. The Missouri from Sun River to Fort Benton was not used as a highway for useful commerce at the time of statehood. I found no credible evidence in the historical record of any passage of goods in commerce between those two points (hereafter the "Great Falls Reach"). In fact, I concluded that the Great Falls of the Missouri and related rapids effectively make the Missouri above Fort Benton a different river from the Missouri below Fort Benton, and that the Great Falls reach is impassable. In my opinion it was (and is) not navigable.

2. The Missouri from Cascade to Stubbs Ferry was not used at the time of statehood as a highway for useful commerce. While there is some evidence in the historical record that a few vessels did float on this stretch, they did not carry goods in commerce, and–at best–any travel was sporadic, ineffective and downright dangerous, even after not inconsiderable sums had been expended to try and improve this reach from its natural state into a navigable river. In my opinion, it was not navigable at statehood.

3. I found no evidence at all in the historical record of any use of the Madison River from the

Wyoming border to the confluence of its West Fork as a highway for useful commerce at the time of statehood. In my opinion, it was not navigated and not navigable at statehood.

4. I found no evidence in the historical record of any commercial use of the Madison River from Varney to Three Forks around the time of statehood. This reach of the river was (and remains) very braided. In my opinion, it was not navigated and not navigable at statehood.

5. Given the lack of any evidence in the historical record of the use of the entire Madison for commerce, except one ineffective log drive on the reach between the confluence of the West Fork and Varney–and that after the construction of the Hebgen dam had radically altered the natural condition of the river making it more susceptible to navigation – it is my opinion that the entire Madison River was not navigated and not navigable at the time of statehood.

6. I found no credible evidence in the historical record of the use of the Clark Fork River from the confluence of the Flathead River to the Thompson Falls, as a highway for useful commerce. This reach was fast, rocky, steep and treacherous. The few uses that were made of it before the building of the Thompson Falls dam radically altered its character, were sporadic, ineffective, and deadly. In my opinion, this reach was not navigated and, thus, not navigable at the time of statehood.

7. I found no credible evidence in the historical record of the use of the Clark Fork River from Deer Lodge to Thompson Falls as a highway for useful commerce. In my opinion, the Clark Fork above

Thompson Falls was not navigable at the time of statehood.

Those are my conclusions. What follows are the more detailed interpretations, analyses, and reasons for those conclusions.

VII. THE MISSOURI: A TALE OF TWO RIVERS

A. The Lewis and Clark Expedition

1. The Dream of a Northwest Passage – searching for a short portage to the Columbia River and the Pacific Ocean.

John Logan Allen in his definitive *Passage Through the Garden: Lewis and Clark and the Image of the American Northwest* writes: "The concept of a water route across the North American continent had been a fundamental part of the geographical lore of North America ever since the world had first been made aware of that continent's existence," and that this new world was in the way of an ocean passage from Europe to "the silk and spices of the Orient." Aristotle and Virgil were among those who believed–or hoped–that it would be a short passage. Columbus, of course, sailed to find it. All of that, however, takes the story further back than present needs require, although it is important to keep in mind just how ancient was that dream and with what tenacity it was held. Dreams of this sort are

not abandoned easily and never without a share of heartbreak.[6]

A more reasonable starting point is the famous exploration of the "Corps of Discovery of the Northwest" captained by Meriwether Lewis and William Clark in 1803 - 1806. Lewis and Clark were commissioned by President Thomas Jefferson whose instructions to Lewis arose directly from the dream and its geographical images. The captains were "to explore the Missouri river, and such principal stream of it, as, by its course and communication with the waters of the Pacific ocean, whether the Columbia, Oregan, Colorado or any other river may offer the most direct & practicable water communication across this continent for the purposes of commerce." Jefferson knew there was a great westward flowing river that emptied its waters into the Pacific; he knew of its mouth but not of its headwaters. The same was true of the Missouri; he knew where it ended but not where it started. He had, however, an image of the dreamed of Northwest Passage, with one short portage, and the rest a grand highway for the commerce to come between east and west.[7]

The State has referred to Lewis in its summary judgment brief as Jefferson's "expert on navigability." In one sense, he was precisely that,

---

[6] John Logan Allen, *Passage Through the Garden: Lewis and Clark and the Image of the American Northwest* (Urbana: University of Illinois Press, 1975), pp. xix-xx.

[7] *Ibid.*, p. xix. By their nature, historical documents often contain spellings of words different from spelling standards today. When quoting, I have kept the original spelling used by the author of the document.

but not in the way the State intended. Lewis and Clark accepted Jefferson's image "without modification." And, until they reached the mouth of what they called Portage Creek (now Belt Creek), they had no reason to modify it other than to give geographical precision to some of its hazier aspects. Above Portage Creek, however, their image of what western landscapes should be gave way to a much different reality. It was, as Allen puts it, the "exploratory genius" of Lewis and Clark that they were able to shed their preconceptions and "to differentiate between the geography as it had been imagined . . . and the geography as it actually was." And the geography as it actually was, was both awful and awesome. The Corps had reached the "impassable rapids and cascades" of the Great Falls of the Missouri.[8]

2. The Nightmare of Portage – 33 days around the Great Falls

There is a reason why this stretch of the river is always capitalized. Allen calls the Falls "one of the great landmarks of the West." At the time Lewis and Clark reached them in 1805, only Niagara of the world's great water falls had been discovered. "Discovering" the Great Falls was one of the signal achievements of the expedition and seeing them made an indelible impression. Clark recorded the site in a wonderfully accurate hand-drawn map (copy attached as Ex.G). He charted and listed fifteen different rapids and nine waterfalls, including the

---

[8] *State's Summary Judgment Brief*, p. 5; Allen, *Passage*, pp. 174, 280-82.

five named falls in this reach of the river. The highest of the five was the equivalent of a nine story building; navigating them was clearly impossible. It still is.[9]

And moving around them was no bargain. A third of the way into the portage Lewis admitted that "the season is now waisting a pace." Portaging the Great Falls was bound to delay the Corps' progress and Lewis was "extremely impatient . . . fully preswaded that we shall not reach Fort Mandan again this season if we even return from the ocean." This is an exceptionally important reference: clearly Lewis saw the expedition which he co-led as at most a one and a half year adventure; they would get to the coast and come back to Fort Mandan. The portage around the Great Falls, however, changed his mind–and his mood. The Passage, he was forced to admit was going to be "less easy than so many earlier generations had believed and hoped." Getting around the Falls would be "no easy half-mile carry," but "the most perilous and difficult part of our Voyage." It was assuredly that. It took the Corps thirty three days to make the eighteen mile carry from Portage Creek to the mouth of the Sun (then

---

[9] Allen, *Passage*, pp. 43-44. OTH 01680-1738 Gary Moulton (ed.) *The Journals of the Lewis & Clark Expedition*, 11 vols. (Lincoln: University of Nebraska Press, 1987), vol. 4, pp. 322-81, esp. pp. 353, 355. See also Paul Russell Cutright, *Lewis and Clark: Pioneering Naturalists* (Urbana: University of Illinois Press, 1969). The Clark Map is OTH01739.

Medicine) River on the other side of these Great Falls.[10]

3. The River Above the Falls – Lewis & Clark use "navigable" to mean a walkable trail through mountainous country, not a commercially navigable river.

By the time they reached the head waters of the Missouri at the Three Forks, Lewis and Clark knew that the Northwest Passage to India was chimerical. They ascended the largest and most westerly of the three forks, naming it the Jefferson, but it could never be said that they "navigated" it, any more than it could be said that they "navigated" the upper Missouri in the sense we mean today. Instead, the Expedition pushed, poled and towed their log canoes along the water, dealing with rocks and rapids as best they could. Lewis often took to walking in the uplands. He made a journal entry for July 16, 1805 having "pursued our route through a high rolling plain," about what may have been the Half-Breed rapids near present-day Hardy. Gary Moulton, editor of the best edition of the Journals observed Lewis may never have seen the Half-Breed rapids– what the Expedition called the Lone Pine Rapids. At best, he only looked down on them and did not go over them.[11] The task of "navigating" the Lone Pine rapids was left to Clark and the enlisted men.

---

[10] OTH01701, OTH01718, Moulton (ed.), *Journals*, vol. 4, p. 344; Allen, *Passage*, pp. 280-282.

[11] Moulton (ed.), *The Journals of Lewis and Clark*, Vol. 4, p. 287 (my emphasis).

On July 24, 1805, Lewis made an extremely important and revealing entry in his journal, writing that he fully expected to encounter other falls and rapids above the Great Falls. How could he not have? He was traveling along a large river that was coursing through a valley surrounded by high mountains. Surely, somewhere up stream that river would have to plummet from those mountains as it had earlier at the Great Falls. Sacagawea, however, the "Indian woman," as Lewis called her, told him that there were no impassable falls and Lewis was delighted to learn she was right, that the Missouri had carved deeply into the mountains, creating a gate through them. Travel alongside both the Missouri and the Jefferson, pulling canoes along, was slow and gradual, but it was possible. It was that which accounted for his reference to the rivers' "navigability." All he meant by that word was that his men would not have any more 33 day upland portages to deal with, and that the river could be followed without long upland walking bypasses.[12]

Lewis and Clark were "navigating" in small dugout canoes that were barely more than floating logs. These river vessels were made in a couple of hours; trees were felled, limbed, hollowed out, their bottoms flattened. Craft such as these could have "navigated"–as in pulled and cordelled–up any decent sized creek in Montana. As to what Lewis meant by "navigated," listen to these descriptions: "the men complain of being much fatiegued. their labour is excessively great. I occasionally encourage

---

[12] *Ibid.*, p. 422.

them by assisting in the labor of *navigating* the canoes and have learned to *push a tolerable good pole. . . .*" Lewis wrote "the current still so rapid that the men are in a continual state of their utmost exertion to get on, and they begin to weaken fast from the continual state of violent exertion." This is hardly a description of navigating up a river.[13]

Clark was no different. In describing what the expedition called the Philanthropy (Ruby) River, he wrote that "this river is 30 yds wide is navigable and heds in the Roky Mountains with Madison's River." Not even the State claims this small stream as "navigable" for title purposes.[14] Keep in mind, too, that Lewis and Clark were the commanding officers of this expedition. The "enlisted" men, as in every such enterprise, were the ones who became "much fatigued."[15] One of them, Joseph Whitehouse kept a separate journal and recorded some of his experiences above the Falls. He made repeated references similar to this entry from July 23, 1805: We ". . . found the current run very rapid. . . . the current still running very Rapid. . . .Our Men being very much fataigued." Two days later Whitehouse wrote that "We found several bad rockey Rapids . . . the Water was so shallow that the Rocks appeared above the Water almost across the River. We double manned our Canoes, and with difficulty, got over them by hard towing. . . . The men were very much

---

[13] *Ibid.*, vol. 4, pp. 423, 433. First emphasis mine; second in original.

[14] OTH 01808-09, State's Navigable River list.

[15] Moulton (ed.), OTH 01796, OTH01808-09, pp. 47, 59, 60.

fataigued towing. . . and some of them had their feet Cut in passing over the Rocks." Clearly, Whitehouse would not have said that the Corps of Discovery was navigating the rivers. It was walking up them, and it was a most demanding walk.[16]

Lewis's and Clark's comments regarding navigability must be interpreted in this proper historical context; they did not mean the word "navigability" the way we use the word now. When Lewis wrote that "I do not believe that the world can furnish an example of a river runing to the extent which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so *navigable* as they are," all he was saying was that he was surprised that the rivers provided passage as far into the mountains as they did. But it was passage by foot and by dragging hollowed out trees which passed as canoes. Those canoes could be towed up what were essentially pathways, little better than watery and somewhat wider game trails. Lewis was an explorer, not a tradesman. To use his words to suggest he was making a case for the *commercial* navigability of the Missouri above the Falls isn't just a strained use of his remarks; it is an ahistorical misreading of them.

---

[16] *The Journal of Joseph Whitehouse*, May 14, 1804-April 2, 1806; Moulton (ed.), *Journals*, vol. 11, pp. 238, 240-41.

4. The End of the Dream of a Northwest Passage – the Falls cannot Reasonably be Portaged, the Upper River is not commercially navigable.

What then can be said about the significance of Lewis's and Clark's voyage of discovery, their search for a passage through the garden? I am entirely persuaded by John Logan Allen's conclusions. They are based on thorough research and thoughtful and informed analysis. More to the point, I know of no historian or geographer who has challenged them. There is, in fact, a remarkable agreement among historians that Allen's basic conclusion is entirely accurate. That conclusion deserves to be better known. Allen writes that "the size of the western cordillera dealt a *shattering blow to the ancient hopes for an easy passage from sea to sea through the western interior.*" As for the rivers, "experience had proved to the American explorers that many of the rivers of the West were not navigable, and where Jefferson had believed in the navigability of streams all the way from their mouths to their sources in the core drainage area," their "observations had proven that the short portage did not exist." This, in fact, "was *the final denunciation of the Passage to India*. . . . an end to the centuries of search for the Northwest Passage." And finally, the "traditional adherence to the concept of the short portage did not survive. . . . the time-honored concept of the simple passage from

the Missouri to the Columbia was dealt a fatal stroke."[17]

B. After Lewis and Clark: Bypasses, not Portages

1. Road Travel not River Travel.

As Allan puts it, Lewis and Clark had discovered a "break in navigation created by the Falls." Allan's is an important reference. It meant that for purposes of any commerce that might come, the Missouri would be two rivers, one, to Fort Benton, a comparatively straight river highway, the other a crooked, impassable barrier consisting of falls, rapids, cascades, and low water. Boats did not leave Fort Benton bound upstream; but tens of thousands of ox-, mule-, and horse-drawn wagons did. All roads, it was said, left from Fort Benton. Had the Missouri above Fort Benton been navigable, I have no doubt it would have been navigated. By the late 1860s, Montana's population was large enough and sufficiently diverse to require means of traverse from east to west. That Montanans did not make use of the upper Missouri for navigation speaks volumes. [18]

The Army Corps of Engineers did not have to be dispatched to prove that the Missouri above Fort Benton was not a highway–or even an arduous pathway of commerce. In fact, Congress did not commission an investigation of the upper Missouri River until nearly eighty years after Lewis and Clark had returned home. The issue for the engineers was

---

[17] Allen, *Passage*, pp. 286, 328, 330, 391. My emphasis.

[18] *Ibid.*, p. 279.

not to study the Missouri River above the Falls, but to conduct a surveillance of the easiest way to get around both them and the sections of the river above them. One of the intriguing aspects of this historical case study is that all of those roads leading from Fort Benton were *not* bound for Great Falls or Stubbs' Ferry (just east of Helena) or Townsend or Three Forks. None of the roads out of Benton led back to the river. Had they, I suppose it would be possible to refer to a portage, though a very long and arduous one. A portage, however, whatever its length, would have accomplished nothing. First of all, getting to Great Falls (the townsite) was not easy, as Lewis and Clark would willingly have attested. Second, and more to the point, unloading cargo at Fort Benton and reloading at Great Falls left only fifty miles of what might be barely navigable waterway–the Long Pool. Above the pool, the rock-strewn, rapids-filled river was not even barely navigable, which is why there were *no wagon roads back to the river at all.*[19]

The Army Corps of Engineers understood this unhappy fact perfectly. In its 1878 report the Corps noted regarding shipments to Montana that ". . . about one-fourth are to Benton and the remainder *to*

---

[19] See David Billington and Donald Jackson, *Big Dams of the New Deal Era: A Confluence of Engineering and Politics* (Norman: University of Oklahoma Press, 2006), p. 204. The Mullan Road ran from Fort Benton to Walla Walla, Washington through Helena, Missoula and points west. The Whoop-Up Trail ran from Fort Benton to Canada. Another road ran from Fort Benton to St. Paul, Minnesota. One easily accessible source regarding roads from Fort Benton is the National Historic Landmark website maintained by the U.S. Bureau of Land Management; *www.blm.gov./ldo/um/docs/ftbenton.htm*.

Helena via Benton. Helena, the principal distributive depot, is about 140 miles from Benton, the transportation between the two places being by means of wagon trains." Helena, needless to say, is not a port city on the Missouri. This bypassing of the river was true not just because of the Falls; it was not just the Falls that had to be skirted but the entire river from Fort Benton to Helena. Nor was there any reason to return to the river at Helena and head upstream to Three Forks. Rather, cargoes were forwarded from Helena by road or, later, railroad to points west. Montana had an enormous need for transportation facilities. The Missouri River, however, could not meet that need. Portaging the Falls was, first of all, extremely difficult, and, second, availed nothing. There remain two historical certainties: If the upper Missouri had been suitable for use, it would have been used. It wasn't and it wasn't.[20]

2. The Mullan Road – the Army builds a 600-mile bypass of the Great Falls and Upper Missouri, connecting "the heads of navigation" on the Missouri and Columbia Rivers; Fort Benton, Montana to Walla Walla, Washington.

One of Montana's singular misfortunes was that the Missouri River above Fort Benton was a hindrance rather than an aid to transportation.

---

[20] 1122550015, U.S. Department of War, "Extract from Report of the Chief Engineer, 1878," in *Report of the Chief of Engineers*, U.S. Army, House Ex. Doc. 1, Part 2, 50th Cong., 1st sess. 1887.

Ferries were built up and down the upper river (e.g., Stubbs Ferry, Gibson's Ferry) to cross it. The issue, then, was not how best to use the river, or even how best to portage the Great Falls that marked it. The issue was how best to avoid it entirely. And here the Army's engineers were of great service. In 1858 Captain John Mullan was sent to explore a route for a wagon road from the head of navigation on the Missouri to the head of navigation on the Columbia. The wagon road was to "attain the *minimum land transit*; to "solve the special problem of connecting by a continuous practicable wagon road line . . . ." the highways of commerce that much of the Missouri and Columbia could properly be called. The connection to which Mullan referred was with the head of navigation on the Columbia at Wallula near Fort Walla Walla in Washington, but the Montana section of his road was built to enable freight to move by wagon train to Helena and over the Mullan Pass to Missoula and points west.[21]

Had the dreamers been right, had the Missouri (or the Columbia) been navigable to, or even close to, their headwaters, this would have been a relatively short road–perhaps 60 miles from the Missouri just east of Helena to the Clark Fork of the Columbia near present Garrison Junction. Instead the Mullan Road ran for *624 miles*. According to his own reports, Mullan did not even investigate any "short portage." He did not even look to follow Lewis and Clark and improve their 18 mile trail around the

---

[21] Mullan to Topographical Bureau, Feb. 14, 1863 in *Report on the Construction of a Military Road from Fort Walla Walla to Fort Benton* (Washington, D.C.: GPO, 1863), p. 3.

Falls, then use the river to get to Helena and the 60 mile road over the Continental Divide to the Clark Fork of the Columbia. He did not terminate his road on the Clark Fork either; it was no more navigable than the upper Missouri. Rather, he proceeded eastward from Fort Walla Walla, referring to it as the *"head of navigation"* on the Columbia, to Fort Benton, which he identified as the *"head of navigation"* on the Missouri.[22]

As noted, the Mullan Road, completed in 1866, was more than 600 tortuous miles long. That, I would contend, was not a portage by any meaningful historical definition of the word. A portage is a means to get back *to* a river; the Mullan Road was a means of *bypassing* a river. And this was no easy bypass. As Norman Holter, son of the Helena lumber baron for whom the Holter dam would later be named, testified in the FPC matter, from his own experience of meeting wagons on the Mullan Road, "the road was pretty rough over the Bird Tail Divide and Sullivan's Hill." In muddy weather the relatively short trip from Benton to Helena could be extremely slow. The Mullan Road was no bargain; it was simply a way of dealing with an intractable fact of life: the Falls and most of the Missouri above them were – as Lewis and Clark discovered – a genuine break in navigation. *That never changed.*[23]

Portaging the Falls could not heal that breach; nothing could. Most true portages are not very long

---

[22] *Ibid.* His road, it should be noted, ran to the *north* of the Missouri over the last 80 some miles to Fort Benton.

[23] Holter, FPC testimony, MDH001828.

and, though inconvenient, easily enough accomplished. In the case of the Missouri, however, cargoes were taken out at Carroll or Fort Benton, loaded onto wagons and brought by road to Helena, from where they were taken via the Mullan Road to points west. Other than to cross the river at Stubbs Ferry, those cargoes were never returned to the Missouri for the simple reason that the Missouri was not navigable above Great Falls; returning them to the river would have made no sense because it would not have been useful. Historically, this renders meaningless any quarrel over the legal definition of what constitutes a portage. *There were no commercial portages on the Missouri.*

3. The Carroll Cutoff – The Army contemplates improving a road from Carroll to Helena to bypass the Falls and the "fierce rapids" of the River above the Falls.

Two years after the completion of the Mullan Road, the February 27, 1868 edition of the *Daily Herald* of Helena carried an interesting story that extends the significance of both Lewis and Clark's discovery of the non-navigability of the Missouri and John Mullan's tacit acknowledgment of that non-navigability. That issue contained an unsigned story about what was known as the "Carroll Cutoff," a rough and undeveloped wagon road from Carroll, Montana, a small village on the Missouri river 175 miles *downstream* from Fort Benton, to a point on the Missouri just east of Helena. The *Herald* notes that the Missouri was navigated–and navigable–to Carroll well into September and October while Fort Benton could not usually be reached after early July. Obviously, making Carroll the western terminus of

the Missouri would extend the trade season and vastly improve the Territory's access to outside markets. The story went on to relate that using an overland route from Carroll to Helena (Stubbs Ferry) had the obvious benefit of dodging the "fierce rapids intervening between that point (Helena) and Benton." The *Herald* editor was here referring to the Half-Breed and other rapids on the river above Cascade. Had he meant the Great Falls, he would have said the "Great Falls." "Fierce rapids," it seems needless to add, are not the same as "great falls."[24]

Montanans were becoming used to the idea that "all roads lead from Fort Benton." The *Herald* wanted to change that to "all roads lead from Carroll." The important point here, however, is the same one I made regarding the Mullan Road. The editor of the *Herald* was not advocating an improved "portage road." He was not referring to a portage at all. He seems to have understood that the upper Missouri River was not and could not become a highway of commerce. At issue was not whether the river could be navigated above Fort Benton; it could not. Somehow, somewhere, roads were needed to connect with Helena. Such a road, whether

---

[24] *Helena Weekly Herald*, Feb. 27, 1868. Between 1859 when the first steamer arrived at Fort Benton to 1872, the latest arriving boat reached the city on September 6. The usual closing date was in late June. See Thomas P. Roberts, *Report of a Reconnaissance of the Missouri River in 1872* (Washington, D.C.: Government Printing Office, 1875), pp. 28-32. A more complete list running from 1859 to 1889 can be found in "Contributions to the Historical Society of Montana", I160300368-82, vol. I in *Joint Appendix*, Exhibit 32a and 32b, pp. 1420-34.

originating in Carroll and headed south–the Carroll Cutoff–or in Fort Benton and headed north–the Mullan Road–would be the "highway of commerce." The Missouri River would continue to run unnavigated and scarcely used between the two highways.[25]

The editor of the *Herald* was also convinced that the "Government is likewise alive to the importance of opening up and protecting the most practicable route to the interior of her rich fields of wealth in Montana. . . ." Nothing could be shipped "down the river," whether from Helena or Great Falls. If Montana's riches were to make their way to market it would have to be by road and, though the good citizens of Fort Benton might not like it, the best road went to Carroll. The *Herald's* reference to an interested government was not fanciful, and lends some credence to this otherwise dismissible piece of boosterism. In 1875, seven years after the newspaper's story, the U.S. War Department conducted a "Reconnaissance from Carroll, Montana Territory on the Upper Missouri River, to the Yellowstone National Park." The reconnaissance was led by Captain William Ludlow of the United States Army and his final report contained some interesting and important observations. Ludlow noted that "Carroll is a frontier 'town'. . . 165 miles below Fort Benton, *the limit of navigation on the Upper Missouri.*"[26]

---

[25] *Helena Weekly Herald*, Feb. 27, 1868.

[26] *Ibid.* Also see, *Report of a Reconnaissance from Carroll, Montana Territory . . . to the Yellowstone National Park and Return Made in the Summer of 1875* by William Ludlow, U.S.

Ludlow also noted that if the Carroll Cutoff were to be used, "a large savings can be made by the Government in the cost of transporting its troops and supplies. . . ." Montana was still a frontier territory and near to Canada where, at this time, border disputes were a real possibility. Likewise, by now, the importance of Montana's "treasures" was becoming recognized, but they were "treasures" only if they could be brought to markets. Obviously, if the Missouri above the Falls had been able to be navigated, Montana would not, in the language of the *Herald's* editor, have "wanted for an outlet for its production," and the Army would not have been looking for another way to move its troops west, and no one would have had to build a road any longer than was sufficient to bring goods around the Falls.[27]

C. Other Dreams of Commercial Navigation on the River above the Falls.

No one who ever looked at the Falls seriously contemplated navigating the Great Falls reach of the river. Dreams of making commercial use of the river above the Falls did not evaporate so easily.

Army (Washington, D.C.: Government Printing Office, 1876), p. 12. (My emphasis.)

[27] *Helena Weekly Herald*, Feb. 27, 1868.

1. Thomas Roberts (1872) an NP Railroad engineer hopes to "improve" the river above the Falls and build a railroad around the Falls. This never happens.

Ludlow, with his focus on roads was a realist. Thomas Roberts was not. In 1872, three years before Ludlow took the field, Roberts, an assistant engineer for the Northern Pacific Railroad, floated a skiff down the Missouri in order to conduct what he called a reconnaissance of the "Upper Missouri River from the Three Forks to Fort Benton." Those who would argue today that the Upper River is navigable try to make much of Roberts. They should not. Roberts concluded that the upper Missouri was "navigable," or could be easily made such, but it is difficult to know with any historical precision what Roberts meant. The report of his investigations is a scant 14 pages long. One of the Army engineers who later consulted Roberts's Report, Lieutenant (later Captain). Edward Maguire, noted tellingly that "I have at present only Mr. Roberts's report to depend upon, and should prefer to have more data at my command. . . ." Maguire even criticized Roberts for changing the name of Lone Pine Rapids, the name given them by Lewis and Clark, to Half-Breed Rapids, noting that by whatever name it was "a very dangerous place."[28]

---

[28] BX0501899-20, *Report of the Chief of Engineers*, House Exec. Doc. 1, pt. 2 vol. II, 44th Congress 1st Session, 1875, pp. 517-18; BX050248 U.S. Army Corp of Engineers, *Annual Report*, House Exec. Doc. 1, pt. 2, vol. II, 46th Cong. 2nd sess, 1879, p. 1096; BX050262 U.S. Army Corps of Engineers, *Annual Report for*

In his report, Roberts made comments regarding what he hoped would be future navigation. Above the Falls, Roberts described: "Upper Mosquito Rapids. Water very swift in these rapids. . . Boats will have to cordelle here." His passing skiff than reached Lower Mosquito Rapids and Roberts concluded that ". . . these rapids are serious obstructions to navigation for steamers." Then came "Goose Rapids," "Curlew Rapids", "Bull Rapids," "Montana Rapids," "Slough Rapids," "Wall Rapids," "Sweeny Rapids," "Ferry Rapids," "Fork Rapids," and finally what he called "Half-Breed Rapids, . . , the most serious rapid we have seen. . . .worse than any of these mentioned. . . ." But once the river was "improved" (Roberts was frustratingly vague about how) he did not "think" the Half Breed Rapids "will result in more than a delay of steamers while cordeling"–in other words, dragged up the river using the simple physics of driving poles in the ground along the shore line and setting up a rope and pulley system–not, I would argue, the customary mode of navigating steamboats. Even Roberts would have agreed: The "boats" (again left undefined as to size and means of propulsion) on the "Upper Missouri will, at all times, *even with the numerous improvements that could be suggested,* have to be of small size and navigated with great caution."[29]

At the mouth of the Sun River, Roberts began to survey "for a narrow-gauge railroad along river-

---

1880, vol. II, part 2 (Washington, D.C.: Government Printing Office, 1880), p. 1474.

[29] *Ibid.*, Roberts, pp. 44, 55 (my emphasis).

bank." Had it ever been built, it would have been more than twenty miles long. That would have been a portage, but it was never built for the simple but compelling reason that it would have returned cargoes to an unnavigable river. Add to this Roberts's admission that steamboats, by 1872 the "customary mode" of moving commerce by water, would encounter "serious obstructions," and Roberts offers next to nothing useful on actual navigability. No one took Roberts seriously enough to act on his railroad plans for what might be called a "short portage" of the Falls.[30]

I return to a point made earlier: There were no overland commercial portages on the Missouri River. A portage–and that is what Roberts was advocating–would have meant that cargoes bound upstream would have been unloaded at Fort Benton and reloaded on other vessels at Great Falls, from there to continue up the Missouri to what Roberts hoped would be an intersection with the Northern Pacific Railroad–for which he worked. The roads out of Fort Benton would have been replaced by one narrow gauge railroad destined for Great Falls. This plan, however, could have worked only if the Missouri above Great Falls could be navigated. No one, it seems, was willing to gamble that it could, which is strong and historically valid evidence that it could not. Cargoes were still unladed at Fort Benton; roads still left from there, but the roads ran to Helena over difficult upland passes to continue their *overland* journey on the roads that left from there. All of

---

[30] *Ibid.*, pp. 48-49.

which, for an historian at least, makes Roberts' "reconnaissance" an interesting boat ride in a skiff but nothing more.

2. The Montana Navigation Company (1878)–a private company spends thousands in the late 1870s "improving" the river above the Falls for navigation, finally abandoning the project.

Gold was struck in the area of what would become Helena in 1864. Even at this early date, these new "Montanans" were hoping to make commercial use of the upper Missouri. The *Chippewa*, the first steamboat to reach Fort Benton, had made its historic voyage several years before. In December 1864, the Territorial legislature granted corporate status to the upper Missouri River Steamboat Navigation Company giving it "the power and authority and the exclusive right to open and *remove all obstructions, and make navigable* that part or parts of the upper Missouri River, from the Falls on said river above Fort Benton to the Three Forks on said river, or what is known as Gallatin City." Nothing ever came of this, but the hope was real, as was the recognition that human intercession was needed for any chance "to make navigable" the naturally unnavigable.[31]

A gold rush followed the initial strike in Helena and other Montana locations, and by the 1870s Helena was bustling but still physically isolated.

---

[31] *Acts, Resolutions and Memorials of the Territory of Montana*, Dec. 12, 1864. MDH 022922-23 (my emphasis).

Two new companies incorporated, and then consolidated into one – the Montana Navigation Company – in 1878. This time real money was put into a further recognition that the upper river in its ordinary condition was not useful for commercial navigation. Hoping to solve the area's transportation problem by making the upper Missouri navigable, that same year the company hired out work on some of the worst rapids on the river above the Falls – men apparently removed rock, dug trenches, blasted boulders, and built wing dams. One colorful newspaper report described these efforts as using "giant powder in reducing the boulders under water to small pieces," and a corporate resolution stated that the company "expended several thousand dollars in the improvement" of the river. For whatever these reports are worth, a few years later the Army Corps of Engineers would make note of these improvement efforts. As all others to follow would do, the Montana Navigation Company seems to have left its improvements to the ravages of the river. Nevertheless, because of the improvements made, after this point, the river above the Falls–where its most difficult rapids were found–could no longer be said to be in its natural condition, albeit still not navigable.[32]

---

[32] MDH022922, MDH022258, *The Helena Weekly Herald*, Feb. 2, 1882; MDH022916, *The Helena Daily Herald*, Dec. 10, 1878, MDH022301, *The Daily Independent: Helena*, Oct. 3, 1878; MDH022192, Articles of Incorporation of the Montana Steam Navigation Company, MDH022403, Articles of Incorporation of the Montana Navigation Company, MDH018231; the work by the Montana Navigation Company was mentioned in an 1881 Appendix to a Corps report filed by Captain Edward Maguire

3. Samuel Barker (1916) – Mining Engineer Barker travels down the Upper River in a small metal craft to assess its navigable potential. He finds the river "remarkably tortuous" and utterly unfit for commercial navigation.

In 1916, there was another engineering reconnaissance of the Missouri above the Falls. A private engineer, Samuel Barker, was hired by the Montana Power Company as part of the Company's preliminary planning for what became the Holter dam. Barker, a Mining Engineer from Butte, began his examination in April during high but manageable water; he went from Hauser Lake to Cascade in an 18 foot steel boat; his report, accompanied by photographs and maps, amply confirmed what the Army Corps of Engineers–as detailed below–had been saying for years. The stretch of river above Half-Breed Rapids was tough enough to navigate. Barker described "vertical canyon walls," "swift" flowing and muddied waters, frequent rapids, extremely high winds, which, "if navigation should

---

regarding Corps work on the Bear Tooth Rapids/Bear's Teeth Shoal that occurred in 1990: "The Montana Navigation Company had undertaken to improve the shoal. They closed the upper chute with a stone dam, and built about 150 feet of a dam to close the lower chute." By 1880, this dam had not been maintained but "had a large break in it, made by the ice." 47th Congress, House Exec. Doc. 1, Part 2, *Report of the Secretary of War*, Vol. II, part 2, Appendix T; p. 1671 (Washington, D.C.: Government Printing Office, 1882).

be attempted, would be a dangerous element" given the "remarkably tortuous" course of the river.[33]

Then his crew reached the area of the Half Breed Rapids. Barker concurred with every previous assessment of this obstacle; these "constitute[d] the worst section of the river. . . . They are two and one-half times as long as the Beartooth rapids, and present a far more dangerous situation because of rocks, islands, shoals and a widening crooked channel of extremely swift water. The boat had to be unloaded and lowered down stream. . . ." And that was before he reached the "lower portion of these rapids" which were the "worst because of the large rocks across the entire channel. The passage of the river is made more dangerous also for the reason that there are quick changes in direction along the line of the greatest water channel. . . ." His photographs of this section confirm his written description, as did his slope figure of "18.9 feet per mile."[34]

Barker's slope figures at Half Breed proved that "the river for a half-mile" was "practically an uncontrollable torrential force, rushing swiftly down a small channel strewn with immense rocks." His conclusions were directly to the point: ". . . the navigability of the Missouri River from Hauser Lake to Cascade is not practicable and almost impossible. . . ." There were "no commercial or other uses to

---

[33] I1910008 William Barker, "*Examination of Missouri River from Hauser Lake to Cascade with Respect to Navigation*," Sept. 6, 1916, p. 8.

[34] *Ibid.*, pp. 9, 11.

which it can be put. . . ." It ran through a "tortuous rock bound canyon. . . . constant dredging would have to be done to keep the channel clear. . . . because of the numerous rocks and rapids an immense amount of work would be necessary to clear. . . obstructions. . . . Therefore, from every standpoint, navigation would be attended by so many difficulties that such is not feasible or practicable." Decades later, in testimony in the FPC case, Barker was equally plainspoken. When asked if it "would be difficult for a boat carrying either freight or passengers to go up or down that section of the Missouri [he had] examined," Barker replied, "It would be more than difficult. *It never could be done.*"[35]

D. The Army Corps of Engineers – The Great Falls Reach is unnavigable and cannot be improved; attempts to "improve" the river above the Falls to make it navigable, all fail.

The Army Corps of Engineers is the federal agency that long has had the care of rivers in its hands. As the name suggests, it is mostly staffed with engineers who surveyed rivers and carried out engineering projects to improve their navigable capacities. The Corps' engineers have a long, and historically quite relevant, history with the Upper Missouri. I address some of that history below.

---

[35] *Ibid.*, p. 11. MDH002675, "Testimony, FPC," p. 1859. My emphasis.

1. Lt. Maguire (1880)–blasts out boulders, digs channels and builds wing dams on the Upper River, changing its natural condition. It is still not navigable.

Lieutenant (later Captain) Edward Maguire surveyed the Upper River in 1879. That survey, and constant exhortations by prominent Montanans and the Territorial legislature, led Congress in June 1880 to appropriate $25,000 for improvements on the upper Missouri, "work [to] begin at once on Half Breed rapids ... ." By September 1880, men under Lt. Maguire's command would use dynamite, trenching and the constructions of wing dams, to try and improve the upper river for navigation. During his survey, Maguire used the Roberts report, but he did not come to the same conclusion that Roberts had about the navigability of the upper river. In fact, on one occasion Maguire found the Missouri below Fort Benton, "almost literally paved with boulders," . . . noting then that he had been "led to believe, from the Robert's report, that there were but few boulders scattered here and there through the channel."[36]

---

[36] "Missouri River Study," p. 17. U.S. Army, Corps of Engineers, *Annual Report for 1877*, Part I, p. 521. The combined approximately $30,000 expended by the Montana Navigation Company and the U.S. Government in 1878 and 1880 to improve the Bear Tooth and Half Breed Rapids was not an inconsiderable sum. Using a CPI calculator, $30,000 in 1880 is over half a million in 2005 dollars. The CPI calculator I used is found at www.measuringworth.com. This site explains that CPI calculators often dramatically understate the differences between dollar amounts over long time spans. Another comparison the site suggests – the unskilled wage rate – puts

Instead, a year later Maguire and his crew found it necessary to use dynamite to blow up the boulders Roberts said were not there. Following in the footsteps of the Montana Navigation Company, Lt. Maguire's men not only blew up boulders, they constructed more wing dams and dug more channels. Detailed notebooks kept by Assistant Engineer Wood and Foreman Batsan regarding work on the Stubbs Ferry to Cascade reach, show that up to 17 men worked for nearly three months on the Bear Tooth and Half Breed (aka Lone Pine) Rapids. Such entries as, "[b]lasting outside rocks on upper reef. Big rock, with three foot hole charged four times before it went off. Too big a rock for one hole," give a clear picture of just how impassable these rocks and rapids made the upper river. The natural condition of this reach, of course, was dramatically altered by this government work. It still did not, however, make the reach a highway of commerce, as discussed below.[37]

In his 1879 survey, Maguire had stated, as Lewis and Clark had over sixty years earlier, that the Great Falls "separat[ed] the river into . . . two natural divisions, 'Missouri River above the Falls' and 'Missouri River proper.'" The Missouri River "proper" commenced at Fort Benton and Maguire

---

the 2005 value of the $30,000 spent on improvements at over $4 million.

[37] MDH018231, *Report of the Secretary of War*, Appendix T, 1881; MDH013725-28, Sanford, *Annual Report*, 1898; MDH022919, *The Helena Daily Herald*, July 11, 1882; MDH022761-22781 Wood, *Journal*, 1880; MDH022783-22802, Batsan, *Journal*, 1880, MDH022773, Wood, *Journal*, 1880.

emphasized that "all through freight carried on the river above the falls would have to be portaged from Benton to Sun River, a distance of 45 miles, or from the foot of the falls to Sun River, a distance of 25 miles." In either case, "there would have to be two rehandlings of freight . . . and thus a great expense incurred." The shorter portage, moreover, was very unlikely; "the great slope" from Fort Benton to the foot of the falls "would render navigation difficult"–a considerable understatement. What Maguire was clearly implying was that the river above Fort Benton was a separate body of water, sufficiently so to require a different name. To my knowledge, previous to Maguire, the term "Upper Missouri" most often was used to mean that section above either Sioux City or the mouth of the Yellowstone. Maguire's point, after his "extensive survey," was that the Falls created an entirely distinct and disconnected river.[38]

As to navigation on this new Upper Missouri, in 1879 Maguire was ambivalent at best. The "customary mode" of navigation was by steamboat and, as he pointedly said, "No steamboat has ever been on this portion . . ," meaning obviously the Upper Missouri as he had defined it. He was impressed with the navigable potential of the Long Pool–though he did not call it that. The Long Pool–a 54 mile stretch below Cascade–presented "no obstacles to easy and rapid navigation. . . . there [was] sufficient water for light draught boats", *i.e.*,

---

[38] U.S. Army, *Report of the Chief of Engineers*, House Exec. Doc. 1, part 2, vol. II, 48th Cong., 1st Sess., 1883, p. 1342, MDH018245.

steamers able to use a three foot deep channel or less. This turned out to be not quite correct; the Long Pool, too, required expensive improvement work to open a channel of sufficient depth. In any event, above the Pool conditions were far different. Near "Gibson's Ferry, . . . the slope and current are very great. . . ." There were "fifteen places at which the depth at low water is less than 2.5 feet, and twenty-eight places at which the depth is less than 3 feet. . . . No improvements have been estimated for those places."[39]

Then came Maguire's final, prescient judgment on the Upper Missouri: "I do not believe the river above the falls will every be navigated by steamboats, except perhaps. . . one or two small pleasure boats. . . for the benefit of tourists," on very short stretches of the upper river. The improvements made by Maguire's men in 1880, although extensive, did not change this. Despite the high hopes of all the dreamers, boats did not begin to carry commerce on the upper river. In fact, by 1882, even some of the dreamers were losing hope, acknowledging "the upper river in worse condition than we had been led to suppose from former explorations and our knowledge that some work had been accomplished by the government engineers," and recognizing that "a lock should be constructed" at the Half Breed rapids if the upper river were ever to be made navigable. Like Roberts' proposed railroad around the Falls, this too never happened.[40]

---

[39] *Ibid.*, pp. 1339, 1342, MDH018248, MDH018245.

[40] MDH013725-27, Sanford, *Annual Report*, 1898.

2. 1880-1896, Other Army Engineers – more improvements; no navigation

a. Between Fort Benton and Great Falls–no navigation on the Great Falls reach; river seriously obstructed.

In 1885, six years after Maguire's survey, five years after the government-funded improvements to the upper river, the Missouri River Commission reported that the "obstacle" to navigation presented by the Falls, "completely and permanently cuts off the extreme upper portion of the river from all open channel connection with the lower." This, of course, seconded Maguire's opinion. In 1891 the Corps Report contained the following language: "The river above Fort Benton, the head of navigation, to the foot of the falls is seriously obstructed by numerous rapids and rocks. This part of the river is the tailing out of the Great Falls. No work has been done upon it and none is proposed." As to the stretch above the foot of the Falls, the Corps had no comment–and no reason to comment. It was totally unnavigable.[41]

The next year, 1892, three years after Montana entered the Union, the Army Corps stated that "from Great Falls to Fort Benton the Missouri River is so much obstructed and has so steep a slope that no improvement for the purposes of navigation seems practicable and none has ever been attempted." In

---

[41] *Report of the Chief of Engineers*, 1885, p. 2994; *Ibid.*, 1891, p. 275.

1895 the report noted that between the Great Falls and Fort Benton. . . the channel is unnavigable, being obstructed by rocks and having a very steep slope. No effort has ever been made to improve it and none is contemplated." In 1896 the Corps was even more specific: "Between Great Falls and Fort Benton . . . the river is unnavigable, having three sheer falls of 90, 50 and 26 feet. The river is very rapid between the different falls. . . ." These reports, all written at or very near the time of Montana's admission to the Union, are like a drumbeat. Year after year the Corps said the same things: the Great Falls Reach was not navigable and could not be made navigable.[42]

b. The River Above the Falls – the Corps abandons improvement efforts.

In 1885, the Missouri River Commission, a kind of branch of the Army Corps of Engineers, stated as follows: "It is held by the Commission that the appropriations [for river improvements] are intended as a business investment made by the Government with the object with which any other capitalist enters upon a great enterprise, *viz*, a return of the capital together with interest; that the primary object of the improvement is to deepen the channel and thus to provide cheap *through* transportation for freight. . . ." The emphasis on "through" was in the original. It was the Army Corps' consistent position that the Great Falls prevented any through

---

[42] *Ibid.*, 1892, p. 2299; *Ibid.*, 1895, p. 301; *Ibid.*, 1896, p. 260.

navigation. For purposes of navigation the "upper Missouri," as Maguire had called it, was tributary to and separate from what he had called the "Missouri River proper."[43] And that Missouri was not navigable like the more "proper" river.

The Army would continue to carry out "intermittent work" aimed at "improvement of critical passages of the river above the Falls." After Maguire's blasting and construction efforts in 1880, the Army continued some efforts at improving navigation. As late as 1894 obstructions were still being removed from the upper river in the Long Pool. These improvements, while mostly ineffective, plainly improved the river for the navigation that would be attempted. They were, however, the end of any serious attempts by the Corps to make the upper river commercially navigable.[44]

3. 1896 – The Secretary of War grants leave to build the Black Eagle Dam – Captain Sanford's report concludes the Great Falls reach can never be made navigable.

The first of the Missouri hydroelectric facilities—The Black Eagle dam– was built in 1891. The president of the Townsite Company that constructed it wrote to the Secretary of War in 1896 asking if his company should have formal permission to maintain the dam. The Secretary of War responded by

---

[43] BX050331 Missouri River Commission Report in *Annual Report of the Secretary of War*, 1885, (Washington D.C. GPO, 1885), vol. II, p. 2992.

[44] MDH013725-27.

sending him a copy of a "report of the local U.S. Engineer Officer. . . ." The officer, Captain J.C. Sanford, got straight to the point: the "portion of the river" where the Black Eagle dam had been built, could never, in his judgment, "be made navigable at a cost that the demands of commerce will ever justify. While the dam is in a stream which in the greater portion of its length is a 'navigable stream'"–a reference to the river below Fort Benton and a point not in dispute–"it is situated in a portion of this stream which is not now navigable and which in all probability never will be. For these reasons it appears to me that the permit referred to is unnecessary." The issue of permits would not arise again until after the law on federal regulatory navigability changed dramatically with passage of the Federal Power Act.[45]

4. 1915: Army Corps Report – The Missouri is Two Rivers. Above Fort Benton no further improvements are contemplated.

In 1915 the Corps of Engineers offered up its most detailed analysis yet of the Missouri River and its potential use as a highway of commerce. In its Annual Report of that year, the Chief of Engineers summarized all that had been learned to that date. Among other items of interest in this report was the statement that, by the terms of the River and Harbors Act of June 25, 1910, the Missouri was "divided. . . into two sections, *viz*, Kansas City to

---

[45] I13550003 Daniel Lamont to Samuel Hill, Nov. 2, 1896; I13550004 J.C. Sanford, *Report*, Oct. 24, 1896.

mouth and Kansas City to Fort Benton." I note with emphasis that *there was no reference to the river–or even a river–above Fort Benton.*[46]

The chief explained why, in language that the Army Corps had been using for more than two decades: "As far as navigation is concerned the headwaters of the Missouri are completely and permanently separated from the river below." That reference was to the 49 miles from Fort Benton to Great Falls, but the Corps was scarcely more optimistic in discussing the river above Great Falls; I would point specifically to the Chief's quite matter-of-fact statement that not a dime had been appropriated for improving the river above the Falls since 1896; throwing money at hopeless causes made no sense.[47]

5. 1935: 500-plus Page Army *Report on the Missouri* – the report ends at Fort Benton and makes no mention of the Upper River.

By 1935, this understanding of the two Missouri Rivers was set in stone. I found it interesting and instructive that when the Chief of Engineers and the Secretary of War issued a massive (500+pages and hundreds of maps, charts, and illustrations) *Report on the Missouri River* in that year, the table of contents under the heading of "Navigation" read as follows: 1. "Kansas City to Mouth;" 2. "Kansas City to Sioux City;" 3. "Mouth of Yellowstone to Sioux City;"

---

[46] *Annual Report of the Chief of Engineers*, 1915, p. 1892.

[47] *Ibid.*, p. 1897.

and, 4. "Mouth of Yellowstone to Fort Benton." Conspicuous by its absence was *any* reference to *any* navigation of *any* part of the river above Fort Benton. The reason for that absence was quite simple: the river was not navigable above Fort Benton and, therefore, the Department and the Corps had nothing to talk about.[48]

6. 1940s Engineers Tyler, Elliott and Kramer – a proposal to make the upper river navigable is "ridiculous" and "harebrained"

The final contingent of Army corps engineers whom I want to discuss were those called by Montana Power in its 1940s legal dispute with the FPC, already mentioned. But before I bring them to center stage, a couple of general comments would be in order. By this time, the Federal Power Act had been interpreted very broadly by the U.S. Supreme Court in The Appalachian Power case.[49] Thus, each of the engineers about to be discussed was dealing with navigability for purposes of establishing regulatory authority, which means that each was applying the most permissive definition of navigability, not the much harder to meet "title navigability" test I understand to be at issue here. Technically, I suppose that makes their comments irrelevant. Historically, however, it makes them indispensable: The three make an incontrovertible

---

[48] *The Missouri River*, House Doc. 238; 73rd Cong., 2nd sess., 1934, pp. vi-viii, MDH015817-818.

[49] MDH008618, *U.S. v. Appalachian Electric Power Company*, 311 U.S. 377, 61 S. Ct. 291 U.S. 1940 (December 16, 1940).

case that not only was the Missouri above Fort Benton non navigable, *it could not be improved and rendered navigable*, at least not at a cost that made any sense.

General Max Tyler had once been the chief engineer for the Federal Power Commission. Tyler had been involved in what he referred to as a "preliminary plan" to "determine whether a [more complete] survey" of the navigable potential of an improved Missouri River was "warranted." This preliminary plan involved a nine foot deep channel, along with the dams and locks necessary to lift boats. Tyler was not impressed with the idea of improving the river, including the upper river, for navigation. To summarize his most relevant remarks: Making the Missouri navigable from the Falls to the Three Forks would cost $488,000,000. That's 488 million dollars, not counting interest, yearly maintenance costs or the inevitable cost overruns which he estimated at about 30 percent. Using a CPI calculator, that is $6.8 billion in today's dollars. Tyler's final verdict on the "preliminary plan" was that the improvements could be done but he wanted it understood that "I think . . . this whole thing is a fantastic thing. I think it is fantastic. . . . the basic assumption that you can make such an improvement, I think, is entirely untenable. . . . It is a *fantastic proposal.*"[50]

---

[50] "Testimony, FPC", MDH1385, p. 1300; MDH001284-93, pp. 1204-1213; MDH1312, p. 1231; MDH1316, p. 1235; MDH1328, p. 1247; MDH1387-88, pp. 1302-03. My emphasis. I again used the CPI calculator at www.measuringworth.com. Using the unskilled wage comparison, Colonel Elliott's $488 million to

Next up was Colonel Malcolm Elliott. He was asked whether the Missouri could carry or had ever carried "ordinary river commerce." His answer was unequivocal. "I have found no evidence of commerce between the States above Fort Benton at any time." In other words, what came up the Missouri to Fort Benton from states to the east, went out on all those roads from Fort Benton, not back on the river. And no commercial goods came down the river from above the Falls to travel further down the river to North Dakota and points east. His explanation went to the heart of the matter: "The Missouri River," said Elliott, "naturally divides itself into separate sections . . . influencing methods of treatment for developing a navigable waterway." There were ten such sections . . . . . , "the sixth and seventh . . . comprise the reach between Fort Benton and Great Falls which the annual reports of the Chief of Engineers have so frequently described as non-navigable and not susceptible of improvement. I know of no instance anywhere where obstructions to navigation so formidable as in this section of river have been overcome." When asked "Is there any one word which you believe could be used to describe your opinion of any program to the development of navigation of the Missouri River from Sioux City to Three Forks?" Elliott responded, "Ridiculous." On the central question of legal definitions, Elliot's position was strikingly like that of most historians: "in my opinion, it does not require an expert to

---

make the upper Missouri navigable is $14 billion in 2005 dollars.

believe that court decisions cannot make facts out of falsities." That's my opinion too.[51]

General Hans Kramer was last up. Kramer's estimate of "the ultimate construction costs" of the entire proposed improvement project was in the amount of "one and a half billion dollars, a figure, incidentally, which is nearly three times the capital cost of the Panama Canal." He then returned to the guiding principle of socially responsible applied science: "I would consider the expenditure of public funds for such an improvement to be grossly unjustified." No law could or should negate that principle. "I regard the question . . . to be one of common sense judgment of physical facts. . . . it being my philosophy that sound legal concepts cannot be based on fiction but must be consistent with the facts of life. On the basis of that philosophy a waterway to be navigable in a legal sense must certainly be navigable as an actual fact." Any plan to make the upper Missouri navigable was "*preposterous . . . unrealistic. . . entirely beyond the realm of justification* . . . and, for final good measure "*harebrained.*"[52]

---

[51] "Testimony, FPC", MDH1543, p. 1455. Quotes from MDH1544, p. 1456; MDH1550, p. 1462; MDH1557-58, pp. 1469-70; MDH1560-61, pp. 1472-73.MDH1611, p. 1523; MDH1640, p. 1549; MDH1668, p. 1577; MDH1687, p. 1596.

[52] "Testimony, FPC", MDH1705-06, pp. 1614-15; MDH 1709, p. 1618; MDH1727, p. 1636; MDH1731-32, pp. 1640-41; MDH1711-12 , pp. 1620-21. My emphasis.

7. 1974: An Army Lawyer versus its Engineers – fictional "history."

So far as the engineers in the Army Corps were concerned, that was where the matter ended. There was, however, a historically meaningless 1974 "determination" by a lawyer in the Department of the Army, one E. Manning Seltzer, which requires some attention. The date stamped on the document was October 25, 1974 and, though the evidence is admittedly circumstantial, historians are used to working with circumstances; they are the basis of most historical investigations.[53]

Let me look briefly at the circumstances likely in play here. On August 12, 1974, just two months previous to Seltzer's memorandum, the Heritage Resource Center forwarded its "Missouri River Navigation Study" to the Omaha District of the Corps of Engineers. I have referred earlier to this study; it is one of the River Reports on which the State relies. It is also so seriously flawed as a historical document as to be worthless, a topic which I addressed in my Affidavit. The study was written under contract to the Corps of Engineers; its purpose was to prove that the Missouri in Montana was and is navigable. The study was faithful to its contract, if not to the historical record. Among other flaws, it uses two hopelessly untrustworthy sources: Frederick Goddard's 1869 gazette, *Where to Emigrate and Why*, and H.H. Bancroft's historical

---

[53] SJ00274 U.S. Army, Chief of Engineers, "Determination of Navigability, Missouri River above Fort Benton, Montana," memorandum of E. Manning Seltzer, Oct. 25, 1974.

compilations, to make its argument that miners and trappers used the river at all. I commented on Bancroft's unreliability in my Affidavit, and will have more to say on him later in this report. Goddard was an equally untrustworthy source. He was one of a number of gazetteers who toured the West, usually at the urging of the land office of a railroad or the Republican Party. These gazetteers wrote glowingly–though seldom accurately–of the future of America's grand Western Empire. They reveal, as few other sources can, the wild flights of fancy that were so conspicuous a part of the scripting of America's westward expansion.[54]

Seltzer had the same free and easy way with the truth as the most inveterate of Western boosters. In a remarkable passage, he wrote in his memorandum that *"Several steamboats traversed sections of the river between Great Falls and Fort Benton carrying textiles, produce and passengers."* The River Study said nothing about these miraculous steamboats; Seltzer himself offered no evidence to support his statement. Seltzer's comment was either a complete fabrication or a misunderstanding of staggering proportions. First, his "several steamboats" were going downstream and hence plunging *over* the Falls.

---

[54] Goddard, *Where to Emigrate* (Philadelphia: People Pub. Co., 1869). I have dealt extensively with these gazetteers. See Emmons, *Garden in the Grasslands: The Boomer Literature of the Central Plains* (Lincoln: University of Nebraska Press, 1969) and "The Influence of Ideology on Changing Environmental Images: The Case of Six Gazetteers," in Brian Blouet and Merlin Lawson (eds.) *Images of the Plains: The Role of Human Nature in Settlement* (Lincoln: University of Nebraska Press, 1975), pp. 125-36.

Coming upstream and breaching the Falls was impossible; going downstream and over them was suicidal. Second, unless buffalo hides are to be counted, Montana produced no "textiles" that might have been taken to Great Falls to be shipped down the Missouri.[55]

In other words, Seltzer's historical "facts" were based on an inaccurate secondary account, which itself was based on notoriously untrustworthy sources. He then embellished the story by inventing one of his own–steamboats laden with textiles, produce, and passengers making their way over the Great Falls of the Missouri. Still not finished, Seltzer then "hereby determine[d] that the Upper Missouri River between Fort Benton. . . and Three Forks. . . is a navigable water of the United States for the purposes of the exercise of regulatory jurisdiction of the Corps of Engineers." There is a certain imperious quality to Seltzer's "determination," based as it was on a historical invention. He did get one thing correct, though. He notes that "improvements to navigation" were carried out on the upper river before whatever navigation he relies upon occurred (if it did at all), thus rendering his determination useless for a study of navigability for title purposes.[56]

Seltzer's memorandum proves only that there were bureaucrats in Washington D.C. who knew absolutely nothing about what they were talking about. No one interested in the historical truth can

---

[55] Seltzer memorandum, SJ00274. My emphasis.

[56] *Ibid.*

take Seltzer's "determination" seriously. It is the Corp's engineers who deserve the attention of historians. While the idea of steamboats somehow traversing the Great Falls has a certain attraction, the historical, hydrological and engineering record cannot be escaped.[57]

E. The FPC Case Against the Montana Power Company – different navigability tests, different results; ahistorical "history."

I need at this point to make a prefatory remark. Proving a negative is impossible. No historian can prove that no boats ever made their way up and down the Missouri–or any other river. There were no river watchers who recorded that "no boats came by today" and then carefully stored their records for later archiving and study. What historians can do is investigate what was said to have happened and then offer an interpretation of what in fact *probably* happened. That involves an understanding of historical context, a determination to avoid being anachronistic, and an appreciation of the fact that some sources are better and more trustworthy than others. It also involves the use of simple common sense. These are among the more obvious of the rules of the historians' craft.[58]

---

[57] *Ibid.* I think it is extremely doubtful that the engineers looked closely enough at Seltzer's recommendation to have noticed the absurdity of it.

[58] As explained in my previous Affidavit, I taught a course entitled "the Historian's Craft" for more than two decades at the University of Montana.

In this case, as I said above, my task was made considerably easier by the prodigious labors of those who researched the historical record in the 1940s as part of the legal tangle between the Montana Power Company and the Federal Power Commission. I have read every page (some 2,000 of them) of the appeal and trial transcripts in that matter. I came away absolutely convinced that the FPC was far more interested in the consequences of MPC's operations on interstate navigation *below* Fort Benton than on the purported historical navigability *above* it. I say that in part because the FPC called only one expert witness in its effort to prove historic navigability in the upper stretches and his actual testimony takes up less than 20 pages. The interstate issue, however, was entrusted to engineers who counted every gallon of water stored behind and released from MPC dams and then calculated the effect of that stored and released water on navigation below the last of those dams–which is to say, below Fort Benton. That testimony covered more than 200 pages.[59]

It is true that the Trial Examiner ruled in favor of the FPC, deciding that the Missouri was navigable for federal regulatory authority; it is also true that the judges in the power company's appeal of the

---

[59] The expert was Professor Paul Phillips, a historian at Montana State University (now University of Montana.) His testimony is from "Testimony, FPC," pp. 197-236, MDH002343-82. Most of the time when Phillips was on the stand was taken up with legal wrangling among the attorneys for both sides. The FPC's principal engineer was Ralph Coomes whose testimony from the same source is on pp. 369-82, 410-14, 427-512, MDH002508-21, MDH000474-78, MDH000491-575.

examiner's ruling came to the same conclusion. Willard Gatchell, however, the lead attorney for the FPC, was uncommonly candid in admitting that navigability above Fort Benton was not an important part of his case. During Montana Power's appeal of the FPC insistence that it secure licenses, Gatchell told the trial examiner that

> When we come to the evidence on navigation, I think the Trial Examiner will be surprised to find that we are going to put in everything that we have been able to dig up relating to the use of the upper Missouri River above Great Falls for the transportation of persons and property, whether that is favorable to a finding of navigability or against it. And we are doing that because we felt the Commission should have everything that is available. And the reason some of the statements may appear to look to a non-navigable finding is that the conditions are peculiar to this River, but we are giving everything we can.

Essentially, Gatchell was saying that he didn't care if he could prove navigability or not, that he "would attempt to show that even if the seven Missouri River plants [of MPC] are not in navigable waters . . . , they nevertheless affect navigable capacity below Fort Benton. . . ." Navigability above Fort Benton was not exactly incidental to his case, but neither was it central to it.[60]

---

[60] Gatchell's comment is from MDH002252 "Testimony, FPC," p. 111. See also MDH003159 *Respondent's Reply Brief to Main Brief of Staff Counsel*, July 10, 1947, p. 4.

The Federal Power Act of 1920, the legislation upon which Gatchell based his case, was based on a standard for navigability much easier to meet than the test for title at issue here. That test, I understand, looks not to time of statehood, natural condition, or even actual use, but to potential use. One senator who supported passage of the Act bluntly stated: "We simply say that for the purposes of this Act–that is, for the purpose of applying for permits to build dams. . . –certain waters shall be considered navigable." The FPC *claimed* the Missouri was navigable for its entire length; it did not *prove* historical, commercial navigability for the simple but compelling reasons that it didn't need to and didn't really try to.[61]

In my considered and careful opinion, the decision for licensing has no historical significance as evidence of anything regarding the commercial navigability (as opposed to regulatory navigability) of the Missouri River above Fort Benton at statehood. The decision proves nothing about the actual history of navigation. One need only look to what I am told is the final legal decision, to see why. The District of Columbia Circuit court properly conceded that "the Great Falls themselves have never been navigated." But then it listed what it called "substantial evidence" of "several steamboats" making it to the foot of the Falls, and of gold miners who "in considerable numbers traveled downstream with the aid of a portage or 'land carriage' around the Falls."

---

[61] *Congressional Record*, 59th Congress, pp. 6537, 7729 in MDH003167, *Respondent's Reply Brief*, p. 12.

Neither is evidence of commerce at all, much less "substantial" evidence.[62]

The statement regarding steamers at the foot of the Falls is from evidence presented at the hearing by historian Paul Phillips based on a book by H.M. Chittenden; that about miners in Mackinaw boats from H.H. Bancroft. A Corps Engineer himself, Chittenden is a fairly reliable source. In his book he discussed the steamer *Peter Belen* that purportedly took some passengers on a sightseeing trip close to the foot of the Falls some time in the late 1860s. Chittenden added in a footnote that two other boats "were reported" to have done the same, but his sources for these "trips" were even more uncertain and anecdotal at best. Back to the *Peter Belen*, Chittenden does not suggest that this stunt trip (if it occurred at all) proved anything about the navigability of the steep, rocky, rapids-laden miles between the foot of the Falls and Fort Benton. To the contrary, the hearings officer and the court needed to read further. What Chittenden actually said regarding the *Peter Belen* was this: "The feat was accomplished during the June flood and would have been impossible at ordinary stages. *Fort Benton has always been considered the head of navigation on the Missouri River.*"[63]

---

[62] MDH002119 and 2120, U.S. Court of Appeals for D.C. Circuit. *MPC v. FPC*, Oct. 4, 1950, pp. 2 and 3.

[63] Hiram M. Chittenden, *History of Early Steamboat Navigation on the Missouri River* (1903 Minneapolis, 1962), p. 220.

That brings us to Hubert Howe Bancroft and his "considerable number" of floating gold miners. Historians owe a great deal to H.H. Bancroft. He founded the Bancroft Library at the University of California, Berkeley, and his collected documents still make up a considerable percentage of the holdings of that remarkable depository. Bancroft the historian, however, did not write anything that even approaches historical works generally considered authentic and reliable. Instead, he collected documents. Those for California can be very useful. That cannot be said for other states, including Montana, where all Bancroft did was have assistants peruse unreliable newspapers and gazettes. The historian's profession has come a long way since a compiler like Bancroft could be given the title of historian. Indeed, the profession has come a long way in the half-century since Professor Phillips apparently felt comfortable relying on Bancroft's Montana sources in the FPC case. No reputable historian today would use Bancroft as a sole source on an important factual point of Montana history. The premiere historian of California history, USC's Professor Kevin Starr, dismisses any reliance on Bancroft, of whom he says: "as a historian, [he] was often ludicrous and sometimes dishonest." For Montana, even stronger language is required; Bancroft is not a reliable source.[64]

---

[64] Kevin Starr, *Americans and the California Dream*, 1850 - 1915 (New York: Oxford University Press, 1973), pp. 117-118. Also, Charles S. Peterson, "Speaking for the Past," in *The Oxford History of the American West*, ed. Clyde A. Milner II, Carol A. O'Connor and Martha A. Sandweiss (New York: Oxford University Press, 1994), pp. 743-69.

In any event, the decision in the FPC/MPC dispute cannot be taken as serious history, particularly on the purported floating gold miners. Why would miners who had likely spent a year in the dirty work of gold mining trust their precious cargo to a treacherous stretch of river that had never been safely traveled before? The apparent source behind Bancroft is a puff piece in an 1866 *Helena Gazette*. That article told of "two to three thousand people" floating on the upper river in Mackinaws and making a "six mile" portage around the Falls. Of course, a six mile portage would have left those poor passengers in the middle of the Falls, and dead by drowning. This account is entirely unbelievable. Two to three thousand people? In 1866 Montana? If anything like this had actually happened, it would be reported in source after reliable source, including the Army Corps reports. I am certain it did not happen. The casual acceptance of newspaper predications and advertisements as fact is a hallmark of Bancroft's works, which can no longer accurately be called "histories." One looking for actual history must look elsewhere than Bancroft and the 1940s FPC decision.[65]

F. "Navigating" the Missouri - Customary modes of trade and travel were not used in commerce on the upper river.

I reviewed carefully the record of what were referred to in the FPC matter, offhandedly, as "stunt trips" and pleasure boating. Of course, none of that

---

[65] 1866 *Helena Gazette* Article; SJ00229, Missouri River Study, p. 13.

occurred on the Great Falls reach–stunts are one thing, suicide quite another. There is evidence in the historical record of short trips on small stretches above the Great Falls reach, but the terms "occasional" and "sporadic" fit them well, and in any event, these pleasure trips and picnic outings were not made for commercial purposes, and occurred on a mere six-mile long section in the Gates of the Mountain, or in a small part of the Long Pool.[66] Likewise, as explained in detail above, the evidence for any non-steam powered navigation is equally lacking. I have already discussed Lewis and Clark; they do not help the case for commercial navigability. Nor do the mythical miners in Mackinaw boats. That brings me, then, to the *Fern* and the *Rose of Helena*, the only two steamers that ever made their way to Great Falls from above Cascade.

The first thing to consider is that both these small steamers made these trips after Maguire and others blew hundreds of cubic yards of boulders from the river above the Falls, and built wing dams and dug trenches to create channel depths that did not exist in the river before these improvements. Thus, no steamer–or any vessel bigger than a canoe or skiff of which I am aware–ever traversed the Stubbs Ferry to Cascade reach of the river in its unimproved natural state. Given the great difficulties the *Fern* and the *Rose* encountered, it is my opinion that neither could have made the trips they did on the river as nature made it. That is the real, telling, story of the *Fern* and the *Rose*.

---

[66] Testimony, FPC, MDH000472-73.

1. The Fern–40 days of tribulations and terror.

In 1886, Dr. A.L. Davison of Townsend financed the construction of a steamer, the *Fern*, variously estimated at 75 to 88 feet long. Davison set the *Fern* on its sole voyage to Great Falls in the early Autumn of 1887. It was quite a trip. Carrying neither freight nor passengers, the *Fern* was barely afloat past Townsend when it struck a large slab which created a gaping hole in its hull. It sank in four feet of water. The crew quickly patched the damaged hull and refloated the boat, which then suffered a broken wheel, further delaying its passage.[67]

It took the *Fern* 17 days to negotiate (navigate just does not fit the circumstances here) the 34 miles between Townsend and Canyon Ferry. More than three weeks later, the badly battered *Fern* reached Great Falls; the entire trip of 172 miles took 40 days–averaging just over four miles a day – and this for the downstream run. It could easily have been walked in ten days. This lengthy trip was excitement enough for Davison; from this point forward the *Fern* was kept on a very short mooring rope. It never again traveled above Cascade, its owners unwilling to challenge the rapids above the Long Pool. As Davison's son (after whom the *Fern* was named) put it in 1923, "though staunchily built and skillfully maneuvered, the Fern was no match

---

[67] The trip to Great Falls was covered in I12390068, 70-72 *Great Falls Semi-Weekly Tribune*, Oct. 8, 26, Nov. 9, 1887, pp. 63, 65-67; I12390069 *Townsend Tranchant*, Oct. 12, 1887, p. 64. See also MDH003019 "Oral Arguments," Washington, D.C., Feb. 16, 1949, p. 2195.

for the treacherous Missouri. The stream's penchant for changing its course in a night quickly dispelled the dream of a steam connecting link between Great Falls and the railroad."[68]

2. The Rose of Helena–never again; happy to be home.

The *Fern's* sole competitor for control of the recreational use of any portion of the Upper Missouri was the *Rose of Helena*, a small boat owned and operated by Nicholas Hilger whose ranch was near the Gates of the Mountains below Helena. From 1886 to 1904, the *Rose* ran picnic parties through the Gates, a trip of between six and seven miles. On two occasions, the *Rose* went down the upper river below the Bear Tooth Rapids, seven miles below the Hilger Ranch. One of those trips was a memorable day in 1887, when the *Rose* ventured below the Half Breed Rapids, fifty some miles below the Hilger ranch, and all the way to Great Falls. On the downstream run, Hilger planted "snubbing posts" and carefully ran the rapids with their help. The return trip was harrowing – it took two hours to pass the Half Breed Rapids – six days for the entire trip. "Judge Hilger," reported the *Great Falls Tribune*, "takes great pride

---

[68] For the *Fern's* later career, see I12390088 *Great Falls Semi-Weekly Tribune*, June 29, 1889, p. 83 and MDH003019-20 "Oral Arguments," pp. 2195-96. Davison's son, Fern, related his story in the *Helena Daily Independent*, Sept. 9, 1923. Like all reminiscences, this one has to be used with caution, but Fern Davison was an eye witness and his comments unmediated.

in the Rose. 'She will go almost anywhere,' he says."[69]

The key word in this piece of boosterism is "almost." In fact, Hilger and his *Rose* would *never again* attempt the Half Breed Rapids. It would take another five or six years, in 1892 or 1893, before Hilger and his son would again attempt to run even the Bear Tooth Rapids in the *Rose*; this time in some of the highest water ever recorded, and only to Craig – just below the Bear Tooth rapids but well above the Half Breed Rapids. The son's testimony in the MPC/FPC affair regarding the Craig trip is worth repeating: "That was high water when we went down. We was going toward that rapids, and, say, anybody that never seen that stream [at] high water can't realize what it was like." What it was like, in Hilger's words, was the "high seas," as they attempted their return from Craig. "We would have got home [too] except for the Bear Tooth Rapids." They came on the Bear Tooth section–a considerably less difficult area than the Half Breed–and knew immediately that "any man who has any judgment at all would have known better than to . . . run those rapids in the condition it was. . . . We couldn't have handled the boat. We would have went straight into that rock, with the waves rolling 20 or 30 feet." The Hilgers waited *two weeks* at the Bear Tooth Rapids before they could get off the bank where they had

---

[69] MDH000766-775 "Testimony, FPC," pp. 697, 698, 706, 713, 707. MDH003185 "Respondent's Brief," p. 30; I12390059 May 14, 1887 in BX12 0039, Exhibit 21, p. 54.

landed–or been deposited–and ascend the rapids and return home.[70]

They never went down the Missouri past the Bear Tooth Rapids again. As for Great Falls, the *Rose* "had no business going there," Hilger explained, . . . "There was no call for freight . . . we didn't do anything with the boat but run passengers, and there was no inducement to get us to run to Great Falls." But, asked one of MPC's lawyers, did not the passengers "demand . . . a trip to Great Falls and back?" Hilger's answer was quick and to the point: "I should say not." Interestingly, one of those passengers was the engineer Samuel Barker who, on the 4th of July, 1896, took the *Rose* to Picnic Gulch. Barker noted in his FPC testimony that "Mr. Hilger was asked why he did not go farther and he said the Beartooth Rapids were impassable." This was twenty years before Barker made his own investigation of the Upper Missouri. He added in his testimony that "I proved that very fact when I made my examination in 1916."[71]

The *Fern* and the *Rose* loom large in the efforts to prove the navigability of the Missouri River between the Helena area and Great Falls. They have to; they are all the advocates of navigability have: two small boats which between them made three extremely hazardous trips over the rapids above the Falls, after expensive and extensive improvements had been made to those rapids. And only the *Rose* made it

---

[70] MDH000779, "Testimony, FPC," p. 709.

[71] Barker from MDH002691-92, "Testimony, FPC," pp. 1875-76; Hilger from 00780-784 *Ibid.*, pp. 710-14.

back *upstream* to port, and it to stay. Perspective is an important part of historical analysis. And so I offer, by way of providing that perspective, the fact that between 1859 and 1889 there were 441 steamboat landings at Fort Benton. Some of these steamers made the trip from and to various eastern cities scores of times. They carried many thousands of tons of trade goods and tens of thousands of passengers. Whole city blocks of Fort Benton were packed high with finished items about to be loaded on ox and horse drawn wagons for the trip into Montana's interior or with raw materials to be loaded on east bound steamers. *That* is historical evidence for navigability.[72]

The same cannot be said of the two little boats, the *Fern* and the *Rose*. In the first place, using the two occasions between them when they made it to Great Falls, and the *Rose's* trip back, while ignoring the circumstances of the voyages and the fact that they were never repeated by either boat – or by any other – is unpersuasive and illogical. One "successful" trip followed by one complete failure and no further efforts seems to prove the exact opposite. This is particularly so since the river they traveled on had been greatly improved from its natural state. Add to that these facts: Neither the *Fern* nor the *Rose* ever carried any freight. Except for the trips discussed above, the *Rose* ran only from below Helena to the Gates of the Mountains; the *Fern* limited its excursions to the Long Pool with its

---

[72] I160300368-89, "Joint Appendix," Exhibit 32-a and b "Contributions to the Historical Society of Montana", vol. I, pp. 1419-34. Handcount.

owners unwilling even to attempt a trip back home by water. Both were henceforth used exclusively for dance parties, picnics, sight seeing; and what we would now call keggers. Neither crossed county lines, not to mention state lines. They do not provide evidence of anything other than Montanans' unending search for a good time. As a historian, I do not consider these short, recreational jaunts to be evidence of commerce at all. Nor do I consider the two arduous trips to Great Falls (and only one return, both without carrying any goods), evidence that the upper river was or could be used as a highway of useful commerce at statehood. Indeed, they prove the opposite.[73]

G. Logs and Lumber – occasional, ineffective and at high water.

This leaves one flimsy piece of historical evidence for navigability: the logs and milled timber rafts floated down (obviously, never up) the Missouri. For historians, putting logs into a river is not commerce; it does not make the river a highway anymore than rolling or skidding the logs down a hill makes the hill a highway. There was a fascinating note in a Fort Benton newspaper of 1887 to the effect that high water had brought hundreds of trees downed in every variety of way to the area, and that enterprising and daring young men could make between $25.00 and $50.00 a day by swimming out

---

[73] The "keggers" were called "beer gardens;" see MDH000473, "Testimony, FPC", p. 409. For other accounts of the pleasure boat careers of the two, see, e.g. I12390088 *Great Falls Semi-Weekly Tribune*, June 29, 1889; "Joint Appendix, Exhibit 21, p. 83 and MDH000472 "Testimony, FPC," p. 408.

and somehow dragging them to shore. Would anyone contend that this was evidence that the river, because it carried trees that had commercial value, was thus a highway for the delivery of those trees?[74]

However, since I was asked to investigate whether and where log floats occurred, I did so. What I found was that single logs were floated mostly on the Long Pool. I found no credible evidence of log floats of any distance occurring above Cascade. To a historian, this evidence is of no import since at most these "floats" were short and occasional drives. And obviously, logs were never floated on the Great Falls reach except by accident. Such accidents did occur, as logs escaped from the booms–which established a kind of river "holding pen" where logs cut elsewhere were rolled into the river to cool and soften before they were pulled out again for debarking and milling. One report characterized such logs that were not caught by the boom as "on their way to New Orleans." That is not commerce.[75]

There is one other issue. In 1884 the Holter Lumber Company of Great Falls built a raft of milled lumber, loaded the raft with wagons, men, and horses, and set it to float on the Missouri from the company's mill on Stickney Creek to its lumber yard some 70 miles down the river near Great Falls. There the raft was to be taken apart and the lumber moved by the wagons to the yard. Unfortunately, the men lost control of the raft above the Great Falls;

---

[74] 112390063, *The Great Falls Tribune*, June 8, 1887.

[75] 112390094-95, *The Great Falls Semi-Weekly Tribune*, Aug. 9, 1890.

men and horses barely escaped with their lives as the raft went over the first of the Falls and the lumber from which it was made was destroyed. It is not clear how many of these rafts were ever used. Norman Holter testified in the FPC matter that they could only be used "in high water," and, as the lost raft would indicate, it was a tough and dangerous activity. The "high water" requirement makes good sense. While Stickney Creek is below the Bear Tooth rapids, it is above Half Breed. In my opinion, lumber rafts would have floundered on the rapids and rocks in anything but high water, and I also believe such rafts could not have passed the rapids at all if the boulders blown up by Maguire and other had still been in the river. In any event, the lost Holter raft may have brought a sudden end to this very seasonal, ineffective and dangerous practice. As far as I am aware, there were no subsequent attempts by the Holters or anyone else to float lumber rafts to Great Falls, and I am aware of no credible evidence which shows that this was anything but a sporadic and ineffective practice.[76]

In my opinion, these few instances of high water, daredevil stunts are also not competent evidence to show that the upper river was ever a highway of useful commerce, even in its post-1880 improved condition. I take some comfort in this assertion from the State's quotation in its Milk River brief of the words of the U.S. Supreme Court: "the mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not

---

[76] MDH001834 "Testimony, FPC," p. 1738-9.

make it a navigable river." As a historian, I completely agree.[77]

H. **Missouri Conclusions – No historic navigation on the Great Falls reach. No commercial navigation between Stubbs Ferry and Cascade. All uses on the Upper River were sporadic, ineffective and on an "improved" river.**

When reduced to its essentials, the case for the navigability of the Missouri above Fort Benton is based on a mistaken reading of what Lewis and Clark meant when they used the words "navigable," and "navigate." This initial error is followed by an unwarranted reliance on stories that show little more than that water flows down hill in Montana and swiftly in the Spring. The year by year reports of engineers, including those in the Army Corps, provide the most compelling historical evidence. They establish the fact that the entire river above Fort Benton, not just the area of the Great Falls, was useless for the movement of goods. Finally, for this historian, the concept of navigability, if it is to make any sense at all, has to involve actual, commercial navigation, and there wasn't any or even the potential for any. The upper Missouri was not suited to serve as a watery roadway; in the language of Fern Davison, after whom the *Fern* was named, it had a higher calling. Without meaning to suggest that Fern Davison spoke ultimate historical truths–assuming that such even exist–he is worth quoting

---

[77] DRU00014, *Drugge v. State of Montana*, State's Memorandum; p. 4.

on this issue because of his intimate knowledge of what can and cannot be done on the river his father tried to navigate.

His father "knew that his venture had failed. . . . The Fern in her struggle with the . . . Missouri had demonstrated for all time the fallacy of attempting to navigate the stream with vessels of her tonnage." But that failure "was of lasting benefit to the budding state! The Fern's lack of success as an up-river packet furnished with an unanswerable argument the men who later sought permission to throw power dams across the stream. It proved that no amount of dredging would ever fit the upper channel for steamboat navigation and that the western Missouri could be made to serve mankind only by harnessing it to the wheels of industry." I would argue that Lewis and Clark–though obviously they had no idea of hydroelectric power–had proved the same point. It would, however, be churlish to deny Fern Davison the historical salience of his point. Like Lewis and Clark, his father had dared bravely. The Missouri River above Fort Benton simply could not be made to serve as a highway of useful commerce. The Missouri River is one of Montana's treasures. To steal from Hemingway, it is truly a big two-hearted river – or, and more accurately – *two* big two-hearted rivers. The upper of the two, however, was never a navigable one.[78]

---

[78] Davison's comment from *The Helena Daily Independent*, Sept. 9, 1923.

VIII. THE MADISON RIVER–THE 100 MILE RIFFLE

There's a fond place in my heart for the Madison River. It's a lovely, lively trout stream that locals often refer to as "the 100 Mile riffle." What it is not is a navigable river. I will discuss the historical record for navigation on the Madison first by reaches, and then as a whole.[79]

A. The Wyoming Border to the West Fork – no evidence of any navigation.

The Madison starts in the high country of Yellowstone Park. It is a small stream until it reaches the confluence with its West Fork. In this uppermost stretch, it is a mountain stream of incomparable beauty. Quake Lake, an odd and misshaped body of water created by the 1959 earthquake, is located on this stretch as is Hebgen Lake, the huge reservoir which began to impound the Madison's waters in 1912. Historically, however–at least for purposes of commercial navigation–it is a nonentity. There is nothing in the historical record to show that anyone ever tried to use it to move goods in commerce. The State has offered nothing. I checked every part of the extant historical record and found nothing. The authors of the River Study reviewed the relevant newspapers and found nothing. It was not navigated.[80]

---

[79] "Montana Afloat, Madison Floater's Map": The Madison River from Quake Lake to Three Forks.

[80] For detailed information on when the Hebgen facility was begun, when, by how much, and how rapidly the water behind it began to collect, see I14320002 F.W. Bird, *Montana Reservoir*

B. **Varney to Three Forks–no evidence of any navigation.**

The history of the reach on which the Madison hydroelectric facility near Ennis is located, the Varney to Three Forks stretch, is equally easy to summarize. Again, there is nothing in the historical record to show any commercial activity of any sort on this part of the Madison. Having looked at old maps, that makes perfect sense to me. This part of the river is so "braided" as to resemble multiple rivers. The braids were there at statehood, they are there still today. This reach is simply not navigable.

C. **West Fork to Varney – a single, ineffective log drive, not on the river in its natural condition.**

That leaves the middle section, between the West Fork and Varney. No dams are located on this reach; even had it been navigated, that would not matter for purposes of this report. Nevertheless, to tell the story of the Madison as a whole, I did review the record of this reach as well. Here the historical record does document a single instance of a 1913 log drive by the Madison River Lumber Company. There are no dams on this section. The Hebgen dam, however, upstream from the West Fork, was central to this log float, and that does present a very minor historical issue. I say very minor because there was

---

& Irrigation Company History of Hebgen Reservoir, typescript, Jan. 10, 1916. *See also* OTH02689, *Jeffers v. Montana Power Company*, 1923, p. 128. SJ00174, "Madison River Study", p. 5. I have used this last named source only for uncontested facts. I reject its conclusion that the Madison from its headwaters to its mouth is navigable.

only the one float, and a single instance of anything is synonymous with "sporadic." That one drive, moreover, was–and I understate significantly–nothing if not "ineffective." It took two months to complete the 55 mile long drive to the mill at Varney; scores of logs were "beached" and stacked up on the banks of the river; some were not recovered for two years. As for the Madison River Lumber Company, it went broke and folded up its operations in 1916.[81]

There is also the insurmountable problem that this effort to move logs on the river occurred in 1913, long after statehood and immediately after the river had been substantially altered by the construction of the Hebgen dam and filling of its large reservoir. Indeed, it seems obvious to me that Hebgen was the reason that a log drive could even commence. Put directly, the timing of the dam and the timing of the log drive were not only not coincidental but the impounded waters behind the Hebgen dam were all that made the drive possible, and the Madison River Lumber Company knew this and scheduled its project to coincide with the reservoir's filling. In 1932 the Army Corps of Engineers reported that during low water–and the Madison drive did not begin until late July–the Hebgen Reservoir "increase[d] the natural flow by from 1,000 to 3,000 second-feet. . ."[82]

---

[81] *Ibid.*, SJ00173-179 and attached documents.

[82] OTH 00891, *U.S. Secretary of War Report ... on The Jefferson, Madison and Gallatin Rivers*, (Washington: GPO, 1932), p. 6.

It has been suggested that the Hebgen and Ennis dams *prevented* subsequent log drives. That argument turns the historical record on its head; the Hebgen reservoir made the drive as possible as it was. That suggestion, moreover, begs an important historical question. Why, if the Madison could be used for that purpose, were there no log drives prior to the construction of the dams? The resource was in place as was the market. In fact, there had been a market for logs and milled timber in this part of Montana for at least 40 years before the Madison River Lumber Company decided to begin operations. Why had no one attempted to tap that existing market? I think the answer is simple: because the Madison could not even be used to float logs prior to the construction of the Hebgen dam. Unfortunately for the lumber company, in 1914 the power company that controlled the Hebgen dam apparently chose not to release its impounded waters to be used for another log drive. There is a sizeable difference between that and the argument that the dam impounding the water prevented a log drive, that there would have been more and larger drives had not those pesky dams been in the way.[83]

That one log drive is all that has been uncovered about the use of the Madison for "navigation." During the FPC dispute, both sides agreed that the Madison had never been navigated and was not navigable. Lewis and Clark said nothing about its potential as a highway of useful commerce for the

---

[83] For an account of the power company's reported refusal to release water, see SJ00168 *Madison River Report* and attached documents.

simple reason that they did not ascend it. Fur trappers and traders certainly were active in the area through which the Madison flowed, but there is no evidence that they used its waters as a means of transporting either furs or themselves. There are references in the1974 Madison River Study to commercial fishing guides on the river, but that purported "commercial" use of the river began many decades after Montana entered the Union and long after the dams had altered the Madison's natural condition to one more susceptible to navigation.[84]

D. **The Army Corps of Engineers – there has never been any navigation on the Madison.**

That leaves me with the Army Corps of Engineers as a principal source. I'm comfortable with that–as I think any historian would be. The Corps' engineers studied and reported on the navigable potential of rivers. What follows is some of what they said about the Madison in their 1932 report. Foremost among their findings was that the fall rate of the Madison was extremely rapid "due to the steep fall and narrowness of the canyon and valley sections of the Madison River. . . ." "The main stream. . . flow[s] . . . through deep canyons. . . . The slopes . . . are very steep. . . ." "From the vicinity of the Hebgen Dam, and downstream for 8 miles, the river flows through a deep and narrow gorge about 500 feet deep." Based on my own admittedly rough calculations, the fall

---

[84] *Ibid.* *See also* Affidavit of Stanley Schumm. It is my opinion that downstream floating in small craft for recreational fishing – even if paid for – would not, in any event, turn an otherwise non-navigable river into a highway for useful commerce.

rate of the Madison was about 29 feet per mile in its upper canyon section, where the Hebgen reservoir is located. That is almost six times faster than Thomas Roberts thought was navigable–and Roberts was nothing if not sanguine about the possibilities of navigating western rivers. In the lower canyon the fall is 16 feet per mile.[85]

The Corps' conclusions followed from these fall rates and from other relevant data: the Madison and the other two forks of the Missouri, the Jefferson and the Gallatin "flow generally in deep canyons and narrow mountain valleys. . . ." Combine that with the braided nature of the river and the swiftness of its current and the conclusion was absolutely predictable: "*There never has been any navigation on these rivers and their improvement for this purpose is impracticable.*" "As far as is known there has never been any navigation on these streams, and commercial navigation on them is *entirely out of the question.*" And finally, "Commercial navigation is out of the question on these streams." "There is no navigation in the Three Forks Basin, nor any prospects of any." That last comment has relevance to the question of the navigability of the Missouri as well. Note, too, that the Corps said nothing about the dams on the Madison having anything to do with the fact that the river was not navigable. Nor–and this less than twenty years after the event–did they say a word about the Madison River Lumber Company and its historically meaningless log drive.

---

[85] OTH 00917, p. 58, *U.S. Secretary of War Report ... on the Jefferson, Madison and Gallatin Rivers*, (Washington GPO,1932); OTH 00895, p15.

The Corps' position was that the Madison was not navigable; that is still its position, and mine.[86]

IX. THE CLARK FORK RIVER, "BY WHATEVER NAME CALLED"

A. Introduction – a river with many names and many reaches.

I have fished and explored the Missouri and the Madison. Both are among Montana's treasures and I have a strong affection for them. But the Clark Fork of the Columbia flows through the heart of Missoula and that city has been my home for the last 40 years. Over the course of those years, I have watched this river, fished it, walked along its banks, and rafted its twisting course through many rapids, eddies, and over countless submerged boulders. It is in every respect a grand river. And the fact that it was never commercially navigated detracts not at all from that grandeur. If anything, it enhances it; the Clark Fork has more important things to do than to serve as a highway of useful commerce.

Which is a very good thing, because it could never have been such a highway. In the first place, taking as its headwaters the juncture of Warm Springs and Silver Bow Creeks, its rate of fall from its head to its mouth some 350 miles away is 7.5 feet to the mile. If its headwaters were to be pushed upward to the mouth of Silver Bow Creek, as some have done, the Clark Fork not only becomes more than 50 miles longer but its average rate of fall over its entire

---

[86] *Ibid.*, OTH 00888, p. 1; OTH 00921, p. 66; OTH 00923, pp. 70, 71.

course exceeds 12 feet per mile. There are, it is true, some languid stretches, but they are not very long and there are not very many of them. This is a mountain river, fed by other mountain rivers and streams. It does not run downstream, it crashes downstream; it has some class 3 and 4 rapids, some twists that are difficult to handle in kayaks. I am willing to allow that four miles of it in Idaho were commercially navigable; that is what the Army Corps of Engineers has said. Based on the historical record, including conspicuously the reports of the Corps, I do not believe that the river above Thompson Falls was ever commercially navigated.

The above preliminary comments, of course, refer to the entire river from its headwaters to its mouth. But that raises another issue that I must address early on in this report. I have to this point referred only to the Clark Fork River. That is the convention now, but it was not the practice prior to about 1920, after the chronological limits of this study. In the early nineteenth century and for more than a century after that, the river was known–moving downstream–as the Deer Lodge River, the Hellgate River, the Missoula River, the Clark Fork River, and the Pend d'Oreille River. In 1891 Thomas Symons, an engineer with the Army Corps evaded the issue–and the confusion–by titling his report a "Preliminary Examination of Clarke Fork of the Columbia River (By Whatever Named Called)." I sense that Symons felt some quite understandable

frustration as he considered the title of his report; I am grateful to him for resolving it so neatly.[87]

Proprietary claims by the towns and villages along its banks occasioned some of this multiple labeling. More important, however, was the fact that this was a diverse waterway; different of its stretches had different "personalities" that required different names. For purposes of this report, I am interested, for the most part, in that section from where the Flathead River enters it near present-day Paradise, Montana to the Thompson falls just below the mouth of the river and very near the present-day city of that same name. Fortunately, for ease of understanding, that stretch was the Clark's (or more commonly and inaccurately, Clarke's) Fork.

B. Thompson, Suckley, and DeLacy–early explorers

Since Lewis and Clark did not explore the river that bears Clark's name, the history of the uses of this stretch of the river begins in 1808 with David Thompson, a fur trader and explorer for the British North West Company, who established a trading center, Saleesh House, at or near the Thompson falls. Thompson kept a journal and in it he wrote of canoe trips upstream from Saleesh House toward the mouth of the Flathead River. There is nothing in those journal entries that would indicate that Thompson was "navigating" the Clark Fork. He was

---

[87] See n. 1 (Symons).

simply taking canoe trips–and rather hazardous ones at that.[88]

His journal is filled with entries like ". . . very strong Rapid . . . cannot be run. . . . I think this Rapid may be shot from left to right, but always keeping to the left of the waves. . . . Rapids very frequent & many very heavy–some few dangerous. . . . they run the Rapid . . . in doing which both Canoes received a severe blow, by the Waves dashing them against a Rock–but only the new Canoe was broken." Little wonder that Thompson was forced to portage his canoes or that he had to make frequent use of the wearying "line and hand" technique to make his way to and from Saleesh House.[89]

There were supposed to have been two other exploratory journeys after Thompson's. Three secondary accounts (no one of them credible), deal with one or both of these journeys. One recounts that in 1853 Dr. George Suckley, a surgeon and naturalist, made his way with three others from Fort Owen on the Bitterroot River to Lake Pend d'Oreille, where they were "hospitably received" at the Jesuit Mission. They began their adventure in a boat constructed of bull hides; there is no indication, however, that they completed their trip in or even with that same vessel, much less that they engaged in any commerce. The source indicates only that the Suckley party traveled *down* the Clark Fork. It says

---

[88] Affidavit of Jodie Foley, May 10, 2006; document #2. Supplemental Affidavit of Jodie Foley, Nov. 1, 2006.

[89] Supplemental Affidavit, at pp. 98, 110, 221, 97, 216, 221. See also Affidavit, documents #2-5.

nothing about any travel *on* the river or if any portages were required.[90]

Another secondary account deals with the 1859 trip of W.W. DeLacy who allegedly went by a twelve-foot flat bottomed boat from the Bitterroot River to its mouth at the Clark Fork and then down the Clark Fork to the mouth of the Flathead River which DeLacy ascended to the Jesuit mission where he was "hospitably received"–the exact language used earlier in the Suckley account. Certainly, from these two secondary sources, it may be presumed that the Jesuits were "hospitable," but it is clear that the authors of these two accounts disagree on which of the two, Suckley or DeLacy, was treated to their hospitality. More to the point, the two sources disagree on where the Jesuit mission was located; the Suckley story had it on Lake Pend d'Oreille, some 65 miles below Thompson Falls; the DeLacy story on the mouth of Plum Creek, a tributary of the Flathead well above Thompson Falls. The third secondary account, the unnamed author of the Clark Fork River Study, repeats both stories, without recognizing the fact that one or the other confuses Suckley with DeLacy and that the two contradict each other. As I said, these are not credible sources. Even if they were, they are dealing with a few men in canoes. There was no trade; their trips were dictionary definitions of "sporadic," "occasional," and "ineffective."[91]

---

[90] Foley Affidavit, document #4.

[91] *Ibid.*, documents #3 and 4. The third secondary account is SJ 00153 the "Report on Navigability of the Clark Fork of the Columbia River, Idaho and Montana." No author is given for

C. Steamships on the Pend d'Oreille River and Captain Mullan's Road – no steamboats above Thompson Falls; the Mullan Road bypasses the Clark Fork.

But what of larger craft? There were steamers on the stretch of the Clark Fork below Thompson Falls. The *Mary Moody* began to carry passengers and cargo on the Pend d'Orielle River and Lake as early as 1865. Two years later the *Cabinet* and the *Missoula* joined the *Mary Moody* in a kind of steamship tag team that resulted in a very few passengers and freight making their way from the mouth of the Pend d'Oreille (now spelled Pend Oreille) River to Thompson Falls, the "upper limit of navigation," according to two historians. None of these three steamships, however, ever ventured farther than that. Instead, before the railroad came through, goods and passengers were transported from Thompson Falls to Missoula and points east on "a good wagon road."[92]

There is some newspaper mention of the steamer, *Kangeroo,* which, according to the promoters who ran *The Missoula Pioneer* newspaper, is supposed to have taken a voyage that "demonstrate[d] the practicability of navigating the Deer Lodge, Hellgate and Missoula rivers from Deer Lodge City to the Pen

---

this report; it is undated, and uncertain for whom prepared. See pp. [11], 12. See also OTH 001941. U.S. Department of the Army, Letter from the Secretary of War, Ex. Doc. #186, 47th Cong., 1st Sess. 1998, p. 13.

[92] Burlingame and Toole; Foley Affidavit, document 1. *Ibid.*, *The Missoulian*, Feb. 24, 1882.

d'Oreille." There is, however, another story from the *Pioneer*, the date of which cannot be read, that reported that the *Kangeroo* had first smashed up on rocks and then been "ignobly stolen." There are no further references to the *Kangeroo*, or to the practicability of navigating the river–and no documented, credible references to it being navigated at all.[93]

I have already discussed Captain John Mullan and his road in connection with the non-navigability of the Missouri. There is no reason to revisit that issue here except to note that Mullan's marvelous 624 mile long road bypassed the Clark Fork as surely as it did the Missouri. It began at Walla Walla on the Columbia, not at Paradise or Missoula on the Clark Fork. Mullan understood completely that the Clark Fork was a river to be bridged, not navigated. This was true by "whatever name called."[94]

---

[93] *Ibid.*, documents #10 and 11.

[94] *Ibid.*, documents #1-9 There was a newspaper account that mail had been delivered from Deer Lodge to Missoula via a vessel that floated the Deer Lodge River through the Hellgate. I see absolutely no reason to take this account seriously. If, for purposes of argument, I were to take it seriously, I see no reason to take it as evidence of the "navigation" of the Clark Fork. Indeed, once the Milltown dam is removed, I can imagine someone floating a stout rubber raft with a sack of mail aboard from Deer Lodge to Missoula. I cannot imagine anyone referring to that as commercial navigation. See SJ00157, *Report on Navigability of the Clark Fork*, p. 13.

D. **Log Drives – no credible evidence of drives of applicable distance above Thompson Falls.**

Which leaves the usual references and sources–log drives and the Army Corps of Engineer reports–plus, in this instance, an important court case dealing with navigability for title and an interesting piece of correspondence between officers of the Montana Power Company and a Washington D.C. engineering firm regarding the navigability of the Clark Fork at Thompson Falls. Western Montana is (or was) logging and milling country. From Thompson Falls to St. Regis, Superior, Frenchtown, Missoula, Bonner, Drummond, and Deer Lodge, the landscape was dotted with lumber mills filled with acres of logs and with their ubiquitous "teepee burners" incinerating the "hog fuels." The highways and city streets, not to mention the precipitous logging roads in the mountains, teemed with heavily loaded logging trucks bringing freshly cut timber to the mills. I can remember when logging trucks were more common in Missoula than Subarus are now.

The historical question is simple: before the roads and the trucks, before even the chain saws that felled the timber, how were cut trees brought to the mills? More specifically, were logs ever carried by the Clark Fork for any distance to any of those mills? I have already noted that proving a negative is no easier for historians than for anyone else. I note here that there is reason to believe that logs were floated on the Clark Fork–as they were on the Missouri and once on the Madison – for short, often indiscernible distances. There is one account that some logs were "splashed" over the dam at Thompson Falls, but I am convinced that evidence of that sort

indicates that the dam made any drive that did occur possible – as was the case on the Madison. In all events, the splashing certainly took place after the dam had altered the river behind the falls from its natural state of a fast, rocky river, into a wider, more placid reservoir.[95]

The basic questions remain, then: When, where, and how often did log drives occur and how far did they carry the logs? In the undated Clark Fork Study and in the Rivers Study of 1986, for example, it is stated that "drives occurred. . . originating on Nine Mile Creek, White Pine Creek, Trout Creek, Vermilion River and Bull River" and ending in Clark Fork, Idaho. That casual statement of "fact" is essentially without a citation. There is a brief reference to an old-timer from the region who "remembered" these drives. But even allowing for the accuracy of the statement (which I do not), I would like to know *how far* the logs were floated. Clark Fork, Idaho, over 200 miles from Nine Mile Creek, won't do.[96]

The statement that log drives originated on Nine Mile Creek is particularly troublesome. Not far below the mouth of that stream the Clark Fork enters what is now known as the Alberton Gorge. No logs could have been *driven* through the Gorge; it is doubtful that any logs could even have *floated*

---

[95] OTH 001970 U.S. Army Corps of Engineers, *Report on Navigability of Clark Fork River Above Pend Oreille Lake, Idaho and Montana*, April 15, 1932, p.1.

[96] SJ 00153, *Report on Navigability of Clark Fork*, p. 9, SJ 00136, *Montana Navigable Water Study*, p. 20.

through the Gorge and not been either destroyed or washed ashore by Tumble Weed Rapids or the wonderfully named Boat Eater Rapids. Mention should also be made of the fact that White Pine Creek, as well as the Vermilion and the Bull Rivers are below Thompson Falls and hence not relevant to the discussion. That leaves an undocumented statement that log drives "originated" at Nine Mile and Trout Creeks and no indication of where they "terminated" except for a puzzling and meaningless reference to Clark Fork, Idaho. Answers to those questions involve looking at more than a few newspaper clippings.

Better sources include the archives of the logging companies that were located on the Clark Fork River. Some of these companies were very small and their business records seem not to have survived–or at least not to have made their way into the University of Montana's Archives. Some records, however, did survive and I looked at all of them. They reveal that logs from western Montana were destined for the mines and ore processing facilities *to the east* of where they were cut, that bringing western Montana logs to Idaho was like bringing coal to Newcastle, that the logs were often stored in the river in booms (as was also the case on the Missouri), that log drives were so inefficient that those on the Big Blackfoot River were abandoned and a rail line built for more efficient operation, and that the Northern Pacific Railroad constructed log loading platforms along its line to facilitate the carrying of log cargoes to the mills. There were no references in

these corporate records to floating logs or rafting milled lumber down the Clark Fork.[97]

In sum, in the record I have reviewed, in particular I see no credible evidence of historic log drives on the swift, rocky reach between Paradise and Thompson Falls. The sole mention of a milled

---

[97] Among other archives, I looked at the Anaconda Forest Products Records, Series VI, Box 1, folder 1 which indicated that the Anaconda Company's mills served the Anaconda Company's mines and smelters and that the logs and milled lumber made their way east via the Northern Pacific Railroad. The Records of the Hope Lumber Manufacturing Company in Hope, Idaho indicate that in 1911, as a representative year, sales were made to buyers in Idaho, Kansas, Montana, Nebraska, and Wisconsin. The Records of the Big Blackfoot Milling Company in Bonner, Montana (near Missoula) from 1903 indicate sales to the Boston and Montana Mining Company, the Butte and Boston Company, Anaconda Copper Mining Company, and the Parrot Silver and Copper Mining Company, all in Butte. There were no customers west–or downstream–from the Big Blackfoot Mill. The St. Regis Lumber Company Records indicate that the company sent all of its products via the Northern Pacific Railroad. All of these companies made use of the N.P. loading stations at Eddy, Gold Creek, and Clinton. There is an entry in the St. Regis Company's records that "The above list includes everything cut this fall at Camp #1 except about 300,000 which has been cut opposite the mill and which is being *rolled into the river* from time to time. . . .," (my emphasis) which I take as a reference to logs being held in a boom. This was followed by a ledger entry on "river expenses." The Big Blackfoot Records also include the 1913 speech by company executive John Ross explaining why the company had built a rail line 13 miles up the Big Blackfoot River rather than continuing to rely on log drives to the mill at the mouth of the River. Log drives, Ross explained, were inefficient and, though the rail line cost a lot of money, in the long run, it would pay for itself.

lumber raft is one that was supposed to be a short float – Weeksville to the mouth of the Thompson River – but was lost over the Thompson Falls, with one man drowned. This float, in June's high water, was seasonal, sporadic and deadly. I saw no other evidence of lumber rafts. I have likewise seen no credible evidence of log drives of any appreciable distance on any of the Clark Fork River above Thompson Falls.[98]

E. **The Army Corps of Engineers – the river in Montana is not navigable.**

The first report from the Army Corps of Engineers regarding the Clark Fork seems to have been issued in 1882 and consists of a general description of the region of the upper Columbia River basin. There are no references to navigation. The Corps turned to that issue ten years later in 1891 when it issued another report. This second document is an interesting and important one. The engineer in charge of the examination of the river for navigability, Thomas Symons, surveyed the entire stretch from the mouth of the Blackfoot to Lake Pend d'Oreille, a distance of 250 miles. His conclusion: this "is a mountain torrential stream, full of rocks, rapids, and falls, and is utterly unnavigable, and incapable of being made navigable except at an enormous cost." That sane and prudent judgment was made two years after Montana entered the Union. What makes it even more interesting is that it was concurred in by the mayor of Missoula as well as by "prominent citizens engaged in various

---

[98] Foley Affidavit, Document #12, *The Missoulian*, July 7, 1882.

commercial and mining pursuits." That such a gathering would have been interested in promoting the region is as safe an historical assumption as I can make. In this instance, however, Symons "could not find that there was any demand for the improvement of the river. *In fact, the idea of making the river navigable was scouted as an absurdity.*" It was Symons' "opinion" that "the Clarke Fork . . . is unworthy of improvement."[99]

In 1932 the Corps of Engineers again examined the Clark Fork. Its investigation indicated that logs had been floated from as "far upstream as Dixon, . . . 22 miles" above the mouth of the Flathead River. It did not say to where they were floated; again the terminus of the drive is missing. On the record I have seen, it is clear that whatever log drives may have occurred were at best "sporadic." The report also pointed out that Congress had never authorized any funds for the improvement of the river and that the judgment of a steamboat captain was that, except for the four mile stretch from the head of Lake Pend d'Oreille to the Northern Pacific Railroad bridge in the state of Idaho, it was "utterly impossible to make it a navigable river." I think the historical record bears out his opinion.[100]

---

[99] The 1882 Reports are in OTH 001937.1-58. Symons's from MDH013716 his "Preliminary Examination of Clarke Fork of the Columbia River (By Whatever Name Called). . . ." March 21, 1891 (my emphasis).

[100] OTH001971-72, Report on *Navigability of Clark Fork River Above Pend Oreille Lake* ..., 1932. See also OTH 001975, Malcolm Elliott to I.M. Brandjord, Sept. 20, 1932; and OTH

Eight years after this Corps report, M.O. Leighton, a Washington D.C. engineer, indicated that the Corps had not changed its mind. In a letter to a Montana Power Company official Leighton made "definite inquiry . . . as to the opinion of the Corps on the navigable status of Clark's Fork River from the mouth of the Blackfoot . . . to Pend O'Reille Lake." This, it must be pointed out, was an inquiry for purposes of establishing regulatory authority, not title. In other words, it did not take much for a determination of "navigability." As it happened, Leighton already knew the answer because he had "already seen it on the chart at the office of the Chief of Engineers. The answer is that the river "is not navigable within the above named limits except for a short distance . . . upstream from Pend O'Reille Lake."[101]

F. The Donlan case–in 1910, the Montana federal court declares the river in Sanders county non-navigable under the federal navigability for title test.

Given the significance–both historical and contemporary–of the navigability question, I found it odd that there had been no court cases dealing with that issue on the relevant sections of the Missouri and Madison Rivers. Perhaps past generations were not as litigious as this one. That the matter of the navigability of the Clark Fork–and in that section of the river that is of most concern here–did provoke a

---

001976 Army Corps of Engineers, Seattle District to Division Engineer, Pacific Division, Feb. 9, 1933.

[101] I34110042 Leighton to J.E. Corette, Nov. 18, 1940.

legal dispute was a welcome bit of news for me. In 1910 three complainants challenged Edward Donlan's and his Northwestern Development Company's claims of ownership of the beds and banks of the Clark Fork River in a part of Sanders County, Montana. The complainants argued that the Clark Fork was a navigable waterway and that as such Donlan had no right to its beds and banks. The Montana federal district court had a distinctly different view of it.

The decree of the court was unambiguous. It ruled that "the Clark's Fork . . . in Sanders County . . . was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation. . . ." That being the case, the ". . . Northwestern Development Company was and is the owner of the first and prior right to the use for power development and other industrial purposes. . . ," and "owns all of both the banks of said stream [for certain distances] and the whole bed of such stream at all points opposite the said bank lands ... including the portion of the bed carrying that portion of said river known as Thompson Falls ... ." There is no trial transcript so I cannot comment on how it is that the court reached this ruling; given some similarities in language, I strongly suspect that the Army Corps Reports were an important part of the evidence on which the ruling was made.[102]

---

[102] MDH000232-33 Decree of Circuit Court of the U.S., Ninth Circuit, District of Montana in case no. 950; *Fred Steele, Edward Maher and Zaidah E. Wenham vs. Edward Donlan and Northwestern Development Company*, July 19, 1910. See also Foley Affidavit, document #9.

More generally, I would like to think it was because the court knew how the river had been used in the past and simply applied the lessons of history in reaching a judgment. I am also of the mind that that same unbeatable combination of historical awareness and a willingness to take lessons from what can be known of the past has the same usefulness and relevancy when dealing with the Missouri and the Madison. That is the historians' prerogative and I claim it.

X. FINAL CONCLUSIONS – THE RELEVANT REACHES WERE NOT HIGHWAYS FOR USEFUL COMMERCE

That last thought leads me to my final conclusions. A careful analysis of the historical record can do one of three things: It can support "side A" of an issue; it can support "side B" of that same issue; or, and most commonly, it can support neither side or both sides. The record may be inconclusive, even contradictory. In this instance, however, the historical record is none of those. Lewis and Clark not only did not prove that the Missouri was navigable above Fort Benton; they proved that it was not. The same must be said of John Mullan and his road and of the reports of the Army Corps of Engineers, and all the others who investigated or lived on that stretch of the Missouri, and tried, in vain, to improve it to a navigable condition. Similarly, the Madison River log drive of 1913 did not prove that the river was navigable in its natural condition, it showed that it was not. The record regarding the Clark Fork is also similar. There is no credible evidence that the stretch between Paradise and Thompson Falls, indeed the entire river above these falls, was ever navigated and no evidence that

it was commercially navigable or could ever be made such. If history can be likened to a bridge game, this is a lay down hand. It is my opinion that the reaches of these three rivers that I studied for this report were not navigated and were not navigable at statehood.

OPPOSITION BRIEF

No. 10-218

In The
Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION OF THE STATE OF MONTANA

STEVE BULLOCK
Montana Attorney General
ANTHONY JOHNSTONE*
Solicitor
MONTANA DEPARTMENT OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026
ajohnstone@mt.gov

* *Counsel of Record*

October 1, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. The Clark Fork, Madison, and Missouri Rivers in Montana have a recorded history of navigation that dates as far back as the Lewis and Clark Expedition. Based on this history, and decades before this action and PPL's purchase of the projects at issue, the Montana Supreme Court, the Federal Courts of Appeals, the Federal Power Commission, the United States Army Corps of Engineers, and the Montana Department of State Lands found these rivers to be navigable in fact in their original condition. PPL's pleadings and deeds confirmed the rivers' navigability, and it failed to set forth specific facts sufficient under state rules to dispute this. The district court granted summary judgment confirming the State's title. The Montana Supreme Court affirmed. Does this state-specific factual and procedural record merit review in this Court?

2. The Federal Power Act contemplates that a hydropower project licensee will obtain all property rights necessary under state law for operation of the project. Does the same Act preempt state property rights that require compensation for the use of state sovereign trust lands?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	16
I. MONTANA'S TITLE TO THE RIVERBEDS AT ISSUE IS FACTBOUND AND SETTLED	16
A. Each Navigability Determination Below Stands on Its Own Facts.	17
B. PPL Never Had Title to the Riverbeds.	24
II. THE FEDERAL POWER ACT CONTEMPLATES, AND DOES NOT CONFLICT WITH, STATE PROPERTY LAW	26
III. PPL'S PETITION PRESENTS NO ADDITIONAL FEDERAL ISSUES, IMPORTANT OR OTHERWISE	30
CONCLUSION	34

APPENDICES

A. State of Montana's Answer and Counterclaims ..... App. 1

B. Plaintiff PPL Montana, LLC's Answer to Defendant's Counterclaims and Affirmative Defenses ..... App. 14

C. State's Summary Judgment Appendix: Evidence of State's Title to Riverbeds ..... App. 26

TABLE OF CONTENTS – Continued

Page

D. Memorandum and Order on PPL's Motion for Partial Summary Judgment Regarding Prima Facie Ownership of Lands ..... App. 58

E. Affidavit of Bob McFarland..... App. 61

F. Montana Navigable Water Study ..... App. 66

G. Report on Navigability of the Clark Fork of the Columbia River, Idaho and Montana ... App. 95

H. Madison River Navigation Study ..... App. 114

I. Missouri River Navigation Study (Loma, Montana to Three Forks, Montana) ..... App. 136

J. Findings of Fact and Conclusions of Law ... App. 170

TABLE OF AUTHORITIES

Page

CASES

Audit Services v. Frontier West, 827 P.2d 1242 (Mont. 1992) 26

Beck v. Washington, 369 U.S. 541, *rehr'g denied*, 370 U.S. 965 (1962) 29

City of Centralia v. FERC, 851 F.2d 278 (9th Cir. 1988) 20

Consolidated Hydro v. FERC, 968 F.2d 1258 (D.C. Cir. 1992) 19

Cooper Valley Elec. Ass'n, 4 FERC ¶ 61,336 (1978) 28

The Daniel Ball, 77 U.S. 557 (1870) 16

Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954) 28

First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152, *rehr'g denied*, 328 U.S. 879 (1946) 26, 28

Gibson v. Kelly, 39 P. 517 (Mont. 1895) 10

Haines Pipeline Constr. v. Montana Power, 876 P.2d 632 (Mont. 1994) 25

Herrin v. Sutherland, 241 P. 328 (Mont. 1925) 10

Interstate Power v. Anaconda Copper Mining, 159 P. 408 (Mont. 1916) 5, 24

Jeffers v. Montana Power, 217 P. 652 (Mont. 1923) 7

TABLE OF AUTHORITIES – Continued

Page

Leavitt v. Jane L., 518 U.S. 137 (1996) 27

Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984) 20

In re Montana Power, 7 FPC 163 (1948), *aff'd*, *Montana Power v. Federal Power Comm'n*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951) 9, 22, 24

Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Comm'rs, 989 P.2d 800 (Mont. 1999) 2

Montana Power Co., 32 FERC ¶ 61,070 (1985) 29

The Montana Power Co., Project No. 1869, 8 FPC 751 (1949) 6, 25

The Montello, 87 U.S. 430 (1874) 11, 12, 18, 19

Mountain West Farm Bureau Ins. Co. v. Brewer, 69 P.3d 652 (Mont. 2003) 29

Muckleshoot Indian Tribe v. FERC, 993 F.2d 1428 (9th Cir. 1993) 20

Niagara Falls Power Co. v. Water Power & Control Comm'n, 267 N.Y. 265, *cert. denied*, 296 U.S. 609 (1935) 21

Northwest Steelheaders Ass'n v. Simantel, 112 P.3d 383 (Or. App. 2005), *cert. denied*, 547 U.S. 1003 (2006) 20

Portland General Electric Co., 12 FERC ¶ 63,055 (1980) 29

TABLE OF AUTHORITIES – Continued

Page

PPL Mont. v. State, 229 P.3d 421 (Mont. 2010) 1

Rowland v. Klies, 726 P.2d 310 (Mont. 1986)..... 26

St. Anthony Falls Water Power v. St. Paul Water Comm'rs, 168 U.S. 349 (1897) 21

State Land Bd. v. Corvallis Sand & Gravel, 429 U.S. 363 (1977)..... 16

Steele v. Donlan, No. 950 (D. Mont. 1910)..... 6

Stop the Beach Renourishment v. Florida Department of Environmental Protection, 130 S. Ct. 2592 (2010)..... 32

Tin Cup Co. Water and/or Sewer Dist. v. Garden City Plumbing & Heating, 200 P.3d 60 (Mont. 2008) 15

United States v. Appalachian Electric Power, 311 U.S. 377 (1940)..... 20, 23

United States v. Rio Grande Dam and Irrigation, 174 U.S. 690 (1899) 20

United States v. Utah, 283 U.S. 64 (1931) ("*Utah I*") .....*passim*

Utah v. United States, 304 F.2d 23 (10th Cir.), *cert. denied*, 371 U.S. 826 (1962)..... 20

Utah v. United States, 403 U.S. 9 (1971) ("*Utah II*") 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

Federal Power Act 3, 26, 27, 28

Hydroelectric Resources Act 27

Mont. Code Ann. § 70-1-201 24

Mont. Code Ann. § 70-1-202, *enacted as* § 1091, Mont. Civ. Code (1895) 2, 24

Mont. Code Ann. § 70-19-302 30

Mont. Code Ann. § 70-28-109 31

33 C.F.R. § 329.16 11

RULES

Mont. R. Evid. 803(8), (16), (20), and (24) 4

Mont. R. Civ. P. 56(c) 11, 14

Mont. Uniform D. Ct. R. 5 25

Mont. Uniform D. Ct. R. 5(c) 31

OPINION BELOW

In addition to the unofficial report cited in the Petition for Certiorari, the Montana Supreme Court decision is reported at *PPL Mont. v. State*, 229 P.3d 421 (Mont. 2010).

STATEMENT OF THE CASE

1. On December 17, 1999, PPL purchased from Montana Power Company its hydroelectric projects located on the Clark Fork, Madison, and Missouri Rivers. At trial, PPL's General Counsel and lead witness conceded that PPL had never reviewed its deeds to determine whether or not Montana Power purported to own or convey to PPL the lands underlying the Clark Fork, Madison, and Missouri Rivers:

> Q. Did you make a review of whether the streambeds were included in the real property when you acquired it?
>
> A. I did not.

Tr. 619-20. The deeds conveyed by Montana Power to PPL confirm that PPL did not acquire ownership of the lands underlying the rivers. Instead, the legal descriptions of PPL's property run to a river bank or water level as a boundary. Resp't App. 37-38, 59.

Since statehood, Montana law has held that "[t]he state is the owner of all land below the water of

a navigable lake or stream." Mont. Code Ann. § 70-1-202, *enacted as* § 1091, Mont. Civ. Code (1895). The State currently manages thousands of acres within navigable rivers, in addition to the leases approved *for PPL's co-plaintiffs during this litigation.* Pet'r App. 73 n.10. Even though PPL lacked title to the lands underlying its projects within the navigable rivers, it did not apply for a lease or otherwise compensate the State for the use of these lands.

2. In a line of cases dating back a century, the Montana Supreme Court has held that the State's management of some trust lands had not met the historic constitutional requirements to obtain full market value for trust lands. *See Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Comm'rs*, 989 P.2d 800 (Mont. 1999); *see also id.* at ¶ 14. Before PPL acquired its projects in Montana, that court had held that landowners take ownership of sovereign state lands "subject to the constitutional trust status of these lands." Pet'r App. 73, *citing Montanans for the Responsible Use of the School Trust*, ¶ 19.

Parents of Montana public school children, as beneficiaries of the state land trust, contended that the State had failed to obtain full market value for the navigable riverbeds occupied by the hydroelectric projects of Avista, PacifiCorp, and PPL. They originally sued in a diversity action in United States District Court on October 17, 2003, where PPL conceded the navigability of the rivers. Resp't App. 26-31. The State intervened. The Court denied PPL's motion to

dismiss, holding that the State's trust land claims were not preempted by the Federal Power Act. The court also dismissed the trust beneficiaries for lack of standing. In the resulting absence of diversity, the court dismissed the action for lack of jurisdiction and vacated its order on preemption. Pet'r App. 145-46.

PPL and its two co-plaintiffs sued in state district court in November 2004. They sought a declaratory judgment that they did not need to pay for their use of what they conceded were the "navigable riverbeds" of the Clark Fork, Madison, Missouri, and Swan Rivers. Resp't App. 5-8, 17-20. In response, the State counterclaimed for a declaration that PPL and its co-plaintiffs unlawfully occupied state lands and must compensate the State land trust on behalf of its public beneficiaries for the use of those lands. The State also immediately moved for summary judgment on PPL's federal preemption claim and state-law equitable and other defenses to the State's claims.

a. The district court held in accord with the federal district court that "the Utilities cannot invoke the federal navigational servitude to preempt the State's claims for compensation" and the Federal Power Act "does not preempt the State from obtaining rental compensation" or "bringing any common-law claims for damages." Pet'r App. 152, 156. The district court further held, relying on long-established state law, that "the Utilities cannot assert any of their legal or equitable defenses against the State in its role as trustee of state lands," including the defenses of

prescriptive easement, estoppel, laches, statutes of limitations, and waiver. Pet'r App. 157-60.

b. Exhaustive discovery between the parties commenced. More than two years into the litigation, the district court heard the State's motions on summary judgment as to the navigability of the Clark Fork, Madison, Missouri, and Swan Rivers, and the trust status of the state lands underlying those rivers. Based on a lengthy historical record established through primary sources, state and federal government reports, extensive current use, prior judicial and administrative determinations of navigability in proceedings against PPL's predecessor, prior navigability holdings by this Court, PPL's title documents, and unequivocal assertions of navigability-in-fact by PPL and its co-plaintiffs in their pleadings, the district court granted summary judgment to the State on the issue of navigability. Pet'r App. 130-44. Many of these historical facts were hearsay, Pet. 9, but they fell within established exceptions. *See* Mont. R. Evid. 803(8), (16), (20), and (24).

The record in the courts below for each river at issue is summarized by government reports and supported by historical sources produced on summary judgment. The State filed in the district court on summary judgment, and the Montana Supreme Court in its appendix, a summary of the evidence appended here at Resp't App. 26-57. The record in the courts below established the following.

The Clark Fork River. In 1810, David Thompson navigated the Clark Fork River between fur trading posts he established near the mouth of the Clark Fork at Pend Oreille Lake (below PPL's dam) and the mouth of the Thompson River above Thompson Falls (above PPL's dam). Resp't App. 80, 103. In 1853, Washington Territorial Governor Isaac Stevens sent a railroad survey party down the Bitterroot River to the Clark Fork (above PPL's dam) and down it to Pend Oreille Lake (below PPL's dam). Resp't App. 80-81, 103-04. Other forms of navigation continued above Thompson Falls in pre-statehood years, to the Blackfoot River and beyond, including miner traffic followed by log drives that supported a robust timber industry. Resp't App. 80-85, 104-09.

Three decades into statehood, the Montana Supreme Court held it was "a matter of common knowledge that Clark's fork of the Columbia river is a navigable stream" in the area of PPL's dam, and that property "lying along its course are bounded on that side by the line of the stream at low water." *Interstate Power v. Anaconda Copper Mining*, 159 P. 408, 410 (Mont. 1916). In licensing the Thompson Falls Dam to PPL's predecessor, the Montana Power Company, the Federal Power Commission determined that the river "was used for the transportation of persons and property between areas now constituting the states of Oregon, Idaho, and Montana from 1810 to 1870."

The Montana Power Co., Project No. 1869, 8 FPC 751 at Finding 13 (1949) (Thompson Falls Original License).

PPL did not dispute these prior findings. Instead, PPL primarily relied on a "1910 federal decree," dicta from a minor water rights case between private parties enjoining one party from "claiming the waters" of the Clark Fork; the case does not analyze navigability. *Steele v. Donlan*, No. 950 (D. Mont. 1910). Unlike the Federal Power Commission's binding navigability finding against PPL's predecessor in *Montana Power*, neither the State nor any privy was a party to *Donlan*.

PPL also relied on reports commissioned to assess the Clark Fork's potential for future navigational improvements for modern powered watercraft, although it presented them as if they were addressed to historical navigability. Pet. 10-11. For example, the 1891 Corps Report deemed the river non-navigable at points for large powered craft like steamboats, even though an 1882 report (offered by PPL on summary judgment) described navigation by light boat of nearly the entire river, and a 1932 report (also offered by PPL on summary judgment) described log drives down the relevant length of the river. Resp't App. 38-40. These more traditional forms of navigation on the Clark Fork were undisputed and dispositive of navigability in fact.

The Madison River. "The Madison River has experienced considerable use historically by explorers, trappers, miners, farmers and loggers, and is generally considered to have high potential for navigation." Resp't App. 88. When William Clark reached the Three Forks on July 25, 1805, he observed that the Madison and its navigable counterparts the Gallatin and Jefferson were "nearly of a Size." Resp't App. 51-52. The Madison's early navigation has not been as extensively documented as that of its sister rivers, as the surrounding region was reputed to be forbidding to pioneers during the early nineteenth century. Resp't App. 121-22. In the early 20th century, the Madison River Lumber Company floated logs down most of its middle portion (between PPL's dams), though by then the river's navigability was diminished by the Madison Dam and its Hebgen storage facility. Resp't App. 88, 124-28.

A decade later, the Montana Power Company conceded the Madison's navigability in a nuisance suit arising under a statute applicable to "any navigable lake, or river, bay, stream, canal, or basin . . . " *Jeffers v. Montana Power*, 217 P. 652, 658 (Mont. 1923). A U.S. Army Corps of Engineers study concluded in 1974 that, notwithstanding the post-statehood "obstructions of the Madison Dam, Earthquake fill and Hebgen Dam . . . [t]his situation warrants a recommendation of navigability for the entire Madison River from its boundary with Yellowstone Park to its confluence with the Missouri River."

Resp't App. 135. Today, the Madison River, prized by anglers, is one of the most heavily navigated waters in Montana despite reduced post-statehood flows. Only the Missouri is more heavily used over its length. Resp't App. 62-63. PPL did not dispute this.

Instead, PPL again selectively quoted from a 1931 report considering future navigability improvements for modern navigation. Pet. 11. PPL also presented an affidavit, from an expert who has never set foot near any of the rivers at issue, speculating through maps and charts that the river's flow had changed since statehood. Pet. 11. While its expert concluded that increased water depths "make the Madison River more susceptible to use for navigation now than it was at the line [sic] of statehood" in the months of October and November, he also found that the converse was true: the river was at least as deep as it is today, and therefore more susceptible to use for navigation, in every other month of the year. Pet'r App. 210. He also deemed shallows and sandbars at certain locations on the Madison to bar navigation, despite heavy actual use at those locations, Pet'r App. 211-13; Resp't App. 62-63, and the rule that shallows and sandbars "do[ ] not make a river non-navigable." *United States v. Utah*, 283 U.S. 64, 86 (1931).

The Missouri River. More than two centuries ago, Captain Meriwether Lewis led an expedition up the length of the Missouri River in Montana and observed he could not find a better example than the Missouri and Jefferson of rivers that run "through

such a mountainous country and at the same time [are] so navigable as they are." Resp't App. 147-48. After the discovery of gold, miners and settlers floated the river to Great Falls and Ft. Benton from the Helena area mining districts upstream. Resp't App. 91-92, 153-65. Thus, a U.S. Army Corps of Engineers study concluded, and the Corps itself determined, that "[h]istorical evidence supports the contention that the Missouri River is a navigable waterway from Loma, Montana, [below PPL's dams] to Three Forks, Montana [above them]." Resp't App. 167-69.

In the 1940s, PPL's predecessor Montana Power Company contested the Federal Power Commission's effort to license its hydropower projects on the Missouri. It argued then, as PPL does now, that the Great Falls of the Missouri was not navigable in its original condition. The Commission rejected the argument and found, based on historical evidence of the river in its original condition, that "the Missouri River, throughout its entire length, is a navigable water of the United States." *In re Montana Power*, 7 FPC 163 (1948), *aff'd, Montana Power v. Federal Power Comm'n*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951).

Specifically, the Commission found the Missouri to be navigable from Fort Benton to Three Forks before statehood, and also cited two Montana Supreme Court decisions that considered the Upper Missouri to be navigable for title purposes. The first,

Gibson v. Kelly, 39 P. 517, 519 (Mont. 1895), a boundary dispute concerning property between Great Falls and Fort Benton (below PPL's dams), relied on the Missouri's navigability in establishing that the state owns all land below the low-water mark. The second, *Herrin v. Sutherland*, 241 P. 328, 330 (Mont. 1925), involved a similar dispute on the Missouri in Lewis and Clark County (between PPL's dams), and again relied on the Missouri's navigability for title.

PPL did not, and could not, dispute the official determination by the Corps that the Upper Missouri was navigable in fact through its entire length. Instead, PPL again took out of context an 1896 War Department declaration and an 1898 Corps report, which considered only the Great Falls themselves, and then only for modern navigational improvements. Pet. 11. Neither of those documents considered log floating, canoeing, or small boats that suffice for navigability in fact, or contained any discussion of history. Except for the falls themselves, both documents deemed the Upper Missouri River navigable throughout its length. Resp't App. 41-44.

What PPL calls a 500-page "mountain of contrary evidence," Pet. 18, is a pile of largely immaterial government reports on vast interstate river basins. They contain only a molehill's worth of specific historical navigability analysis beyond the fifty words PPL quotes in its petition. Pet. 10-11. Unlike the more recent navigation reports cited by the State, these early reports considered only the prospects of improvements

for future commercial navigation by large powered craft. They do not concern navigability for title, which turns on the susceptibility of navigation by "[v]essels of any kind that can float upon the water," including "rafts of lumber." *The Montello*, 87 U.S. 430, 441-42 (1874). Moreover, the Corps lacks jurisdiction to find rivers non-navigable. *See* 33 C.F.R. § 329.16.

PPL introduced these cherry-picked reports through the short, conclusory, and often contradictory expert affidavit of historian (and proposed *amicus curiae*) David Emmons, who researched only the State's affidavits and the "historical documentation produced in this case" by PPL.[1] He disputed just one of the dozens of specific recorded instances of navigation on the rivers at issue. Pet'r App. 196 (contesting a single log float on the Clark Fork in 1882).

---

[1] PPL's petition improperly appends and relies upon material that was not before the courts below on summary judgment, the *Navigation Report* by David M. Emmons (June 2007); *cf.* Emmons Prop. *Amicus* Br. at 2 (incorrectly asserting that PPL's "evidentiary showing included . . . his expert report, and the report's accompanying exhibits"). Although the report showcases the kind of factless conclusory analysis identified by the lower courts, PPL did not file it in the summary judgment proceedings, which were submitted six months earlier. Pet'r App. 131; *cf.* Mont. R. Civ. P. 56(c) (adverse party's opposing affidavits to be served "prior to the day of the hearing"). Instead, it was one of several pretrial expert reports on the history and geology of the rivers, proferred by both PPL and the State, in the event the district court did not grant summary judgment and the case proceeded to trial. It is irrelevant to whether the courts below properly granted summary judgment on the record PPL actually submitted.

Similarly, far from "discrediting" the State's detailed historical reports, Pet. 10, he attacked only one of the several hundred sources supporting those reports, a nineteenth century historian whose name Emmons misspelled as Hubert "Hugh" Bancroft. Pet'r App. 196. Unlike Emmons, this Court has relied on Hubert *Howe* Bancroft for nearly as long as it has considered navigability cases. *See The Montello*, 87 U.S. at 440, *citing Bancroft's History of the United States*. Emmons's opinions did not so much satisfy Montana's rules of evidence and civil procedure as they sought to displace them with his own "professional historian's assessment." Emmons Prop. *Amicus* Br. at 1.

c. As a consequence of the rivers' navigability, the district court held that the underlying lands passed to the State under the Equal Footing Doctrine at statehood and therefore the lands then became part of the public land trust established by Mont. Const. Art. X, § 11. Pet'r App. 27-31.

Meanwhile, PPL's co-plaintiffs agreed to enter into leases for state-owned riverbeds under the Hydroelectric Resources Act. Pet'r App. 73 n.10. In June 2007, the Land Board approved an agreement by PacifiCorp to enter a lease "for 47.84 acres of common school trust lands forming the bed of the Swan River" at a rental rate of approximately $50,000 per year. In November 2007, the Land Board approved an agreement by Avista to enter a lease for "approximately 3,100 acres of Clark Fork riverbed in the amount of $4 million annually." The district court approved the

agreements by stipulated dismissal and consent judgment.

d. PPL and the State tried their remaining preemption, property, and damages claims in a seven-day bench trial. Based upon expert analysis by a leading natural resources economist familiar with the valuation method used by the Federal Energy Regulatory Commission for similar bedlands, the State and the district court valued the riverbeds used by all three projects at approximately the same annual amount per acre: $1,267 for Avista's projects on the Clark Fork River, $1,045 for PacifiCorp's project on the Swan River, and $1,086 for PPL's projects. These values are typical for hydroelectric uses of riverbeds elsewhere. Tr. 291-309. The district court calculated the full market value of state lands used by PPL to be $6,207,919 annually in 2007, plus damages for past wrongful occupation beginning when PPL purchased the Montana Power Company dams, with the terms of a future lease to be approved by the Land Board. Resp't App. 181.

3. The Montana Supreme Court affirmed in an 84-page opinion, over the dissent of one justice and a district court judge sitting by designation.

a. As to the State's proof, the Montana Supreme Court rejected PPL's challenges to the district court's reliance on the historical record. Pet'r App. 47-53. It held "unequivocally that the District Court's understanding of the navigability for title test was correct." Pet'r App. 54. It further held, "[t]he evidence

presented by the State was clearly sufficient to demonstrate navigability in fact under this test, and entitlement to judgment as a matter of law." Pet'r App. 56.

The Montana Supreme Court paid particular attention to this Court's opinion in *United States v. Utah*, 283 U.S. 64 (1931) ("*Utah I*"). It rejected PPL's claim that interruptions in navigability render "any portions of these rivers non-navigable," when the rivers still "were susceptible of providing a useful channel of commerce" at statehood. Pet'r App. 61-62. Thus, it found "PPL's reliance on *Utah* misplaced" because, as this Court explained, "[t]he question here is not with respect to a short interruption of navigability," but "*with long reaches.*" Pet'r App. 59-60 (emphasis in original), *quoting Utah I*, 283 U.S. at 77. So by the logic of *Utah I*, a portage around the Great Falls was "merely a short interruption in the use of the Missouri as a channel for useful commerce" by navigators whose origins and destinations lay further downstream or upstream within the "long reach" of the river at issue. Pet'r App. 61.

b. The Montana Supreme Court held that PPL's evidence failed under Mont. R. Civ. P. 56(c) to "set forth specific facts" showing a genuine issue of material fact as to navigability. PPL did not dispute that the Great Falls were "portaged by the Lewis and Clark expedition, and many others, early in the 19th century, allowing the Missouri to provide a useful channel of commerce." Pet'r App. 57. PPL's expert witness's recital of "conclusory statements, without any specific factual support, are insufficient as a

matter of [state] law to raise genuine issues of material fact." Pet'r App. 57-58; *see Tin Cup Co. Water and/or Sewer Dist. v. Garden City Plumbing & Heating*, 200 P.3d 60, ¶ 54 (Mon^{t}. 2008) ("[C]onclusory statements and assertions do not constitute facts that are 'material and of a substantial nature' that would prevent summary judgment."). Similarly, PPL's contention that post-statehood flows raised and lowered the Madison River a few inches on a temporary seasonal basis did not raise a genuine issue because regardless of that slight variation, "the Madison was susceptible for use during portions of the year . . . at the time of statehood." Pet'r App. 58.

c. On the preemption issue, the Montana Supreme Court construed the leasing provisions in the State's Hydroelectric Resources Act consistently with PPL's federal licenses. It held the Act "survives the federal preemption" claim as a matter of federal law, and its compensation provisions would survive a severability analysis even if other parts of the Act were preempted by federal law. It therefore held that preemption "would not alter the fact that the core of the HRA is compensatory, not regulatory, in nature." Pet'r App. 71-72. Moreover, this compensatory obligation is not dependent on the Act alone; as the opinion made clear, the State's monetary claim is ultimately "based on failure to provide the State compensation as required under the Montana Constitution." Pet'r App. 85.

REASONS FOR DENYING THE PETITION

PPL repeatedly misstates the record, and that record presents no important federal question. PPL does not, and did not ever, have title to the riverbed lands at issue. To the contrary, its deeds end at the riverbanks, reflecting a documented history of navigability in fact at statehood, confirmed repeatedly by state and federal courts and administrative agencies, and conceded by PPL in its pleadings. PPL's conclusory assertions could not, and did not, controvert these multiple factual and legal grounds on summary judgment as a matter of state law. As a consequence, PPL must compensate the State for the use of its lands, just as it and other federal licensees compensate other landowners in Montana and elsewhere. This result is compelled by long-established state law and contemplated by applicable federal law.

I. MONTANA'S TITLE TO THE RIVERBEDS AT ISSUE IS FACTBOUND AND SETTLED.

Under the federal "equal footing" doctrine, "the State receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union. . . ." *State Land Bd. v. Corvallis Sand & Gravel*, 429 U.S. 363, 372 (1977). Navigable rivers are those that "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1870).

The "crucial question" of navigability is "susceptibility [of use] in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use" at the time Montana was admitted to the Union in 1889. *Utah I*, 283 U.S. at 82. Use "limited in the sense of serving only a few people" sufficiently distinguishes "between navigability and non-navigability." *Utah v. United States*, 403 U.S. 9, 11 (1971) ("*Utah II*"). Courts may rely on post-statehood use probative of a river's "susceptibility in the ordinary condition," especially "where conditions of exploration and settlement explain the infrequency or limited nature of such use" pre-statehood. *Utah I*, 283 U.S. at 82.

The district court granted summary judgment, and the Montana Supreme Court affirmed that judgment, based on PPL's failure to dispute the State's title under state law and not because of any misapplication of federal law.

A. Each Navigability Determination Below Stands on Its Own Facts.

The Montana Supreme Court correctly applied the federal navigability for title test to the particular facts concerning the parts of the Clark Fork, Madison, and Missouri Rivers at issue, all entirely within Montana. Pet'r App. 58-62. There is no lower court conflict here because the history and geography of Montana's rivers is, like those of all American rivers,

unique. "Each determination as to navigability must stand on its own facts." *Utah I*, 283 U.S. at 87.

1. In its attempt to manufacture a conflict worthy of this Court's review, PPL attacks a "river-as-a-whole" navigability test that does not appear in the opinions below. The Montana Supreme Court nowhere concluded "that the Missouri, Madison, and Clark Fork river are generally navigable rivers," based on distant navigation far downstream or upstream. Pet. 19. Instead, that court had before it a lengthy historical record of actual navigation on these rivers at or near PPL's projects. Resp't App. 26-57. In response to that record, PPL did "not put forth any evidence whatsoever of 'long reaches of non-navigability' but instead merely points to relatively short interruptions in the Clark Fork, Missouri, and Madison Rivers." Pet'r App. 60-61. The Montana Supreme Court acknowledged that these falls, rapids, and shallows "impede uninterrupted navigation," but correctly concluded that they "do not affect the actual use or susceptibility of use of these rivers as channels for commerce in Montana at the time of statehood," given undisputed evidence of portages that made the interruptions passable. Pet'r App. 61.

This follows from the archetypal navigability case that involved the Fox River in Wisconsin, which in its natural condition contained "several rapids and falls" and "through its entire length, could not be navigated by steamboats or sail vessels," while short draft boats required "the aid of a few portages." *The Montello*, 87 U.S. at 439-41. Although the case

addressed navigability under the Commerce Clause, this Court considered the river's pre-statehood navigability in fact, "before the improvements resulting in unbroken navigation were taken." *Id.* at 440-41; *see also Utah I*, 283 U.S. at 76 (relying on *The Montello* to determine title). The Fox River was navigable in fact despite the obstructions, because any other rule "would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break." *The Montello*, 87 U.S. at 442-43. This Court made clear that even where "serious obstructions to an uninterrupted navigation" exist, "the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." *Id.*, at 443. Such a channel may bypass navigational obstructions by portage. "If this be so the river is navigable in fact." *Id.*

Even as to the Great Falls of the Missouri, the Montana Supreme Court's application of this principle is consistent with prior federal decisions that "the Missouri River was [held] navigable in the area of Fort Benton, Montana, despite the presence of the Great Falls of Missouri . . . because 'gold miners in considerable number [had] travelled downstream with the aid of a portage or 'land carriage' around the falls.'" *Consolidated Hydro v. FERC*, 968 F.2d 1258, 1262 (D.C. Cir. 1992), *quoting Montana Power v.*

Federal Power Comm'n, 185 F.2d 491, 494 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951).

The undisputed fact that the Great Falls "were portaged by the Lewis and Clark expedition, and many others, early in the 19th century," Pet'r App. 57, distinguishes it from the 36-mile long Cataract Canyon (the navigability of which was not at issue) in *Utah I*, the 59-mile section considered in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), and the hundreds of miles of the Rio Grande in New Mexico in *United States v. Rio Grande Dam and Irrigation*, 174 U.S. 690 (1899). PPL has cited no case in which a court has held that such a short interruption with a history of portages rendered the longer reach of river non-navigable. *See Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1433 (9th Cir. 1993) (holding non-navigable 21 miles of a 55-mile river that had never been "portaged around"); *City of Centralia v. FERC*, 851 F.2d 278 (9th Cir. 1988) (holding navigable a 26.2 mile stretch); *Loving v. Alexander*, 745 F.2d 861, 866 (4th Cir. 1984) (holding navigable a 19.1 mile segment, and rejecting argument that navigation at certain points "should be divorced from the navigability of the balance of the [segment]"); *Utah v. United States*, 304 F.2d 23, 24 (10th Cir.), *cert. denied*, 371 U.S. 826 (1962) (holding non-navigable a 55 mile distance); *Northwest Steelheaders Ass'n v. Simantel*, 112 P.3d 383, 394-95 (Or. App. 2005), *cert. denied*, 547 U.S. 1003 (2006) (distinguishing navigable 100-mile lower river basin from non-navigable 140-mile upper river basin).

Unlike PPL, these cases recognize a distinction between "long reaches" of river at issue in Utah and "a short interruption of navigability in a stream otherwise navigable," such as a series of falls on the Mississippi similar to the Great Falls. *Utah I*, 283 U.S. at 77, *citing St. Anthony Falls Water Power v. St. Paul Water Comm'rs*, 168 U.S. 349, 359 (1897). In *St. Anthony Falls*, this Court determined Minnesota's Equal Footing rights to the Mississippi at the falls themselves, "based upon the really unquestionable fact that it is a navigable river at all points referred to in these records," even though "boats could not go up and down [the falls] in its natural condition," logs could be floated only "with chutes that are artificially prepared," and navigation directly above and below the falls was possible only because "the dam made it so." *Id.* (emphasis added), *cf. Niagara Falls Power Co. v. Water Power & Control Comm'n*, 267 N.Y. 265, 270, *cert. denied*, 296 U.S. 609 (1935) (finding navigability because "[w]hether the Niagara river is navigable at the particular point of the defendant's intake for water used to create power [at Niagara Falls] is immaterial.").

"[N]avigability does not depend . . . on an absence of occasional difficulties in navigation. . . ." *Utah I*, 283 U.S. at 76, *quoting United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). Any other rule would negate both state title and federal jurisdiction over most hydroelectric projects on falls within otherwise navigable rivers, since as PPL explains "what is bad for navigation is good for hydropower generation." Pet. 1.

So PPL's non-navigability and preemption arguments are self-contradictory. The sole basis for federal jurisdiction over PPL's projects on the Great Falls is the pre-statehood use, between 1864 and 1870, "of the entire length of the upper river for through traffic from above the falls to Fort Benton below. . . ." *Montana Power*, 185 F.2d at 494. If that case was incorrectly decided, and as PPL argues the Great Falls "in all probability never will be" navigable, Pet'r App. 200, then there would be no federal preemption because the Federal Power Act could not extend to its projects. Instead, the Great Falls of the Missouri are held to be navigable for interstate commerce because they were found to be navigable in fact before statehood, which proves navigability for title. Pet'r App. 61.

2. PPL attempts to portray a similar split with respect to the Montana Supreme Court's limited consideration of post-statehood navigation. Sparing no superlative, it warns of "an extraordinarily expansive and erroneous reading of *Utah [I]*" and the "dangers of giving modern evidence undue weight." Pet. 28-29. Yet PPL fails to cite a single instance of such misuse of post-statehood evidence.

To the contrary, as PPL admits, "post-statehood usage may be probative of a waterway's use or susceptibility to use at statehood." Pet. 26. The only question is how, and that depends on the facts of the case. The court below applied to the facts below this Court's rule that "where conditions of exploration and

settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved" by means other than actual pre-statehood use, including "the consideration of future commerce" that might occur under more intensive settlement. *Utah I*, 283 U.S. at 82-83. This Court reiterated in *Utah I* "that navigability does not depend on the particular mode in which such use is or may be had. . . ." *Id.* at 76, *quoting Holt State Bank*, 270 U.S. at 56. In other words, if the Madison River was more susceptible to navigation at statehood than it is today, and if fishing boats navigate the Madison River today, then the Madison River was at least as susceptible to navigation in similar boats at statehood as it is today. "[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *Appalachian Electric Power Co.*, 311 U.S. at 416.

In the proceedings below, PPL questioned the propriety of post-statehood evidence only for the Madison River, given the thorough pre-statehood historical record of navigation on the other larger rivers. Pet'r App. 57. Today, the Madison River where PPL's projects are located is the most navigated section of river in Montana, by anglers in driftboats. Resp't App. 62-63. Unfortunately for PPL, it chose to challenge that post-statehood evidence by presenting an expert opinion that found the Madison at statehood to be at least as navigable as it is today for ten months of the year. Pet'r App. 11.

B. PPL Never Had Title to the Riverbeds.

PPL's intemperate claim of "an enormous uncompensated land grab," Pet. 1, would be untrue even in the absence of summary judgment on navigability. The record provides ample factual and state law grounds to render this Court's review unnecessary to the final disposition of the case.

1. PPL owns no riverbed land to "grab." As the district court explained, "[s]ignificantly, excepted from the warranty deeds are the beds of the Missouri, Madison and Clark Fork Rivers." Resp't App. 59. PPL's general counsel, and its lead witness at trial, confirmed that PPL had no basis to claim ownership of the riverbeds when it purchased the projects. Tr. 619-20. Its deeds end at the riverbanks. Resp't App. 37-38. Under state property law, "[m]ention of the stream as the extent of a boundary which terminates in that direction is sufficient to show a connection between such boundary and the line of low water." *Interstate Power v. Anaconda Copper Mining*, 159 P. 408, 410 (Mont. 1916). Therefore title to those lands has remained with the State since statehood. *See* Mont. Code Ann. §§ 70-1-201, -202. This undisputed evidence is dispositive and presents no federal question.

2. Several federal tribunals preceded the Montana Supreme Court in finding the rivers at issue to be navigable in fact. *See, e.g., In re Montana Power*, 7 FPC 163 ("Actual [historical] use alone, therefore, shows the [Missouri] River to be a 'navigable water' of

the United States"), *aff'd*, *Montana Power v. Federal Power Comm'n*, 185 F.2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 947 (1951); *The Montana Power Company*, 8 FPC 751-53 ("The section of the Clark Fork River between Pend Oreille Lake in Idaho and the mouth of the Jocko River in Montana was used for the transportation of persons and property . . . from 1810 to 1870"). Although these facts arose in a determination under the Federal Power Act, these findings are based on pre-statehood use of the river in its original condition. Under state law of preclusion, these findings preclude PPL, which is privity with Montana Power as its successor, from challenging these "determinative facts which were actually or necessarily decided in a prior action." *Haines Pipeline Constr. v. Montana Power*, 876 P.2d 632, 636 (Mont. 1994).

3. Given the lack of title on its deeds, and multiple factual findings of navigability in fact against its predecessor in interest, PPL repeatedly admitted in pleadings that the rivers at issue are navigable. Resp't App. 26-31. PPL's meaning was perfectly clear in these admissions: it admitted in its Answer "that title to the beds and banks of the navigable riverbeds within [] Montana vested in the State." Resp't App. 20. As the plaintiff who originally framed the issues on declaratory judgment, PPL's admissions pose a separate bar to its claims as a matter of state law. Its proposed amendments to those admissions, not raised and therefore waived in the pretrial order, *see* Mont. Uniform D. Ct. R. 5,

amounted to an impermissible shift in the theory of liability "simply to suit [its] legal maneuverings at the time." *Rowland v. Klies*, 726 P.2d 310, 316 (Mont. 1986); *see also Audit Services v. Frontier West*, 827 P.2d 1242 (Mont. 1992) (affirming judgment against the defendant based upon the admissions contained within the answer).

II. THE FEDERAL POWER ACT CONTEMPLATES, AND DOES NOT CONFLICT WITH, STATE PROPERTY LAW.

No federal question can arise from the Montana Supreme Court's construction of the State's Hydroelectric Resources Act. The preemptive scope of the Federal Power Act is limited to a state's exercise of its regulatory powers to modify the development or operation of a licensed project, or otherwise exercise "veto power over the federal project." *First Iowa Hydro-Electric Coop. v. Federal Power Comm'n*, 328 U.S. 152, 164, *rehr'g denied*, 328 U.S. 879 (1946). The decision below demands nothing of the sort. Proof of this can be found in the fact that two other licensees under the Federal Power Act, PPL's former co-plaintiffs Avista and PacifiCorp, have agreed to leases and complied with both their federal licenses and their state rental requirements for several years now. Pet'r App. 73 n.10.

PPL's preemption argument assumes that the Montana Supreme Court held that its federally licensed projects are subject to state regulation. The court below held just the opposite. Like all licensees,

PPL must pay compensation to the State for the land it occupies, but it is *not* subject to state regulation. Pet'r App. 72. PPL requested and received a trial on whether the State's specific claims, as applied to PPL's specific projects at issue, were preempted by the Federal Power Act. Pet'r App. 119. The district court found that "[t]he FPA does not preempt the State's property rights in the riverbeds." Pet'r App. 122. The Montana Supreme Court affirmed, holding that any State interference under the Hydroelectric Resources Act with PPL's licensed operations was "not before the Court in the present appeal, nor is it even remotely probable." Pet'r App. 73.

1. The Montana Supreme Court held that the Hydroelectric Resource Act's rental provisions are severable from the more explicitly regulatory provisions. Pet'r App. 71-72. "Severability is of course a matter of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Whether or not other state laws "worked hand-in-glove" with the State's property rights are questions already answered by the courts below as a matter of that state law of severability. Pet. 33. The Montana Supreme Court's opinion therefore is definitive in its holding that the State's leasing of its riverbed lands does not and cannot invoke any regulatory provisions that conflict with the Federal Power Act.

2. PPL concedes that "the Federal Power Act contemplates that states and other landowners will receive compensation for use of their lands." Pet. 31. With respect to such matters, "[t]he Act leaves to the

States their traditional jurisdiction." *First Iowa*, 328 U.S. at 171. A licensee's "private property rights are rooted in state law, subject to the paramount rights of the State and Nation," which a state may assert "through its rental charges and the Nation through its license." *Federal Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 256 (1954). The Commission "will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of the legal title of the applicant to its riparian rights." *First Iowa*, 328 U.S. at 178; *see also id.* at 174 ("The property rights are within the State. It can dispose of the beds, or parts of them, regardless of the riparian ownership of the lands, if it desires to, and that has been done in some States.").

It makes no difference that "[t]he State actively participated in the federal licensing process and raised no objection that it held title to the riverbeds." Pet. 33. To the contrary, with respect to state property rights, the Federal Power Act "require[s] *Licensees* to obtain all rights necessary or appropriate for the construction, maintenance, and operation of the project," and "the burden remains with [the Licensee] to acquire all rights necessary to comply with project needs." *Cooper Valley Elec. Ass'n*, 4 FERC ¶ 61,336, at 61,796 (1978) (emphasis added). It is, therefore, PPL's duty as licensee to ensure that its property rentals "be factored into the economic analysis when the project is federally licensed." Pet. 31. This is not a

property owner's "bait-and-switch," Pet. 34, but a new licensee's failure of diligence.

3. PPL did not raise its preemption claims concerning "extreme economic burdens" on appeal below. Pet. 34. Therefore, it has waived the argument. *See Mountain West Farm Bureau Ins. v. Brewer*, 69 P.3d 652, 654 (Mont. 2003); *Beck v. Washington*, 369 U.S. 541, 553, *rehr'g denied*, 370 U.S. 965 (1962). Nonetheless, the ability of other federal licensees to pay a small fraction of their revenues in rent for thousands of acres of land necessary for their projects, as well as PPL's own ability to pay millions in rent annually at its Kerr Dam project, disproves this unpreserved argument. *See Montana Power Co.*, 32 FERC ¶ 61,070, at 61,178 (1985) (assessing annual charge for use of tribal lands in the Kerr Dam project of "$9 million adjusted annually for inflation"); Tr. 291-92 (PPL pays an annual rental of $16.9 million for the use of bedlands at Kerr Dam on the Flathead River). PPL ignores a long line of federal authority that has required licensees to compensate sovereign landholders for the value of the lands occupied, even when they have failed to do so in the past. *See, e.g., Portland General Electric Co.*, 12 FERC ¶ 63,055 (1980) (charging licensee for use of sovereign land in project licensed 30 years earlier, including back rents); *cf.* Pet. 34; Edison Elec. Inst. *Amicus* Br. 14-15.

These rental duties are not "retroactive" in any legal sense. As the Montana Supreme Court held under state law, "the HRA codifies an aspect of a

constitutional provision which was extant in 1889," 110 years before PPL arrived in Montana. Pet'r App. 73. In any event, PPL's primary statute of limitations defense in the court below ran back ten years, more than twice as long as it had occupied the lands at issue when the state sued. *See* Mont. Code Ann. § 70-19-302.

III. PPL'S PETITION PRESENTS NO ADDITIONAL FEDERAL ISSUES, IMPORTANT OR OTHERWISE.

The Petition ends with a final volley of claims that have no basis in the record, were waived below, or both. They offer no grounds to grant the petition.

1. There is no support in or out of the record for the assertion that the decision below "require[s] PPL to pay the State rent for lands that the federal government considers to be federal lands." Pet. 34. In fact, both parties presented extensive expert trial testimony by surveyors concerning the precise boundaries of the state lands claimed, excluding federal and other deeded uplands on PPL's motion. Resp't App. 60. The district court made detailed findings of fact as to the amount of state-owned land at issue based on that testimony. Resp't App. 174-75. The only discussion of federal lands arose when PPL testified to the annual charges it paid for flooded federal uplands – not original state bedlands – as part of its damages case. Resp't App. 180. PPL's own deeds demonstrated that all riparian title, whether federal or private, ended at

the riverbanks. Resp't App. 37-38. The prospect of "competing, overlapping obligations," Pet. 34 is a fiction.

2. Likewise, the decision below in no way "purports to determine the property rights along hundreds of miles of three rivers," other than as between PPL and the State. Pet. 35. The navigability of these rivers has been confirmed and reconfirmed by precedent that spans more than a century. This is why the deeds to PPL from Montana Power Company, the projects' owner since shortly after statehood, exclude the riverbeds. Still, the parties devoted a day at trial to specifying exactly how many riverbed acres were at issue, none of which were shown to be held by anyone other than the State. As a matter of state law, no landowner other than PPL is bound by the judgment below. *See* Mont. Code Ann. § 70-28-109. Still, no landowner other than PPL or its co-plaintiffs has disputed the navigability of these rivers for most of a century.

3. PPL tries to have it both ways with its incipient takings and due process claims. Pet. 36-37. PPL raised affirmative defenses under the Contracts Clause, the Ex Post Facto Clause, the Fifth Amendment, and the Fourteenth Amendment in a motion to amend its answer. However, after the district court had determined the State's title, PPL waived these defenses in the pre-trial order, in which it agreed that "this pre-trial order shall supersede the pleadings" and "that all pleadings herein shall be amended to conform to this pretrial order." Mont. Uniform D. Ct.

R. 5(c); *see also* Pet'r App. 62 ("PPL did not raise this omission until the trial was well underway, long after the final pretrial order had been issued.").

Still, nothing in the Montana Supreme Court's opinion "contravened established property law." *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010). The State has claimed and received compensation for uses of navigable riverbeds for decades, and state and federal courts and agencies have reiterated the navigability of the rivers at issue repeatedly over the past century. PPL does not present a question of its water rights, which arise solely under state law. Contrary to the assertions made by *amicus* Montana Water Resources Association, however, more than a century of Montana water law has never established a "right to make *free* appropriation of waters on and within state-owned lands without paying any compensation to the State." Pet'r App. 65-66. Trial established that water users already can, and do, pay nominal amounts for their use of state trust lands under navigable rivers.

The *amici*, hoping to turn this case into the sequel to *Stop the Beach Renourishment* as a matter of "a thinly-disguised judicial taking," Cato *Amicus* Br. at 15, will be disappointed by the fact that PPL's deeds and pleadings show it has no riverbed property to take. Resp't App. 37-38, 59. The dramatic consequences that are alleged to follow from the long recognized navigability of the Clark Fork, Madison, and Missouri Rivers were not so dramatic, it seems, to merit PPL's attention to "whether the streambeds

were included in the real property when [PPL] acquired it." Tr. 619-20. Given this, the only way "thousands . . . will lose their property rights," Cato *Amicus* Br. at 17, is if PPL takes Montana's great rivers from the People who have navigated, enjoyed, and owned them since statehood.

CONCLUSION

This case is fact-bound to a unique historical record wholly within the State of Montana. The Petition often misstates that record and repeatedly departs from it altogether. Many of PPL's claims are procedurally troubled. Those that are not cannot change the disposition of this case because they are controlled by multiple alternative state-law grounds. Given this, and the absence of any conflicted or otherwise important federal question, the proper way in this case "to enforce basic principles of federalism," Pet. 37, is to deny review of the Montana Supreme Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVE BULLOCK
Montana Attorney General
ANTHONY JOHNSTONE*
Solicitor
MONTANA DEPARTMENT OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

* *Counsel of Record*

October 1, 2010

MIKE McGRATH
Montana Attorney General
BRIAN M. MORRIS
Solicitor
ANTHONY JOHNSTONE
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549

COUNSEL FOR DEFENDANT/COUNTER-CLAIMANT
STATE OF MONTANA

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; AVISTA CORPORATION, a Washington Corporation; and PACIFICORP, an Oregon Corporation, Plaintiffs, v. STATE OF MONTANA, Defendant.	Cause No. CDV 2004-846 **STATE OF MONTANA'S ANSWER AND COUNTERCLAIMS**

Defendant State of Montana (hereinafter "Montana") for its Answer, Affirmative Defenses, and

Counterclaims to Plaintiffs' Complaint for declaratory relief states and alleges as follows:

* * *

COUNTERCLAIMS

Defendant State of Montana hereby counterclaims and alleges against Plaintiffs as follows:

GENERAL ALLEGATIONS

1. Montana seeks a declaratory judgment that Plaintiffs must compensate Montana for their use of lands owned by Montana, as required by law, and further seeks damages for Plaintiffs' unlawful past and ongoing use of those lands without compensation to Montana.

2. Montana owns state lands acquired through a variety of means, including: (1) beds and banks of navigable waters granted to Montana upon its admission to the Union on an equal footing with the established states, (2) lands granted to Montana under the Enabling Act, and (3) other state lands (hereinafter collectively "state lands").

3. Montana entered the Union of the United States of America on November 8, 1889, as the 41st state. Upon admission to the Union, Montana acquired title to the beds and banks of navigable waters in Montana at issue herein on an equal footing with the established states.

4. Under section 10 of the Montana Enabling Act of February 22, 1889 (hereinafter the "Enabling Act"), Congress granted Montana lands to be used for the support of common schools.

5. Section 11 of the Enabling Act provides that all lands granted by it may be leased for the development of hydroelectric power, and reserves the proceeds from these lands for public purposes:

> The lands hereby granted shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted.

6. The Montana Constitution accepted these lands and provided that they would be held in trust consistent with the terms of the Enabling Act and thereby creating the School Trust.

7. Under Article X, section 2(4) of the Montana Constitution, "[a]ll grants of land or money made from the United States for general educational purposes or without special purpose" are part of the public school fund and are considered state lands.

8. Under Article X, section 11(1) of the Montana Constitution, Montana holds all state lands in trust:

> All lands of the state that have been or may be granted by congress, or acquired by gift or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of

> as hereafter provided for the respective purposes for which they have been or may be granted, donated, or devised.

9. Montana may not dispose of any interest in state lands unless "the full market value of the estate or interest disposed of, to be ascertained in such manner as provided by law, has been paid or safely secured to the states." Mont. Const. art. X, § 11(2).

10. Although Montana law prohibits the sale of "state lands constituting power sites or parts of power sites capable of developing hydroelectric energy in commercial quantities," Mont. Code Ann. § 77-4-201, both Montana law and the Enabling Act authorize the leasing of state lands for the development of power sites for periods of up to 50 years. Mont. Code Ann. § 77-4-208.

11. The term "power site," as provided under Montana law, includes "not only the state-owned land on which the dam is constructed, but also each separate tract of such land which will become part of the reservoir and which in and of itself makes an essential contribution to the value of the power site as a whole of not less than 5 percent of the entire value of such power site." Mont. Code Ann. § 77-4-202.

12. Montana law requires that rental payments on leases for power sites "must be paid annually or semiannually and such rental shall not be less than the fair market value of the estate interest disposed of through the granting of the lease or license, such

value to be carefully ascertained from all available sources." Mont. Code Ann. § 77-4-208.

13. Montana law also provides for the joint leasing of power sites with the federal government under which the state's share "must be in proportion to the total contribution that the lands of the state make to the value of the entire power site." Mont. Code Ann. § 77-4-210.

14. Montana requires the owners of power sites, including federally licensed power sites, to pay the fair market value for a lease of or other interest in those state lands that the power sites occupy. Mont. Code Ann. §§ 77-4-208 & -210.

15. Plaintiff Avista Corporation owns the Noxon Rapids Dam, a 466 megawatt facility built in 1959 on the Clark Fork River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

16. Plaintiff PPL Montana owns the Thompson Falls Dam, a 90 megawatt facility built in 1915 on the Clark Fork River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

17. Plaintiff PPL Montana owns the Ryan Dam, a 60 megawatt facility built in 1915 on the Missouri River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

18. Plaintiff PPL Montana owns the Cochrane Dam, a 54 megawatt facility built in 1958 on the Missouri River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

19. Plaintiff PPL Montana owns the Holter Dam, a 50 megawatt facility built in 1918 on the Missouri River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

20. Plaintiff PPL Montana owns the Morony Dam, a 48 megawatt facility built in 1930 on the Missouri River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive

lease payments or other forms of compensation for the use of these state lands.

21. Plaintiff PPL Montana owns the Rainbow Dam, a 35 megawatt facility built in 1910 on the Missouri River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

22. Plaintiff PPL Montana owns the Black Eagle Dam, an 18 megawatt facility built in 1891 on the Missouri River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

23. Plaintiff PPL Montana owns the Hauser Dam, a 17 megawatt facility built in 1907 on the Missouri River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

24. Plaintiff PPL Montana owns the Madison Dam, a 9 megawatt facility built in 1906 on the Madison River, a navigable river. Montana has never been reimbursed for the value of the interest in the

state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

25. Plaintiff PacifiCorp owns the Bigfork Dam, a 4 megawatt facility built in 1910 on the Swan River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

26. Plaintiff PPL Montana owns the Hebgen Dam, a storage facility built in 1915 on the Madison River, a navigable river. Montana has never been reimbursed for the value of the interest in the state lands upon which the power site and its appurtenances are located, and presently does not receive lease payments or other forms of compensation for the use of these state lands.

27. Montana owns the bed and banks of each of the foregoing navigable rivers on which the foregoing power sites are located.

28. Montana owns other state lands, granted to it under the Enabling Act or otherwise acquired, that the foregoing power sites occupy and submerge.

29. Montana has been injured by the Plaintiffs' failure to pay the fair market value for use of these state lands as power sites, including but not limited

to those sites listed above, and are entitled to an award of damages including but not limited to compensatory and remedial damages, and an award of interest to avoid injustice.

COUNT ONE

(DECLARATORY RELIEF)

30. Montana incorporates the foregoing allegations herein, as if set forth in full.

31. Montana is entitled to a declaration of this Court, pursuant to Montana's ownership rights and the Hydroelectric Resources statute, Mont. Code Ann. § 77-4-201, *et seq.*, that Plaintiffs' power sites occupy or submerge lands owned by Montana, and Plaintiffs must compensate Montana for the use of such lands.

COUNT TWO

(UNCOMPENSATED USE OF STATE LAND)

32. Montana incorporates the foregoing allegations herein, as if set forth in full.

33. Plaintiffs have entered upon and used state lands as power sites. Montana law, including Mont. Code Ann. § 77-4-201, *et seq.*, requires Plaintiffs to pay to Montana full market value for the use of these lands in the form of annual or semi-annual lease payments.

34. Plaintiffs's failure to make such payments to Montana has injured Montana. This injury entitles

Montana to an award of damages in the amount of these unpaid leases, including an award of interest on such damages to avoid injustice.

COUNT THREE

(UNJUST ENRICHMENT)

35. Montana incorporates the foregoing allegations herein, as if set forth in full.

36. Plaintiffs have received, through occupation and use of state lands, substantial financial benefits by using these state lands as power sites.

37. Plaintiffs wrongfully have failed to reimburse Montana for use of its lands as power sites, in violation of its ownership rights and Mont. Code Ann. § 77-4-201, *et seq.*, which requires annual or semi-annual payments of full market value for the use of any state lands as a power site. Through this unlawful use and occupation of state lands, Plaintiffs unjustly have been enriched at the expense of Montana.

38. As a result of this unjust enrichment, Montana has suffered injury that entitles Montana to restitution and other compensation in amounts as will be just to compensate Montana fully, including an award of interest on such damages to avoid injustice.

COUNT FOUR

(TRESPASS)

39. Montana incorporates the foregoing allegations herein, as if set forth in full.

40. Plaintiffs intentionally have entered upon and occupy state lands without compensating Montana. Plaintiffs intentionally have constructed power sites upon state lands without compensating Montana. These actions have injured Montana.

41. Plaintiffs' actions constitute a past and continuing trespass.

42. Plaintiffs' trespass entitles Montana to an award of compensatory damages and restitution, including an award of interest on such damages to avoid injustice.

COUNT FIVE

(NEGLIGENCE)

43. Montana incorporates the foregoing allegations herein, as if set forth in full.

44. Plaintiffs have a duty to determine the rightful owners of properties to be used for power sites and to reimburse and compensate such owners for the use of those sites. Plaintiffs negligently have failed to determine the proper owners of property on which Plaintiffs' power sites are located and negligently have failed to reimburse those owners, namely Montana.

45. As a result of this negligence, Montana has been damaged and Plaintiffs are liable for restitution and compensatory damages to Montana, including an award of interest on such damages to avoid injustice.

PRAYER FOR RELIEF

WHEREFORE, Montana prays for judgment in its favor as follows:

1. For a declaration that Plaintiffs' power sites occupy or submerge lands owned by Montana, that Plaintiffs' failure to compensate Montana for their use of these lands is unlawful, and that Plaintiffs must compensate Montana for the past and present use of such lands;

2. For damages, in the form of compensation to Montana in an amount to be determined at trial, for Plaintiffs' use of state lands as power sites without payment to Montana;

3. For restitution, in the form of compensation to Montana in an amount to be determined at trial, for Plaintiffs' unjust enrichment to the detriment of Montana, by virtue of its past and ongoing failure to compensate Montana for their use of state lands;

4. For damages, in the form of compensation to Montana in an amount to be determined at trial, for Plaintiff's trespass upon state lands, including benefit derived;

5. For damages, in the form of compensation to Montana in an amount to be determined at trial, for Plaintiffs' negligence in breaching its duty to compensate Montana for their use of state lands;

6. For interest on damages and restitution awarded, as required to avoid injustice;

7. For such other relief to which Montana may be entitled under law, or which is just and equitable.

Respectfully submitted this 24th day of November, 2004.

MIKE McGRATH
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Brian M. Morris
BRIAN M. MORRIS
Solicitor

Robert L. Sterup, Jr.
Kyle Anne Gray
HOLLAND & HART LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59101-1200
Telephone: (406) 252-2166
Facsimile: (406) 252-1669

Paul J. Lawrence [Montana Bar No. 7235]
Preston Gates & Ellis LLP
Suite 2900
925 Fourth Avenue
Seattle, WA 98104
Phone: (206) 623-7580
Fax: (206) 623-7022

Attorneys for Plaintiff
PPL MONTANA, LLC

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

PPL MONTANA, LLC, a Delaware Limited Liability Company; and AVISTA CORPORATION, a Washington corporation; PACIFICORP, an Oregon corporation. Plaintiffs, v. STATE OF MONTANA, Defendant.	Cause No. CDV 2004-846 **PLAINTIFF PPL MONTANA, LLC'S ANSWER TO DEFENDANT'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES**

Plaintiff PPL Montana, LLC ("PPL") answers Defendant State of Montana's counterclaims as follows:

1. Answering Paragraph 1 of the State's Counterclaims, PPL admits that the State seeks declaratory relief and seeks damages. Except as so admitted, PPL denies that the law requires compensation to the State for use of its riverbeds in connection with the production of hydropower and further denies that PPL's past and ongoing occupation of these lands is unlawful.

2. PPL admits the allegations in Paragraph 2, except for the statement that the beds and banks of the navigable waterways in Montana were "granted" to the State upon its admission to the Union. The beds of navigable waterways "vested" in the State under the Equal Footing doctrine and are not legally distinguishable from "other state lands".

3. PPL admits the allegation in the first sentence of Paragraph 3. PPL admits that Montana acquired title to the beds and banks of navigable waters in Montana under the Equal Footing Doctrine, but the State's title is subject to the dominant federal navigational servitude.

4. Answering Paragraph 4, PPL admits that section 10 of the Montana Enabling Act of February 22, 1889 granted Montana certain lands to be used for the support of common schools.

5. PPL asserts that section 11 of the Enabling Act was amended in 1932 and that this amendment to section 11 of the Enabling Act speaks for itself and denies the allegation in Paragraph 5 to the extent they seek to interpret or misconstrue the requirements or intent of the Act.

6. PPL denies the allegations of Paragraph 6 and asserts that through Ordinance No. 1, approved February 22, 1889, the State accepted certain lands.

7. PPL admits that the allegations of Paragraph 7 recite a portion of the current constitution but denies that the quotation is complete and further denies that the current constitution, rather than the 1889 Montana Constitution, governs this matter.

8. PPL admits that the allegations of Paragraph 8 recite a portion of the current constitution but denies the characterization of the provision and further denies that the current constitution, rather than the 1889 Montana Constitution, governs this matter.

9. PPL admits that the allegations of Paragraph 9 recite a portion of the current constitution but denies the characterization of the provision and further denies that the current constitution, rather than the 1889 Montana Constitution, governs this matter.

10. PPL admits that the State accurately recites a portion of Mont. Code Ann. § 77-4-201 but otherwise denies the allegations of Paragraph 10. Mont. Code

Ann. § 77-4-201 and the Enabling Act speak for themselves.

11. Answering Paragraph 11, PPL admits that the State accurately recites a portion of Mont. Code Ann. § 77-4-202, but asserts the statute speaks for itself and denies the allegations in Paragraph 11 to the extent they contain a legal conclusion.

12. Answering Paragraph 12, PPL admits that the State accurately recites a portion of Mont. Code Ann. § 77-4-208, but asserts the statute speaks for itself and denies the allegations in Paragraph 12 to the extent they contain a legal conclusion.

13. Answering Paragraph 13, PPL admits that the State accurately recites a portion of Mont. Code Ann. § 77-4-210 but asserts the statute speaks for itself and further denies the allegations in Paragraph 13 to the extent they contain a legal conclusion.

14. PPL denies the allegations of Paragraph 14, asserts that Mont Code Ann. §§ 77-4-208-210 speaks for itself and further denies the allegations in Paragraph 14 to the extent they contain a legal conclusion.

15. PPL lacks information sufficient to form a belief regarding the truth of the allegations in Paragraph 15.

16. PPL admits the first sentence in Paragraph 16, except that PPL denies that the State has accurately stated the capacity of the Thompson Falls Dam. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in

Paragraph 16 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

17. PPL admits the first sentence in Paragraph 17, except that PPL denies that the State has accurately stated the capacity and the construction dates of the Ryan Dam. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in Paragraph 17 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

18. PPL admits the first sentence in Paragraph 18, except that PPL denies that the State has accurately stated the capacity and the construction dates of the Cochrane Dam. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in Paragraph 18 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

19. PPL admits the first sentence in Paragraph 19, except that PPL denies that the State has accurately stated the capacity and the construction dates of the Holter Dam. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in Paragraph 19 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

20. PPL admits the first sentence in Paragraph 20, except that PPL denies that the State has accurately stated the capacity and the construction dates of the Morony Dam. PPL lacks information sufficient

to form a belief regarding the truth of the remaining allegations in Paragraph 20 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

21. PPL admits the first sentence in Paragraph 21, except that PPL denies that the State has accurately stated the capacity and the construction dates of the Rainbow Dam. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in Paragraph 21 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

22. PPL admits the first sentence in Paragraph 22, except that PPL denies that the State has accurately stated the capacity and the construction dates of the Black Eagle Dam. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in Paragraph 22 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

23. PPL admits the first sentence in Paragraph 23, except that PPL denies that the State has accurately stated the capacity and the construction dates of the Hauser Dam. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in Paragraph 23 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

24. PPL admits the first sentence in Paragraph 24, except that PPL denies that the State has

accurately stated the capacity and the construction dates of the Madison Dam. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in Paragraph 24 but denies that PPL has a legal obligation to compensate the State for use of the riverbeds.

25. PPL lacks information sufficient to form a belief regarding the truth of the allegations in Paragraph 25.

26. PPL admits the first sentence in Paragraph 26. PPL lacks information sufficient to form a belief regarding the truth of the remaining allegations in Paragraph 26 but denies that PPL has a legal obligation to compensate the State for use of the lands underneath the Hebgen storage facility.

27. PPL admits that title to the beds and banks of the navigable riverbeds within the Montana vested in the State upon admission to the Union and that this ownership is subject to the federal government's dominant navigational servitude. PPL is without information sufficient to form a belief regarding whether the State presently owns all the beds and banks within Montana or whether it has alienated any of these lands.

28. PPL lacks information sufficient to form a belief regarding the truth of the allegations in Paragraph 28.

29. Paragraph 29 contains a legal conclusion for which no response from PPL is required. To the

extent a response is required, PPL denies the allegations contained in Paragraph 29.

30. Paragraph 30 incorporates the State's previous allegations and requires no response.

31. Paragraph 31 contains a legal conclusion for which no response from PPL is required. To the extent a response is required, PPL denies the allegations contained in Paragraph 31.

32. Paragraph 32 incorporates the State's previous allegations and requires no response.

33. PPL is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of Paragraph 33 and accordingly denies these allegations. PPL further asserts that to the extent it has entered upon or occupied state lands, such entry or occupation is lawful. PPL otherwise denies the allegations in Paragraph 33.

34. Paragraph 34 contains a legal conclusion for which no response from PPL is required. To the extent a response is required, PPL denies the allegations contained in Paragraph 34.

35. Paragraph 35 incorporates the State's previous allegations and requires no response.

36. Paragraph 36 contains a legal conclusion for which no response from PPL is required. To the extent a response is required, PPL denies the allegations contained in Paragraph 36.

37. PPL denies the allegations in Paragraph 37.

38. Paragraph 38 contains a legal conclusion for which no response from PPL is required. To the extent a response is required, PPL denies the allegations contained in Paragraph 38.

39. Paragraph 39 incorporates the State's previous allegations and requires no response.

40. PPL denies the allegations in Paragraph 40.

41. Paragraph 41 contains a legal conclusion for which no response from PPL is required, but, to the extent a response is required, PPL denies that its actions constitute a "past and continuing trespass."

42. Paragraph 42 contains a legal conclusion for which no response from PPL is required, but, to the extent a response is required, PPL denies that the State is entitled to the requested damages or other relief.

43. Paragraph 43 incorporates the State's previous allegations and requires no response.

44. Paragraph 44 contains legal conclusions for which no response from PPL is required. To the extent a response is required, PPL denies the allegations in Paragraph 44.

45. Paragraph 45 contains legal conclusions for which no response from PPL is required, but, to the extent a response is required, PPL denies that the State is entitled to the requested damages or other relief.

46. PPL denies the remaining allegations in the State's Complaint and Prayer for Relief, including the allegations contained in the Prayer for Relief 1 through 7.

FIRST AFFIRMATIVE DEFENSE

The State's Complaint fails to state a cause of action for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The State's claims are barred by the doctrines of estoppel and waiver.

THIRD AFFIRMATIVE DEFENSE

The State's claims are barred by the applicable statute of limitations or statute of repose.

FOURTH AFFIRMATIVE DEFENSE

The State's claims are barred under the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

The State's claims are barred by prescriptive easement and/or adverse possession.

SIXTH AFFIRMATIVE DEFENSE

The State's claims are barred by accord and satisfaction.

SEVENTH AFFIRMATIVE DEFENSE

The State's claims are barred by license.

EIGHTH AFFIRMATIVE DEFENSE

The State's claims are preempted in whole or in part.

NINTH AFFIRMATIVE DEFENSE

Should the Court find PPL acted negligently, which negligence PPL denies, the State's claims are barred because its negligence exceeds that of PPL. Regardless, the State's negligence must be compared to that of the other parties, and any damages awarded must be reduced in proportion to the State's negligence in accordance with Montana Code Annotated § 27-1-702.

TENTH AFFIRMATIVE DEFENSE

The State's claims are barred because PPL was not the proximate cause of the State's alleged damages.

ELEVENTH AFFIRMATIVE DEFENSE

The State's claims are barred by its failure to exercise reasonable care to protect its interests and to mitigate its alleged damages.

WHEREFORE, PPL prays as follows:

1. For an order dismissing the Defendant's counterclaims with prejudice;

2. For an award of attorneys fees and costs to the extent permitted by law; and

3. For such other and further relief as is just and equitable.

DATED this 4th of February, 2005.

HOLLAND & HART LLP

By /s/ Kyle A. Gray
Robert L. Sterup
Kyle Anne Gray

PRESTON GATES & ELLIS LLP
Paul J. Lawrence
Attorneys for Plaintiff
PPL MONTANA, LLC

STATE'S APPENDIX: EVIDENCE OF STATE TITLE TO RIVERBEDS

a. The Utilities' Admissions in This State and Federal Litigation

1. Clark Fork

Thompson Falls (PPL) Noxon – Cabinet (Avista)

"PPL Montana owns the Thompson Falls Dam . . . built . . . on the Clark Fork River, a navigable river." PPL's Answer ¶ 16 & State's Countercl. ¶ 16

"The Noxon Ra[p]ids Dam is located on the Clark Fork River, a navigable river, and is owned by Avista Corporation." Compl. ¶18

"The Clark Fork River is a navigable river." PPL's Fed. Answer ¶ 25 & Fed. Amend. Compl. ¶ 25, Johnstone Aff. Ex. A

"[T]he Clark Fork Project . . . includes the Noxon Rapids Dam located in Montana on the Clark Fork River, a navigable waterway." Avista's Fed. Mot. to Dismiss Br. at 3, Johnstone Aff. Ex. C

"PPL admits that Montana acquired title to the bed and banks of navigable waters in Montana under the Equal Footing Doctrine." PPL's Answer ¶ 3

"It is undisputed that title to the beds of its navigable waterways vested in Montana subject to the federal government's navigational easement and Commerce Clause power." PPL's Fed. Mot. to Dismiss Reply 10, Johnstone Aff. Ex. B

"Avista does not dispute that the State owns the beds of navigable rivers in Montana." Avista's Fed. Mot. to Dismiss State-Intervenor Br. 10, Johnstone Aff. Ex. E

"Montana's beds and banks vested in the state upon its admission to the Union subject to the federal navigational easement . . . " PPL's Fed. Mot. to Dismiss Reply 6, Johnstone Aff. Ex. B

"The State holds title to navigable waters and the lands therein subject to the Federal Navigational Servitude." Avista's Fed. Mot. to Dismiss Br. 18, Johnstone Aff. Ex. C

"The state holds title to navigable waters in trust for the broader public purposes set forth in the public trust doctrine." Avista's Fed. Mot. to Dismiss Br. 15, Johnstone Aff. Ex. C

"[L]ands beneath navigable waterways . . . are state-owned lands governed by the public trust doctrine." Avista's Fed. Mot. to Dismiss Reply 2, Johnstone Aff. Ex. D

"PPL admits that title to the beds and banks of the navigable riverbeds within [ ] Montana vested in the State upon admission to the Union and that this ownership is subject to the federal government's dominant navigational servitude. PPL is without information sufficient to form a belief regarding whether the State presently owns all the beds and banks within Montana or whether it has alienated any of these lands." PPL's Answer ¶ 27

2. Madison

Hebgen – Madison (PPL)

"PPL Montana owns the Madison Dam . . . built . . . on the Madison River, a navigable river." PPL's Answer ¶ 16 & State's Countercl. ¶ 16

"The Madison River is a navigable River." PPL's Fed. Answer ¶ 34 & Fed. Amend. Compl. ¶¶ 34, Johnstone Aff. Ex. A

"PPL admits that Montana acquired title to the bed and banks of navigable waters in Montana under the Equal Footing Doctrine . . . " PPL's Answer ¶ 3

"It is undisputed that title to the beds of its navigable waterways vested in Montana subject to the federal government's navigational easement and Commerce Clause power." PPL's Fed. Mot. to Dismiss Reply 10, Johnstone Aff. Ex. B

"Montana's beds and banks vested in the state upon its admission to the Union subject to the federal navigational easement . . ." PPL's Fed. Mot. to Dismiss Reply 6, Johnstone Aff. Ex. B

"The riverbeds and banks, while state lands, are not part of the school trust, and thus no compensation is required to that trust." PPL's Fed. Mot. to Dismiss Reply 15, Johnstone Aff. Ex. B

"PPL admits that title to the beds and banks of the navigable riverbeds within [ ] Montana vested in the State upon admission to the Union and that this ownership is subject to the federal government's

dominant navigational servitude. PPL is without information sufficient to form a belief regarding whether the State presently owns all the beds and banks within Montana or whether it has alienated any of these lands." PPL's Answer ¶ 27

3. Upper Missouri

Hauser – Holter (PPL)

"PPL Montana owns the [Hauser / Holter] Dam . . . built . . . on the Missouri River, a navigable river." PPL's Answer ¶¶ 19, 23 & State's Countercl. ¶¶ 19, 23

"The Missouri River is a navigable River." PPL's Fed. Answer ¶¶ 26-32, 34 & Fed. Amend. Compl. ¶¶ 26-32, 34, Johnstone Aff. Ex. A

"PPL admits that Montana acquired title to the bed and banks of navigable waters in Montana under the Equal Footing Doctrine . . . " PPL's Answer ¶ 3

"It is undisputed that title to the beds of its navigable waterways vested in Montana subject to the federal government's navigational easement and Commerce Clause power." PPL's Fed. Mot. to Dismiss Reply 10, Johnstone Aff. Ex. B

"Montana's beds and banks vested in the state upon its admission to the Union subject to the federal navigational easement . . . " PPL's Fed. Mot. to Dismiss Reply 6, Johnstone Aff. Ex. B

"The riverbeds and banks, while state lands, are not part of the school trust, and thus no compensation is

required to that trust." PPL's Fed. Mot. to Dismiss Reply 15, Johnstone Aff. Ex. B

"PPL admits that title to the beds and banks of the navigable riverbeds within [] Montana vested in the State upon admission to the Union and that this ownership is subject to the federal government's dominant navigational servitude. PPL is without information sufficient to form a belief regarding whether the State presently owns all the beds and banks within Montana or whether it has alienated any of these lands." PPL's Answer ¶ 27

4. **Mid-Missouri**

Black Eagle – Rainbow – Cochrane – Ryan – Morony (PPL)

"PPL Montana owns the [Black Eagle / Cochrane / Morony / Rainbow / Ryan] Dam . . . built . . . on the Missouri River, a navigable river." PPL's Answer ¶¶ 17-18, 20-22 & State's Countercl. ¶¶ 17-18, 20-22

"The Missouri River is a navigable River." PPL's Fed. Answer ¶¶ 26-32, 34 & Fed. Amend. Compl. ¶¶ 26-32, 34, Johnstone Aff. Ex. A

"PPL admits that Montana acquired title to the bed and banks of navigable waters in Montana under the Equal Footing Doctrine . . . " PPL's Answer ¶ 3

"It is undisputed that title to the beds of its navigable waterways vested in Montana subject to the federal government's navigational easement and Commerce

Clause power." PPL's Fed. Mot. to Dismiss Reply 10, Johnstone Aff. Ex. B

"Montana's beds and banks vested in the state upon its admission to the Union subject to the federal navigational easement . . . " PPL's Fed. Mot. to Dismiss Reply 6, Johnstone Aff. Ex. B

"The riverbeds and banks, while state lands, are not part of the school trust, and thus no compensation is required to that trust." PPL's Fed. Mot. to Dismiss Reply 15, Johnstone Aff. Ex. B

"PPL admits that title to the beds and banks of the navigable riverbeds within [ ] Montana vested in the State upon admission to the Union and that this ownership is subject to the federal government's dominant navigational servitude. PPL is without information sufficient to form a belief regarding whether the State presently owns all the beds and banks within Montana or whether it has alienated any of these lands." PPL's Answer ¶ 27

* * *

b. Judicial and Administrative Decisions & Legal Opinions

1. Clark Fork

"It is a matter of common knowledge that Clark's Fork of the Columbia River is a navigable stream, and that grants of public lands lying along its course are bounded on that side by the line of the stream at low water." *Interstate Power Co. v. Anaconda Copper Mining Co.*, 52 Mont. 509, 513 (1916).

"The section of the Clark Fork River between Pend Oreille Lake in Idaho and the mouth of the Jocko River in Montana was used for the transportation of persons and property between areas now constituting the states of Oregon, Idaho, and Montana from 1810 to 1870, such use being canoe and batteaux transportation of furs by the fur traders of the British Northwest Fur Co., the canoe transportation of the original missionaries to the Indian tribes in the Clark Fork basin, and with the use of short portages around the Cabinet Rapids and Rock Island Rapids, by steamboats of the Oregon Steam Navigation Co. and its subsidiary, the Oregon & Montana Navigation Co. in the carriage of substantial numbers of gold miners, their pack animals and supplies, as well as commercial freight consigned to the gold camps in the vicinity of what is now Helena, Mont." *The Montana Power Co,* Project No. 1869, 8 FPC 751 at Finding 13 (1949) (Thompson Falls Original License)

"[T]he Clark Fork River is a navigable water of the United States at least from the Pend Oreille Lake in the State of Idaho to the mouth of the Jocko River in the State of Montana." *Washington Water Power Co.,* Project No. 2058, 10 FPC 657 (1951) (Cabinet Gorge Original License)

"Clark Fork is a navigable water of the United States, at least from Pend Oreille Lake in Idaho to the mouth of the Jocko River in Montana, within which stretch proposed Project No. 2075 is to be located." *Washington Water Power Co.,* Project No. 2075, 14 FPC 731 (1955) (Noxon Rapids Original License)

"[T]he state gained an unrestricted title to the [Thompson Falls Project] riverbeds in question immediately upon its entry into the Union in 1889." *Rights to Use of State-Owned Land* (Montana Power Company 1999), Ellingson Aff. Ex. A

2. Madison

"The property runs along the west bank of the Madison River and is connected to the west bank by the bridge in question. . . . The [other] property runs along the east bank of the Madison River." *Kelly v. Wallace,* 1998 MT 307, ¶¶ 19-20 (Mont. 1998)

"All of the pastures are bordered to the north by the Madison River." *Indendi v. Workman,* 272 Mont. 64 (Mont. 1995)

"[T]he state gained an unrestricted title to the [Missouri-Madison Project] riverbeds in question immediately upon its entry into the Union in 1889." *Rights to Use of State-Owned Land* (Montana Power Company 1999), Ellingson Aff. Ex. A

3. Upper Missouri

"[T]he Missouri River, throughout its entire length, is a navigable water of the United States. . . . [Between Fort Benton and Three Forks], a number of exploratory and Government survey trips were made in manually-powered craft of various sizes. . . . . In 1872 . . . [a]fter descending the River from Three Forks to

Benton in a skiff, [Northern Pacific engineer Thomas P.] Roberts concluded that the Missouri above Benton could be relied upon for navigation without improvement, and his report supported a plan for a steamboat link between Benton and Three Forks, trans-shipping freight around the Falls. In the period from 1867 until around 1900, there was extensive intrastate use of the River between Stubbs Ferry (mile 2390), which is 85 miles below Three Forks, and the City of Great Falls (mile 2260) for the downstream transportation of loose logs and large rafts of lumber. . . . [M]ackinaw boats were used as a customary and ordinary means for transporting passengers from Helena to Benton and beyond on their way to the States." *In re Montana Power Company*, IT-5840, 7 FPC 163 (FPC 1948)

"[T]he record reveals that in 1866-67, several steamboats sailed as far as thirty miles above Fort Benton, almost up to the falls. And the river above the falls was used for the transportation of logs and rafts of lumber as well as for local carriage of freight and passengers. The only reported use of the entire length of the upper river for through traffic from above the falls to Fort Benton below occurred from 1864 to 1870. During that period, gold miners in considerable number traveled downstream with the aid of a portage or 'land carriage' around the falls. . . . [T]he 263 mile stretch of the Missouri River from Fort Benton to Three Forks is a 'navigable water of the United States,' and hence subject to the licensing requirements of the Federal Power Act." *Montana*

Power Co. v. FPC, 185 F.2d 491, 493-94, 495 (D.C. Cir. 1950)

"[T]he Missouri River is a navigable stream [at location in Lewis & Clark County]." *Herrin v. Sutherland,* 74 Mont. 587, 594 (1925)

"[T]he state gained an unrestricted title to the [Missouri-Madison Project] riverbeds in question immediately upon its entry into the Union in 1889." *Rights to Use of State-Owned Land* (Montana Power Company 1999), Ellingson Aff. Ex. A

4. Mid-Missouri

"[T]he Missouri River, throughout its entire length, is a navigable water of the United States. . . . [Between Fort Benton and Three Forks], a number of exploratory and Government survey trips were made in manually-powered craft of various sizes. . . . . In 1872 . . . [a]fter descending the River from Three Forks to Benton in a skiff, [Northern Pacific engineer Thomas P.] Roberts concluded that the Missouri above Benton could be relied upon for navigation without improvement, and his report supported a plan for a steamboat link between Benton and Three Forks, trans-shipping freight around the Falls. In the period from 1867 until around 1900, there was extensive intrastate use of the River between Stubbs Ferry (mile 2390), which is 85 miles below Three Forks, and the City of Great Falls (mile 2260) for the

downstream transportation of loose logs and large rafts of lumber. . . . [M]ackinaw boats were used as a customary and ordinary means for transporting passengers from Helena to Benton and beyond on their way to the States." *In re Montana Power Company,* IT-5840, 7 FPC 163 (FPC 1948)

"[T]he record reveals that in 1866-67, several steamboats sailed as far as thirty miles above Fort Benton, almost up to the falls. And the river above the falls was used for the transportation of logs and rafts of lumber as well as for local carriage of freight and passengers. The only reported use of the entire length of the upper river for through traffic from above the falls to Fort Benton below occurred from 1864 to 1870. During that period, gold miners in considerable number traveled downstream with the aid of a portage or 'land carriage' around the falls. . . . [T]he 263 mile stretch of the Missouri River from Fort Benton to Three Forks is a 'navigable water of the United States,' and hence subject to the licensing requirements of the Federal Power Act." *Montana Power Co. v. FPC,* 185 F.2d 491, 493-94, 495 (D.C. Cir. 1950)

"[T]he title of one owning land bounded simply by a navigable river [the Missouri above Fort Benton] extends to the ordinary low-water mark." *Gibson v. Kelly,* 15 Mont. 417, 423 (1895)

"[T]he state gained an unrestricted title to the [Missouri-Madison Project] riverbeds in question immediately upon its entry into the Union in 1889." *Rights to*

Use of State-Owned (Montana Power Company 1999), Ellingson Aff. Ex. A

* * *

c. Land Records

1. Clark Fork

Thompson Falls Project deeded lands run "to a point on the low water line on the South side of the Clark's Fork of the Columbia River," *e.g.*, Kinnard Aff. Ex. N. at WD00109

Cabinet Gorge Project deeded lands run "to the north bank of the Clarks Fork River," *e.g.*, Malasani Aff. CD at AC001271

Noxon Project deeded lands "bounded . . . on the South by the Clark's Fork River," *e.g.*, Malasani Aff. CD at 1723

Cadastral maps show property boundaries "abut the Clark Fork River," Young Aff. Exs. C & N

2. Madison

Madison Project deeded lands "[b]egin[ ] at a point on the East side of the Madison River," *e.g.*, Kinnard Aff. Ex. N at WD00094

Cadastral maps offered by PPL show property boundaries "abut the Hebgen Reservoir on the Madison River," Young Aff. Exs. J, L, S, X, & Y

Cadastral maps show property boundaries "abut the Madison River," Young Aff. Exs. H, Q, R, & T

3. Upper Missouri

Hauser Project deeded lands run "along the bank of the Missouri River," *e.g.*, Kinnard Aff. Ex. N at WD00018

Holter Project deeded lands run "to the right bank of the Missouri River," *e.g.*, Kinnard Aff. Ex. N at WD00042

Cadastral maps show property boundaries "abut Hauser Lake," Young Aff. Exs. U & W

4. Mid-Missouri

Black Eagle, Rainbow, Cochrane, Ryan, and Morony lands run "to the low water line of the Missouri River," *e.g.*, Kinnard Aff. Ex. N at WD00066

Cadastral maps show property boundaries "abut the Missouri River," Young Aff. Exs. E, F &V

* * *

d. U.S. Army Corps of Engineers Reports and Other Studies

1. Clark Fork

"Dr. Suckley, while connected with the Pacific Railroad surveys, started October 15, 1853, from Fort Owen on the Bitter Root River in a canoe made from three bullocks' hides, and a crew of two white men and an Indian. . . . About sixty miles below the mouth of the Hell Gate, the mountains crowd close upon the

river, making it very rapid, but further down it is straighter, deeper, and more sluggish, with large flats on one or both sides. The Horse Plains are just below the junction of the Flathead River with Clarke's Fork, and from this point to Saint Ignatius Mission he proceeded, passing through the [Pend d'Oreille] lake and making two portages. He says that the Hudson Bay Company were formerly in the habit of carrying up their goods from the foot of Pend d'Oreille Lake to Horse Plains [below the junction of the Flathead River] in large boats, making two portages on the way. . . . Above the Cabinet [Gorge] the river would be excellent for rafting purposes." *Report Respecting the Navigable Waters of the Upper Columbia River and Its Tributaries,* 13, 18 (War Dept., 1882); Strong Aff. Ex. 1

"Four miles above Cabinet Can[y]on are the Heron Rapids, which are swift and rocky, but which could be run [by a steamer] at high water. About 18 miles above Heron Rapids are the Rock Island Rapids, which could also be run at high water, but which are impassible at low-water stretches. From Rock Island there is a stretch of about 25 or 30 miles of comparatively good water to the foot of the can[y]on in which are the Thompson Falls." *Preliminary Examination of Clarke Fork* (U.S. Army Corps of Engineers, 1891), Strong Aff. Ex. 2; Emmons Aff. Ex. N

"During about one month out of each year the current of the river is of such high velocity that no sort of navigation is possible. . . . Past commerce: From about 1900 until 1929 logs were floated down Clark

Fork River on rising water in the spring, rafted where the river empties into Pend Oreillle Lake, and towed by tug boats to lumber mills on the lake. About 5 million feet of timber was floated during the last drive in 1929. Logs have been floated from as far upstream as Dixon, Montana, on the Flathead River, about 22 miles above where that river empties into the Clark Fork near Paradise, Montana, which town is more than 100 miles above Pend Oreille Lake. . . . [D]uring the construction of the Northern Pacific Railway, small boats engaged in the construction work made trips to Cabinet Gorge. . . . " *Report of Navigability of the Clark Fork River Above Pend Oreille Lake,* 2 (U.S. Army Corps of Engineers, 1932), Strong Aff. Ex. 4

"Our research has shown that steamboat navigation occurred on the Clark Fork as far upstream as Thompson Falls, Montana, and that other forms of commercial navigation occurred as far upstream as the mouth of the Blackfoot River." *Report on Navigability of the Clark Fork of the Columbia River, Idaho and Montana,* 22 (For U.S. Army Corps of Engineers, 1975), Mason Aff. Ex. B

"[T]he Department [of Fish Wildlife, and Parks] estimates that in 2003 approximately 8800 angler-days were floated in boats on the section of the Clark Fork River between the Flathead River and the Idaho State Line." McFarland Aff. ¶ 3

2. Madison

"Historical material documents navigation on only one section of the Madison River. Yet, the potential use of the river for navigation is tied intricately to the obstructions of the Madison Dam, Earthquake fill and Hebgen Dam. This situation warrants a recommendation of navigability for the entire Madison River from its boundary with Yellowstone Park to its confluence with the Missouri River." *Madison River Navigation Study,* 16 (For U.S. Army Corps of Engineers, 1974), Mason Aff. Ex. C

"[T]he Department [of Fish, Wildlife and Parks] estimates that in 2003 approximately 47,000 angler-days were floated in boats on the Madison River. . . . The section of the Madison River between Hebgen Dam and Ennis Lake was the most heavily used section of river in Montana. . . . [T]he Department estimates that in 2003 approximately 35,000 angler-days were floated in boats on the section of the Madison River between Hebgen Dam and Ennis Lake." McFarland Aff. ¶¶ 4-5

3. Upper Missouri

"Accordingly, on the basis of its past use for interstate commerce, I hereby determine that the Upper Missouri River between Fort Benton, Montana and Three Forks, Montana is a navigable river of the United States for purposes of the exercise of regulatory jurisdiction of the Corps of Engineers." *Determination of Navigability, Missouri River above Fort Benton,*

Montana (U.S. Army Corps of Engineers, 1974), Mason Aff. Ex. D (final 2 pages)

"Stubbs Ferry to Greatfalls, Mont., 130 miles, is the navigable portion above the 'Great Falls.'" *Annual Report of the Chief of Engineers, Pt.* 1, 323 (1898) Emmons Aff. Ex. L

"Historical evidence supports the contention that the Missouri River is a navigable waterway from Loma, Montana, to Three Forks, Montana. This section of river was used extensively for commercial purposes between 1860 and 1900. The presence of numerous dams on the Missouri above Fort Benton coupled with the obvious advantages of rail and highway transport restricts the future use of this section of river for commerce. However, the fact that the Upper Missouri was so heavily used for commerce in the past directs that it be classified a navigable river." *Missouri River Navigation Study*, 22 (For U.S. Army Corps of Engineers, 1974), Mason Aff. Ex. D

"[T]he Department [of Fish, Wildlife and Parks] estimates that in 2003 approximately 2,800 angler-days were floated in boats on the section of the Missouri River between Morony Dam and Cascade Bridge." McFarland Aff. ¶ 6

4. Mid-Missouri

"Accordingly, on the basis of its past use for interstate commerce, I hereby determine that the Upper

Missouri River between Fort Benton, Montana and Three Forks, Montana is a navigable river of the United States for purposes of the exercise of regulatory jurisdiction of the Corps of Engineers." *Determination of Navigability, Missouri River above Fort Benton, Montana* (U.S. Army Corps of Engineers, 1974), Mason Aff. Ex. D (final 2 pages)

"While the [Black Eagle] dam is in a stream which in the greater portion of its length is a 'navigable stream' it is situated in a portion of this stream [the Great Falls] which is not now navigable and which in all probability never will be." *Memo to Chief of Engineers* (J.C. Sanford, 1896), Emmons Aff. Ex. K

"Historical evidence supports the contention that the Missouri River is a navigable waterway from Loma, Montana, to Three Forks, Montana. This section of river was used extensively for commercial purposes between 1860 and 1900. The presence of numerous dams on the Missouri above Fort Benton coupled with the obvious advantages of rail and highway transport restricts the future use of this section of river for commerce. However, the fact that the Upper Missouri was so heavily used for commerce in the past directs that it be classified a navigable river." *Missouri River Navigation Study,* 22 (For U.S. Army Corps of Engineers, 1974), Mason Aff. Ex D

"[T]he Department [of Fish, Wildlife and Parks] estimates that in 2003 approximately 7,100 angler-days were floated in boats on the section of the

Missouri River between Holter Lake and Hauser Dam." McFarland Aff. ¶ 7

* * *

e. Montana Department of State Lands Navigability Study Conclusions

1. Clark Fork

"There are recorded instances of the Clark Fork River being navigated in small boats as high up as Deer Lodge, Montana. Log drives began west of Missoula and ran down the river to the river's mouth at Lake Pend Oreille." *Montana Navigable Waters Study,* 23 (For Dept. State Lands, 1986), Mason Aff. Ex. A

2. Madison

"Without the obstruction caused by Madison Dams 1 and 2 below Ennis[,] [i]t is safe to assume that the Madison could have been navigated from the mouth of the West Fork to its confluence with the Missouri River." *Montana Navigable Waters Study,* 52-53 (For Dept. State Lands, 1986), Mason Aff. Ex. A

3. Upper Missouri

"The Missouri River has been navigated in connection with a variety of activities and by a variety of river crafts from its headwaters at Three Forks to the Montana/North Dakota Border." *Montana Navigable Waters Study,* 58 (For Dept. State Lands, 1986), Mason Aff. Ex. A

4. Mid-Missouri

"The Missouri River has been navigated in connection with a variety of activities and by a variety of river crafts from its headwaters at Three Forks to the Montana/North Dakota Border." *Montana Navigable Waters Study,* 58 (For Dept. State Lands, 1986), Mason Aff. Ex. A

* * *

f. Historical Records

1. Clark Fork

"[Thompson] set off up the Clark Fork, crossed overland to the mouth of the Fisher River on the Kootenai, circled back down his previous course to the new Kullyspell House – and re-ascended the Clark Fork to build a second post before the year was out! . . . The new location was especially convenient to the Middle Kutenais. Ugly Head of the Flat Bows also came up the river to hunt for the White men . . . " *Flathead and Kootenay,* 186 (Johnson, 1969), Foley Aff. Ex. 5

"Between March 8 and 14 [1810], Thompson made another journey to the Salish camp [above the mouth of the Flathead River], where he built a canoe in which he returned down the river [to his Saleesh House near Thompson Falls], surveying the course of the stream as he went. A third trip to the [Salish] camp was undertaken between March 17 and 25. . . . he and the rest of the party descended the river

[to Saleesh House] in a newly constructed canoe." *David Thompson's Journals,* civ, 97-98, 102-03 (White ed., 1950), Foley Aff. Ex. 2 & Foley Supp. Aff.

"In April [1810], Thompson and his men returned [from Saleesh House] to Kullyspel House [on Pend Oreille Lake], arriving there on the twenty-first." *David Thompson's Journals,* civ, 108-11 (White ed., 1950), Foley Aff. Ex. 2 & Foley Supp. Aff.

"On the following day [March 2, 1812], he and his whole party embarked in their canoes [from the Flathead camp on the Flathead River just below the mouth of Jocko Creek] and returned to Saleesh House." *David Thompson's Journals,* cviii-ix, 215-17 (White ed., 1950), Foley Aff. Ex. 2 & Foley Supp. Aff.

"On March 13, Thompson and his men loaded their two canoes, embarked [from Saleesh House], and voyaged downstream to the place known as the north end of the 'Skeetshoo Road,' the Indian trial leading from the Pend Oreille River across to the Spokane River." *David Thompson's Journals,* cxix, 221-22 (White ed., 1950), Foley Aff. Ex. 2 & Foley Supp. Aff.

"A boat was constructed of three bullock hides stretched over a frame. With two white men and an Indian guide, Dr. Suckley left Fort Owen [near Stevensville] October 15 [1853]. The little party made excellent time and despite the hazards of the precipitous river, arrived safely at the Jesuit Mission on the upper end of Lake Pend d'Oreille, where they were hospitably received." *From Wilderness to Statehood,*

a History of Montana, 114 (Hamilton, 1957), Foley Aff. Ex. 4

"[In April 1860, Civil Engineer W.W. DeLacy of the Mullan expedition] took with [him] one of the flat bottomed boats built at the ferry, about twelve feet long, two men and rations for thirty days. . . . [he] was successful in getting the boat over all the rapids in the Bitterroot River and down Clarke's Fork about ten miles [to the mouth of the Flathead River]." *In Retrospect: A History of Mineral County,* 10 (Hahn, 1985), Foley Aff. Ex. 3

"The first steamboat to navigate the waters of western Montana was the *Mary Moody,* which in 1866 commenced operations from Lake Pend d'Oreille in Idaho up the Clark Fork of the Columbia River into Montana. Service to as far east as Thompson Falls was conducted until 1870 by a combination of vessels, each plying between sets of rapids." *The Montana Almanac, 1959-60,* 252 (Montana State University, 1958), Foley Aff. Ex. 6

"The rate of freight on this steamer is 1/2c per lb to the upper landing from whence it is taken by pack trains, no wagon road being opened. The necessity of either, however, will be obviated in about three months at the outside, as a gang of men have already gone forward for the purposes of building another steamer above the portage of seven miles which exists at this point. This second steamer will run to Thompson's Prairie." *Rocky Mountain Gazette,* August 18, 1866, Foley Aff. Ex. 7

"In 1867 two other boats were added which ran in relay, the *Cabinet* running from Cabinet landing to Rock Island Rapids, and the *Missoula* taking the passengers and freight on to Thompson Falls, the upper limit of [steamboat] navigation." *A History of Montana,* at 70 (Burlingame & Toole, 1957), Foley Aff. Ex. 1

"A scheme is also now projected to run a light boat from [Pend d'Oreille] Lake up the Pen d'Oreille [Clark Fork] river to the mouth of the Jocco, which is within a short distance of the Flathead agency." *Helena Herald,* May 2, 1867, Foley Aff. Ex. 8

"They will have their third boat completed and ready for service by the 1st of June, which will give a complete and reliable line of steamers for a distance of 125 miles, from Pen d'Oreille landing to Thompson's river. . . . Last winter, boats could have run without interruption, excepting for the very short space of ten days, when the river was closed with ice." *Helena Herald,* June 5, 1867, Foley Aff. Ex. 8

"We are informed by the agent, H.A. Hogue, that he has succeeded in getting the steamer Missoula above Rock Island, without the slightest damage, and made a successful trip to Thompson's Landing, below Thompson's Falls. . . . The boats make the down trip from Thompson's to Pen 'dOreille in one day." *Helena Herald,* Sept. 12, 1867, Foley Aff. Ex. 8

"The steamer 'Missoula' runs from Thompson's Falls sixty miles down the river to Rock Island rapids, where there is a portage of half a mile. The steamer

'Cabinet' then runs sixteen miles further down, to a portage eight miles in length, terminating at Cabinet Landing. The 'Mary Moody' then runs down the river and across the lake – fifty miles in all – to Pend d'Oreille City." *Helena Herald*, Feb. 13, 1868, Foley Aff. Ex. 8

"Because of so much travel each spring over the Clark Fork route from Hellgate on the east to Ft. Walla Walla on the west, the Oregon Steam Navigation Co. of Portland decided to put a line of Steamboats on the Clark Fork. . . . These boats continued operation throughout the year 1869. Although this particular line of steamers was discontinued, boats were in use between Noxon and Thompson Falls until after the coming of the railroad." *Sanders County Ledger*, Feb. 6, 1958, Foley Aff. Ex. 9

"The Al clipper-built and copper-fastened bark *Kangaroo,* which had been lying at our levee for several months past awaiting profitable charter, was cut loose from her moorings a few nights since, by river-pirates, and carried [off] to Cedar Creek [near Superior]." *Missoula and Cedar Creek Pioneer*, Dec. 8, 1870, Foley Aff. Ex. 11

"Thomas D. Beebe and T.L. Hodge left Frenchtown on Sunday last in an open boat, and passed and arrived at the mouth of Quartz [near Superior] on Tuesday evening, without accident. This, in connection with the cruise of the *Kangaroo* last season, and the uninterrupted transportation of hay and lumber between the Mouth of Cedar [near Superior] and the Missoula

Ferry, demonstrates the practicability of navigating the Deer Lodge, Hellgate and Missoula rivers from Deer Lodge City to the Pen d'Oreille." *Missoula Pioneer,* March 2, 1871, Foley Aff. Ex. 10

"At the end of the [railroad] track a steam boat is loaded with goods and supplies and runs to Cabinet Landing – seven miles. . . . A boat is being built, and will be completed in a month, at Rock Island, which will run to Thompson Falls, a distance of fifty miles. . . ." *Missoulian,* June 30, 1882, Foley Aff. Ex. 12

"The new [railroad] supply boat, being built at Rock Island, is expected to be running on the river between Rock Island and Thompson Falls by the first of August. She will be 130 feet in length and be outfitted with powerful machinery suitable to running the rapids which she will encounter between these points. . . . Mr. Eddy started a raft of lumber down the river a few weeks ago from Weeksville. . . ." *Missoulian*, July 7, 1882, Foley Aff. Ex. 12

"I witnessed the launching of a handsome little side-wheel steamer called the Missoula. This boat is intended to run on the Clarke's Fork of the Columbia, between the end of the track at Rock Island and Thompson's Falls, carrying freight, railroad stores, etc. . . . The boat is forty feet long and is light enough to be hauled around the falls and be re-launched on the river when the road reaches the present head of navigation." *Missoulian*, Aug. 18, 1882, Foley Aff. Ex. 12

"The line of the Northern Pacific R.R. Co. is now in operation to Rock Island, 526 miles from Portland, Oregon. Connecting with the railroad at Rock Island a commodious steamer will afford rapid transportation thirty-four miles farther east to the vicinity of Thompson river. . . ." *Missoulian*, Sept. 8, 1882, Foley Aff. Ex. 12

"[Weeksville, near Plains] is situated near the river in a body of fine timber, and when the supply of logs in the immediate neighborhood gives out, they can be floated right to the locality down the Missoula and Pen d'Oreille rivers." *Missoulian*, Feb. 24, 1882, Foley Aff. Ex. 12

"The Hope Lumber Company's men arrived here last week to drive the logs cut along the river between Eddy [above the mouth of the Thompson River] and the Idaho line to the mill at Hope." *Sanders County Ledger*, April 19, 1907, Foley Aff. Ex. 9

"Several expert log drivers left Clarksfork this week to assist in breaking up the log jam at Heron, Mont. This jam is stated by old river men to be the largest they have ever seen in the Clarks Fork River. After it is broken the men will drive the logs down the river to the sorting works at the mouth of the river." *Sanders County Ledger*, March 13, 1914, Foley Aff. Ex. 9

2. Madison

"[W]e proceeded on a fiew miles to the three forks of the Missouri those three forks are nearly of a Size,

the North fork appears to have the most water and must be Considered as the one best calculated for us to ascend middle fork [Madison] is quit as large about 90 yds wide." *Journals of Lewis & Clark Expedition, Vol. 4,* 428 (Moulton ed., 1988), Foley Aff. Ex. 13

"Messrs. Wilcox and Carroll will have charge of the drive of logs from Lyon [near the mouth of the West Fork] to the mill at the upper Varney bridge." *Madisonian,* May 9, 1913, Foley Aff. Ex. 14

"Wm. Wilcox will begin driving logs down the Madison river to the Varney bridge Tuesday." *Madisonian,* July 4, 1913, Foley Aff. Ex. 14

"[William Wilcox] secured 25 lumberjacks and other help, and says that the work will now proceed rapidly. He has been experiencing the usual amount of trouble in getting his logs started, but with his crew of experienced men expects to have them at his mill within a short time." *Madisonian,* July 25, 1913, Foley Aff. Ex. 14

"[T]he logs were landed at their destination without an accident of any nature. . . . A log boom, 900 feet in length was constructed near the bridge and the floating logs drifting along the swift current followed the boom line to their final destination." *Madisonian,* Sept. 19, 1918, Foley Aff. Ex. 14

"As for the log drive: It was, or I would say, successful in that they got all the logs down to the mill pond, but they did not try a second drive, as most of the timber left was above the Hebgen Dam, and the power

company practically refused to put the logs over the Dam. There would not have been much of a problem of driving the logs if the Power Company had not shut the water off at the Dam too soon, but I suppose that was one way of getting the lumber company out of their hair." *Madison River Navigation Study,* Appx. D (Wilcox letter, 1974), Mason Aff. Ex. C

"[Chief Forest Service Engineer] Mr. Merrill informed [Max Hebgen] that he thought the Company should install an apparatus necessary to take the logs over the dam and operate for the reason that they were obstructing the natural means of getting logs out of the watershed." *Madison River Navigation Study,* Addendum (Kramer memo, 1912), Mason Aff. Ex. C

"The operations of the Montana Reservoir & Irrigation Company in the matter of storing has been very consistent, and we have been especially careful to not fluctuate the flow of the river [at Hebgen Dam]." *Madison River Navigation Study,* Addendum (Hebgen memo, 1914), Mason Aff. Ex. C

3. Upper Missouri

"I do not believe that the world can furnish an example of a river running to the extent to which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so navigable as they are." *Journals of Lewis & Clark Expedition Vo. 5,* 65, (Moulton ed., 1988), Foley Aff. Ex. 15

"[In April 1810] Dougherty, Brown, Ware and myself agreed to trap in company on the Missouri between the [Three] Forks and the [Great] Falls, which lie several hundred miles down the river to the north, from the Forks. We made two canoes by hollowing out the trunks of two trees and on the third or fourth day after our arrival at the Forks we were ready to start on an expedition down the river." *Three Years Among the Indians and Mexicans,* 66 (James, 1966), Foley Aff. Ex. 21

"By late afternoon [in 1878, William F. Wheeler and his exploring party] had the craft afloat [at Stubbs' Ferry upstream of Hauser Dam], and set out to make what distance they could before nightfall. Soon they entered what they called American Canyon, at the point where the Trout Creek bridge now stands. They made twelve miles and camped near the Gates of the Mountains. Next day they reached the mouth of the Dearborn, then on early on the following morning shot the Half-breed Rapids, which were to figure largely in river history for a decade. The trip ended with an uneventful arrival at the falls." *Montana, the Magazine of Western History,* April 1959, 2 (Davison), Foley Aff. Ex. 17

"They were controlling [the steamer *Fern's*] oars, fore and aft; the Jefferson and Missouri, running high, had given no trouble in navigation. Now the bankfull river was taking them at about six miles per hour to Townsend, where they moored just above the bridge." *Montana, the Magazine of Western History,* April 1959, 6 (Davison), Foley Aff. Ex. 17

"[T]he Stickney Creek mill [near Craig below Holter Dam], which was started in May, 1880, had Fort Benton and surrounding country as its prospective market, and we established a lumber yard on the West bank of the Missouri River below the mouth of Sun River. . . . The lumber was hauled about six miles from the mill to the raft landing and then rafted down the river to the Sun River yard, a distance of about seventy miles." *Pioneering Lumbering in Montana: Contributions to the Historical Society of Montana,* at 270-71 (Holter 1917), Foley Aff. Ex. 20

"We are now rafting lumber from Stickney Creek to the Falls, and will deliver lumber to order at any point along the banks of the Missouri from Stickney Creek to Benton." *Fort Benton River Press,* April 13, 1881, Foley Aff. Ex. 18

"This [Holter Lumber] company has now three sawmills in the Belt mountains, turning out lumber for Great Falls and other points. The lumber is rafted by river to this place from one mill. . . . " *Great Falls Tribune,* February 18, 1888, November 9, 1887, Foley Aff. Ex. 19

4. **Mid-Missouri**

"I do not believe that the world can furnish an example of a river running to the extent to which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so navigable as they are." *Journals of Lewis & Clark Expedition Vo. 5,* 65, (Moulton ed., 1988), Foley Aff. Ex. 15

"[In April 1810] Dougherty, Brown, Ware and myself agreed to trap in company on the Missouri between the [Three] Forks and the [Great] Falls, which lie several hundred miles down the river to the north, from the Forks. We made two canoes by hollowing out the trunks of two trees and on the third or fourth day after our arrival at the Forks we were ready to start on an expedition down the river." *Three Years Among the Indians and Mexicans,* 66 (James, 1966), Foley Aff. Ex. 21

"In 1860 the *Chippewa* and the *Key West* completed the short remaining distance to Fort Benton, and made fast to the bank in front of the old post July 2 of that year. On June 16, 1866, the steamer *Peter Balen* ascended the river to the mouth of Belt Creek, six miles from the Great Falls, and thirty-one miles above Fort Benton [during the June flood]." *History of Early Steamboat Navigation on the Missouri River, Vol. 1,* 219-20 (Chittenden, 1903), Foley Aff. Ex. 16

"The steamer Fern will make excursions up the Missouri to the mouth of Sand Coulee or beyond on Sunday next, the 13th instant, leaving the Holter dock at 9 A.M. and 2 P.M. Fare one dollar. A.L. Davidson, captain." *Great Falls Tribune,* Nov. 9, 1887, Foley Aff. Ex. 19

"[T]he Stickney Creek mill [near Craig below Holter Dam], which was started in May, 1880, had Fort Benton and surrounding country as its prospective market, and we established a lumber yard on the West bank of the Missouri River below the mouth of

Sun River. . . . The lumber was hauled about six miles from the mill to the raft landing and then rafted down the river to the Sun River yard, a distance of about seventy miles." *Pioneering Lumbering in Montana: Contributions to the Historical Society of Montana,* at 270-71 (Holter 1917), Foley Aff. Ex. 20

"We are now rafting lumber from Stickney Creek [near Craig] to the Falls, and will deliver lumber to order at any point along the banks of the Missouri from Stickney Creek to Benton." *Fort Benton River Press,* April 13, 1881, Foley Aff. Ex. 18

"This [Holter Lumber] company has now three sawmills in the Belt mountains, turning out lumber for Great Falls and other points. The lumber is rafted by river to this place from one mill. . . ." *Great Falls Tribune,* February 18, 1888, November 9, 1887, Foley Aff. Ex. 19

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

PPL MONTANA, LLC, a Delaware limited liability corporation, and AVISTA CORPORATION, a Washington corporation, Plaintiffs, v. STATE OF MONTANA, Defendant.	Cause No.: CDV-2004-846 **MEMORANDUM AND ORDER ON PPL'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING PRIMA FACIE OWNERSHIP OF LANDS**

Plaintiff and Counterdefendant PPL Montana, LLC (PPL) has moved for partial summary judgment arguing that the warranty deeds it holds constitute prima facie evidence of ownership of lands associated with their hydroelectric projects. The motion was heard December 14, 2006. The Court concludes the motion should be granted.

BACKGROUND

In October 1998, PP&L Global, LLC entered into an agreement to purchase most of The Montana Power Company's (MPC) assets in Montana, including eleven hydroelectric generation plants. Ten of those plants are at issue in this litigation. In 1999, PP&L Global assigned its rights and interest in the purchase agreement to PPL. As part of the purchase, PPL acquired title to lands associated with the

hydropower projects. Additionally, PPL also obtained right of ways owned by MPC and flood easement rights. MPC transferred by way of warranty deed title to those lands and rights to PPL. Many of the warranty deeds describe the flooded lands which are at issue in another motion. Significantly, excepted from the warranty deeds are the beds of the Missouri, Madison and Clark Fork Rivers.

STANDARD OR REVIEW

Summary judgment is appropriate if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P. The moving party has the initial burden of showing that no genuine issues of material fact exist. ***Jobe v. City of Polson***, 2004 MT 183, ¶ 10, 322 Mont. 157, ¶ 10, 94 P.3d 743, ¶ 10. Once the moving party establishes no genuine issues of material fact exist, the burden shifts to the non-moving party opposing summary judgment to prove otherwise. ***Id.*** If the court determines no genuine issues of material fact exist, the court will determine whether the moving party is entitled to judgment as a matter of law. ***Id.***

DISCUSSION

PPL argues that the warranty deeds that were conveyed to them from MPC constitute prima facie evidence that it holds record title to the lands described in the deed and flood easements over other

lands. In support they cite ***Nixon v. Huttinga***, 163 Mont. 499, 501, 518 P.2d 263, 265 (1974), holding that while a warranty deed "is generally considered prima facie proof of good title . . . this presumption extends only to property specifically described by such deed." (Citation omitted.)

The State contends that the warranty deeds do not include the riverbeds of the Missouri, Madison and Clark Fork Rivers. In fact, the State concedes that PPL has received deeds evidencing record fee title to certain properties associated with the dams, as well as easements permitting them to flood lands.

NOW, THEREFORE, IT IS ORDERED Plaintiff and Counterdefendant PPL Montana, LLC's motion for partial summary judgment that the warranty deeds it holds constitute prima facie evidence of ownership of lands associated with their hydroelectric projects **IS GRANTED**.

DATED this 4th day of September 2007.

/s/ Thomas C. Honzel
THOMAS C. HONZEL
District Court Judge

pcs: Robert L. Sterup/Kyle Ann Gray
Stephen R. Brown
Mike McGrath/Anthony Johnstone/Jon Ellingson

MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
JON ELLINGSON
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549

COUNSEL FOR STATE OF MONTANA

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; AVISTA CORPORATION, a Washington Corporation; and PACIFICORP, an Oregon Corporation, Plaintiffs, v. STATE OF MONTANA, Defendant.	)	Cause No. CDV 2004-846 **AFFIDAVIT OF BOB McFARLAND**

STATE OF MONTANA)
:ss.
County of Gallatin

Bob McFarland, having first been duly sworn, deposes and says:

1. I am the supervisor of the Information Services Unit for the Fisheries Division for the Montana Department of Fish, Wildlife and Parks.

2. In that capacity I conduct the statewide angling use mail survey in odd-numbered years to determine licensed angling use estimates on individual bodies of water in Montana. In 2003, the last full year for which data is available, we mailed surveys to a random sample of 89,861 anglers and received 48,349 responses. Based on these responses, the Department calculates river use by the angler day, which is one angler fishing one body of water for any amount of time on one day.

3. **The Clark Fork River.** In 2003, the section of the Clark Fork River between the Flathead River and the Idaho State Line was used for an estimated 34,723 angler-days (including 9,323 angler-days of use by non-residents). Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 25.3% of anglers surveyed floated in boats on the section of the Clark Fork River between the Flathead River and the Idaho State Line. Therefore, the Department estimates that in 2003 approximately 8800 angler-days were floated in boats on the section of the Clark Fork River between the Flathead River and the Idaho State Line.

4. **The Madison River.** In 2003, the Madison River was used for an estimated 183,227 angler-days

(including 123,054 angler-days of use by non-residents). That year, the Madison River was the second most heavily used river in Montana by angler-days, behind the Missouri River with an estimated 195,622 angler-days. Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 25.9% of anglers surveyed floated in boats on the Madison River. Therefore, the Department estimates that in 2003 approximately 47,000 angler-days were floated in boats on the Madison River. For comparison, the Department estimates that in 2003 approximately 51,000 angler-days were floated in boats on the entire Missouri River within Montana.

5. In 2003, the section of the Madison River between Hebgen Dam and Ennis Lake was used for an estimated 115,342 angler days (including 85,263 angler-days of use by non-residents). The section of the Madison River between Hebgen Dam and Ennis Lake was the most heavily used section of river in Montana. Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 30.8% of anglers surveyed floated in boats on the section of the Madison River between Hebgen Dam and Ennis Lake. Therefore, the Department estimates that in 2003 approximately 35,000 angler-days were floated in boats on the section of the Madison River between Hebgen Dam and Ennis Lake.

6. **The Missouri River.** In 2003, the section of the Missouri River between Morony Dam and Cascade Bridge was used for an estimated 20,368

angler-days (including 4,164 angler-days of use by non-residents). Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 13.7% of anglers surveyed floated in boats on the section of the Missouri River between Morony Dam and Cascade Bridge. Therefore, the Department estimates that in 2003 approximately 2800 angler-days were floated in boats on the section of the Missouri River between Morony Dam and Cascade Bridge.

7. In 2003, the section of the Missouri River between Holter Lake and Hauser Dam was used for an estimated 22,175 (including 4,748 angler-days of use by non-residents). Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 32.2% of anglers surveyed floated in boats on the section of the Missouri River between Holter Lake and Hauser Dam. Therefore, the Department estimates that in 2003 approximately 7100 angler-days were floated in boats on the section of the Missouri River between Holter Lake and Hauser Dam.

8. **The Swan River.** In 2003, the section of the Swan River between Swan Lake and its mouth at Flathead Lake was used for an estimated 5,344 angler-days (including 1,705 angler-days of use by non-residents). Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 33.0% of anglers surveyed floated in boats on the section of the Swan River between Swan Lake and its mouth at Flathead Lake.

Therefore, the Department estimates that in 2003 approximately 1800 angler-days were floated in boats on the section of the Swan River between Swan Lake and its mouth at Flathead Lake.

/s/ Bob McFarland
BOB McFARLAND

SUBSCRIBED AND SWORN to before me this 11th day of May, 2006.

/s/ Kari Janikula
NOTARY PUBLIC for the State of Montana
Printed Name: Kari Janikula
(Notarial Seal) Residing at Bozeman
My commission expires 11-19-2007

MONTANA NAVIGABLE WATER STUDY

Submitted to:
Montana Department of State Lands
Helena, Montana

Submitted by:
Heritage Research Center
P. O. Box 9316
Missoula, Montana 59801

December 1986

TABLE OF CONTENTS

Introduction 1
Methodology 2
Big Hole River 8
Big Horn River 9
Bitterroot River 11
Blackfoot River 14
Boulder River 16
Bull River 17
Clark Fork River 19
Clark Fork on the Yellowstone 24
Clearwater River 26
Dearborn River 28
Flathead River, North Fork 30
Flathead River, Main Stem 32
Flathead River, Middle Fork 37
Flathead River, South Fork 39

Fortine Creek....41
Gallatin River....42
Graves Creek....43
Jefferson River....45
Kootenai River....46
Little Blackfoot River....48
Little Missouri River....49
Lolo Creek....50
Lower Deer Creek....51
Madison River....52
Marias River....54
Milk River....56
Missouri River....57
Montour Creek....59
Nine Mile Creek....60
Rattlesnake Creek....62
Sage Creek....63
Sheep Creek....64
Smith River....65
Stillwater River....66
Sun River....69
Swan River....70
Ten Mile Creek....71
Teton River....72
Tobacco River....73

Tongue River 74
Whitefish River 75
Yaak River 77
Yellowstone River 79

Appendices

A. Navigability Study KEY WORDS

INTRODUCTION

The following report was prepared by Heritage Research Center for the Montana Department of State Lands under a professional services agreement dated March 5, 1986 and changes initialed March 18, 1986. The purpose of the contract was to provide the Department of State Lands, where possible, with a determination of commercial navigability and the extent of navigability for the purpose of determining title to streambeds of certain waterways.

Specific provisions of the agreement required that the contractor complete the following two projects:

1. A navigability and reach study focusing upon waterways east of the Continental Divide not reported upon in the 1974-1975 Army Corps of Engineers investigation and upon resources and writings made available since those Corps investigations.

2. A determination of the highest point of recorded navigation and stream segments historically navigated on the following list of 35 streams:

Big Blackfoot River
Big Hole River
Big Horn River
Bitterroot River
Boulder River
Bull River
Clark Fork of Columbia
Clearwater River
Dearborn River
Flathead River – Including North, South and Middle Forks
Fortine Creek/River
Graves Creek
Jefferson River
Kootenai River
Little Blackfoot River
Little Missouri River
Lolo Creek
Lower Gallatin River
Madison River
Milk River
Missouri River
Montour Creek
Nine Mile Creek
Rattlesnake Creek
Sheep Creek
Smith River
Stillwater River (West)
Sun River
Swan River
Teton River
Tobacco River
Tongue River
Whitefish River
Yaak River
Yellowstone River

METHODOLOGY AND RESEARCH RECOMMENDATIONS

Methodology:

Project #1

Navigability and reach study for waterways east of the Continental Divide not reported upon in the navigability reports prepared by the U.S. Army Corps of Engineers in 1974-1975, and research into resources and writings made available since those investigations.

Heritage Research Center investigated the possibility of historical navigation on other streams east of the Continental Divide. The research focused upon streams not reported upon in earlier Corps of Engineer investigations, and upon resources/writings made available since those investigations. The study also included pertinent sources not recognized as applicable at the time of the Corps studies in the early 1970's. Gary Williams, principal investigator for the study, participated in researching and writing the original Corps reports for the waterways east of the Divide and provided insight into the methodology employed under those investigations.

Researchers first constructed a bibliography of local history writings produced for Eastern Montana since 1974. This task was greatly facilitated by Heritage Research Center's bibliography of Montana history on the firm's computer. A comprehensive list of published materials, including local histories, was compiled from the annual listing of Montana related

publications in the Pacific Northwest Library Association Quarterly. The computer bibliography, the PNLA bibliography and a previously submitted bibliography of items recommended for further research projects from the Western Montana navigability research projects were combined to form the research bibliography appended to this report. These bibliographical entries were reviewed for instances of navigation and followed up with research into local newspapers whenever some instance of navigation was found.

Oral history collections at the Montana Historical Society and the K. Ross Toole Archives were reviewed for the study. Also, we consulted archival materials at each of those institutions. We consulted cultural resource managers in Eastern Montana in an attempt to identify reports or sites pertaining to navigation. Old photos and interviews also were included in the research. Newspapers were reviewed for special time periods or to confirm instances of commercial navigation identified from other sources. Interviews were conducted with knowledgeable sources identified during the course of the survey.

Materials researched for this project were applied to Project #2, whenever they seemed appropriate.

Following the research, we analyzed the information retrieved and prepared reports upon individual waterways. The record of historical navigation was written to include, whenever available, the specific segments of the waterway that were navigated.

Project #2

Determination of highest point of recorded navigation and stream segments historically navigated on 35 streams listed in the Statement of Work.

Included in the research for this project were thirty-five (35) streams identified as navigable by the Department of State Lands. For each of these streams researchers reviewed existing reports and extracted citations of historic navigation. They then consulted the original sources to determine, if possible, the segments of the waterways that were actually floated. Copies of reports in our offices, including those prepared for both districts of the Corps and those prepared by our firm, were used.

In addition to consulting the reports, researchers for Heritage Research Center reviewed the sources cited in "Bibliography of Materials Recommended for Further Research" that we submitted with our previous study on Western Montana water-ways. When possible, we supplemented the written record with interviews and available tapes of long-time residents with knowledge of the waterways involved. The Montana State Historic Preservation Office and the various Forest Service archaeologists were consulted to determine whether cultural remains indicated the use of specific waterways. Requested evidence included interviews, splash dams, etc. (See Appendix of Forest Service Returns.)

Research sources included the extensive holdings of Heritage Research Center, the Mansfield Library and K. Ross Toole Archives, the Montana Historical Society, and the Kalispell Public Library.

The document contains a brief report on each waterway with a description of navigation as it pertains to specific stream segments. When it was not possible to determine the area of use, a statement to that effect would be made. As with the reports for the first project, we included a discussion of vague references to navigation that might provide clues to additional research, should it be required in the future.

Due to funding limitations, several exclusions were made from the research. County Courthouse records were excluded because of travel and per diem costs, combined with the difficulty of determining in advance how extensive that research might be. Certain citations uncovered in the past have made references such as, "They put the logs in at John Does's place on Smith River." Property ownership records likely would indicate where John Doe owned property at the time of the log drives. Thus, one could establish the segment of the waterway that was navigated. Such information could be researched at a later date as it might become necessary for litigation purposes. Also, our researchers could not conduct thorough paper-by-paper research of local newspapers, because of the costly and time-consuming nature of that type of search. Instead, we read through newspapers when looking for a specific incident at a specific time.

Recommendations for Further Research:

Because the approach to documenting navigable waterways for title purposes has been constrained by lack of funding, efforts have been focused upon generating the most information for the least possible cost. Below are listed additional sources of information that could not be covered in previous investigations. While some were well-known, others were revealed in the course of the present study, notably the water rights records and Montana Fish, Wildlife and Parks classified trapper and outfitter records. The latter may become more useful in view of a recent district court ruling in Alaska pertaining to the Gulkana River. The Big Hole River, for example, lacks historical evidence of commercial navigation associated with logging or similar ventures, yet Fish, Wildlife and Parks officials report that it is subject to heavy commercial outfitter traffic.

Some further avenues of research include:

1. Search of the Department of Natural Resources Computerized water rights files was discussed with Ron Guse, Water Rights Bureau New Appropriations Program Manager, and Jim Kindle, Records Section Supervisor. Both agreed that there is some possibility for finding water reserves for navigation purposes. Since the files contain approximately 200,000 claims, the cost of the computer run could not be covered under the existing contract. Our own research indicated that at least some commercial logging enterprises

filed for water rights to preserve in-stream flows for floating logs. An example is Rattlesnake Creek, tributary of the Clark Fork of the Columbia. The Water Rights Bureau records are classified by nature of use and point of diversion as well as other descriptions.

In contacting the DNRC chief Legal Counsel, Don MacIntyre, we learned that that office does not maintain files on navigable waterways since no such determinations are necessary for them to issue permits. The issue of navigability could arise on Federal Energy Regulatory Commission (DNRC) applications, but DNRC's legal offices keep no separate records on navigable status.

2. Under a 1985 law, the Montana Department of Fish, Wildlife and Parks has statutory responsibility for classifying Montana's streams to determine rights and restrictions of recreational access. Defined under the law are two classifications. The following discussion is taken directly from the Fish, Wildlife, and Parks brochure titled "Stream Access in Montana".

> "Class I waters are defined as those which are capable of recreational use and have been declared navigable or which are capable of specific kinds of commercial activity, including commercial outfitting with multi-person watercraft. The Department has developed a preliminary list of rivers that meet at least one of the criteria listed in the law for class I rivers (see Section (1)(2) of the law). This preliminary list includes the mainstems of the following waters, as described:

Kootenai River Drainage:

Kootenai River – from Libby Dam to the Idaho border

Lake Creek – from the Chase cut-off road to its confluence with the Kootenai River

Yaak River – from Yaak Falls to its confluence with the Kootenai River

Flathead River Drainage:

South Fork of the Flathead – from Youngs Creek to Hungry Horse Reservoir

Middle Fork of the Flathead – from Schaffer Creek to its confluence with the mainstem of the Flathead River

North Fork of the Flathead – from the Canadian border to its confluence with the mainstem of the Flathead River

Flathead River (mainstem) – to its confluence, with the Clark Fork River

Clark Fork of the Columbia River Drainage:

Clark Fork River – from Warm Spring Creek to the Idaho border

North Fork of the Blackfoot – from Highway 200 east of Ovando to its confluence with the mainstem of the Blackfoot River

Blackfoot River – from the Cedar Meadow Fishing Access Site west of Helmville to its confluence with the Clark Fork

Bitterroot River – from the confluence of the East and West forks to its confluence with the Clark Fork

Rock Creek – from the confluence of the West Fork to its confluence with the Clark Fork

Missouri River Drainage:

Missouri River – from Three Forks to the North Dakota border

Beaverhead River – from Clark Canyon Dam to its confluence with the Jefferson

Big Hole River – from Fishtrap Fishing Access Site down-stream from Wisdom to its confluence with the Jefferson

Gallatin River – from Taylors Fork to its confluence with the Missouri

Jefferson River – to its confluence with the Missouri

Madison River – from Quake Lake to its confluence with the Missouri

Dearborn River – from the Highway 434 bridge to its confluence with the Missouri

Sun River – from Gibson Dam to its confluence with the Missouri

Smith River – from Camp Baker Fishing Access Site near Ft. Logan to its confluence with the Missouri

Marias River – from Tiber Dam to its confluence with the Missouri

Judith River – from the confluence of Big Spring Creek to its confluence with the Missouri

Yellowstone River Drainage:

Yellowstone River – from Yellowstone National Park to the North Dakota border

Bighorn River – from Yellowtail Dam to its confluence with the Yellowstone

Tongue River – from Tongue River Dam to its confluence with the Yellowstone

Keep in mind that this list is preliminary and that other waters may be added to it in the future as other criteria listed in the law for determining class I waters are addressed. Also, keep in mind that there may be times during a year when the flow and physical condition of these waters may not permit their use for certain kinds of recreation.

Class II waters are all rivers and streams capable of recreational use that are not class I waters."

Our contacts with attorney Stan Bradshaw at Fish Wildlife, and Parks indicated that the Class I waters had been determined without reference to the Corps reports or other reports of navigable status. Instead, the Department relied entirely upon information pertaining to commercial outfitter and guide navigation on those streams. Pat Graham was involved in compiling the list of navigable streams for the brochure. Much of the information was derived from restricted-access files that would require permission from the department director for use. The value of these particular records in determining

navigable segments and navigable status for title purposes appears to be underscored by the Gulkana River case in Alaska.

3. Many historical records could yet be reviewed for actual commercial use of Montana's waterways. Foremost among those would be local newspapers which yielded the greatest amount of information in the original Corps studies. No comprehensive newspaper research has been conducted for Western Montana, and many papers not consulted for the original Corps studies east of the Divide remain.

At some future time, the Department could undertake a comprehensive search of selected local newspapers to strengthen available documentation on navigable streams and, possibly, to determine other streams that had commercial use. For Western Montana that approach might involve a comprehensive search of newspapers for such towns as Kalispell, Missoula, Hamilton, Thompson Falls, and Libby from earliest publication dates to approximately 1930 when the last river drives took place. When encountering a particular stream that needs documentation, the first source should be the closest local newspaper.

As stated in earlier reports, much archival research also could be done. Particularly useful would be fur trade records in Canada and Forest Service records in Washington, D. C.

When attempting to document actual stream segments navigated, county land records and government

survey notes and plats could prove valuable as noted in the Tongue River discussion.

* * *

Clark Fork River

(Tributary of the Columbia River)

The Clark Fork River has been navigated from Deer Lodge, Montana, to its mouth on Pend Oreille Lake, Idaho. Early instances of navigation on the Clark Fork included at least 2 canoe trips 1809-11) of David Thompson of the British North West Company from Salesh or Flathead House near the mouth of Thompson River) to the mouth of the Clark Fork River at Pend Oreille Lake Kullyspell House). [Source: M. Catherine White, ed. *David Thompson's Journals Relating to Montana and Adjacent Regions, 1808-1812* (Missoula: Montana State University Press, 1950), pp. c-cxx and 43-222; Olga Weydemeyer Johnson, *Flathead and Kootenay* (Glendale, California: Arthur H. Clark Co., 1969) pp. 57-58, 181, 185-186 as cited in U. S. Army Corps of Engineers District, "Report on Navigability of the Clark Fork of the Columbia River, Idaho and Montana", circa 1975 p. 11.]

Another early example of navigation of the Clark Fork River involved the expedition of Governor Issac S. Stevens to survey a railroad route to the Pacific Coast. Dr. George Suckley, who was charged with exploring the Clark Fork River, travelled down the Bitterroot River and from its mouth down the Clark Fork to a Jesuit mission located on the north end of

Pend Oreille Lake. They travelled down the Clark Fork in three boats made with bullock hides stretched over frames. [Source: James McClellan Hamilton, *From Wilderness to Statehood, A History of Montana*, (Portland:Binford and Mort, 1957) p. 114, as cited in U. S. Army Corps, "Clark Fork River Navigability Report," p. 12.]

In the Spring of 1860, W. W. Delacy, a member of the Mullan Road exploration crew floated two flat-bottomed boats from about 10 miles above the river's confluence with the Flathead River to the Flathead River, which he ascended to the mouth of Plum Creek. [Source: Margaret Hahn, *In Retrospect: A History of Mineral County*, (Superior, MT:Mineral Publishing Company, 1985) pp. 9-10.]

Much more use was made of the Clark Fork River during the 1860's with the construction of the Mullan Road and the discovery of gold in Western Montana. The river served to transport passengers and freight in a variety of river craft. Starting in the 1880's logs used primarily for railroad ties and mine structures were floated on the river. Between 1865 and 1870, the Oregon Steam Navigation Company operated a steamboat line between Pend Oreille Lake and Thompson Falls. To take advantage of the traffic traveling between the Upper Missouri and Columbia Rivers at Walla Walla the company built the *Mary Moody* in 1865, and in 1866 navigated the river to Cabinet Landing, just inside the Montana border. In 1867, the company began navigating the river in the *Cabinet* from Cabinet Landing to Rock Island Rapids

near Noxon) and in the *Missoula* from there to Thompson Falls, the head of steamboat navigation. These trips continued until 1870. [Sources: Merrill G. Burlingame and K. Ross Toole, *A History of Montana*, (New York:Lewis Histories Publishing Company, Inc., 1957), Vol. II, p. 70. As cited in U. S. Army Corps of Engineers, "Clark Fork River Navigability Report," p. 13. Other references to steamboat traffic on the Clark Fork during this time include *The Montana Almanac, 1959-60*, Missoula: Montana State University Press, 1958, p. 252; Rocky Mountain Gazette, August 18, 1866; Helena Herald, May 2, 1867, June 5, 1867, September 12, 1867, February 13, 1868; *Deer Lodge Independent*, June 19, 1868; E. W. Wright, *Lewis & Dryden's Marine History of the Pacific Northwest*, first published 1895 by Lewis & Dryden Printing Co. and reprinted 1867 by Superior Publishing Co., Seattle, Washington. Steamboat navigation also is discussed in Evelyn M. Davis, "Steamboats Once Operated on Clark Fork River", which appeared in the *Sanders County Ledger*, February 6, 1958.]

Other forms of navigation occurred on the Clark Fork River during the 1860's and 1870's. Mail was carried by boat from Deer Lodge to Missoula in 1866. [Source: *Missoula Pioneer*, July 13, 1872 and *New Northwest* July 13, 1872, as cited in Audra Browman, "Some Ways in Which the Clark Fork, Bitterroot and Blackfoot Rivers Have Been Used in the Past", 1974, and U. S. Army Corps of Engineers, "Clark Fork Navigability Report," p. 13.] The same year, two men who went upstream to the mouth of the Blackfoot

river to build a ferryboat drowned while riding a raft downstream to Missoula [Source: Frank Woody, *History of Missoula County and City*, 1897, as cited in Browman and U.S. Army Corps of Engineers "Clark Fork River Navigability Report," p. 13.] In 1870, Henry Buck and others constructed three boats and floated from Lincoln on the Blackfoot River to its confluence with the Clark Fork and from there to Frenchtown on the way to mines at Cedar Creek Mines near Superior. They packed their goods from Frenchtown to the mines. [Source: *Helena Herald*, March 15, 1890 as cited in Browman U. S. Army Corps "Clark Fork River Navigability Report," p. 13.]

Also in 1870, Richard Barry constructed boats for Sam Johns "from Deer Lodge to captain at least as far" as Moose Creek there is a Moose Creek about 5 miles west of Alberton). Sam Johns started the first trip on the *Kangaroo* in May and the boat made more than one trip, presumably as far as Moose Creek. [Source: *New Northwest*, May 6, 1870; December 16, 1870, *Missoula and Cedar Creek Pioneer*, December 8, 1870, as cited in Browman, p. 1.] A March 2, 1871 article in the *Missoula Pioneer* noted that

> Thomas D. Beeke and J. L. Hodge left Frenchtown on Sunday last in an open boat, and . . . arrived at the mouth of Quartz [creek] about midway between Alberton and Superior) on Tuesday evening without accident.
>
> This, in connection with the cruise of the *Kangaroo* last season, and the uninterrupted

> transportation of hay and lumber between the mouth of Cedar [Creek] about 1 mile west of Superior) and the Missoula Ferry demonstrates the practicability of navigating the Deer Lodge, Hellgate and Missoula rivers from Deer Lodge City to Pend Oreille. [Source: *The Missoula Pioneer*, March 2, 1871 as cited in Heritage Research Center, "Report on Western Montana Historical Navigation", prepared for the Montana Department of State Lands, 1984, p. 40.]

Other 1871 newspaper items referred to boats and rafts traveling from Missoula to Superior and to boats carrying hay and lumber from St. Regis to the mines. [Source: *New Northwest*, March 4, 1870, *Missoula Pioneer*, February 24, 1871.] In 1872, a surveying party of Northern Pacific Railroad travelled by boat from Missoula to the confluence of the Clark Fork and Flathead Rivers near Paradise, Montana. [Source: Browman, 1974, p. 3.]

In the early 1880's when the Northern Pacific Railroad was constructing its line to the Pacific coast, it contracted with the Eddy Hammond Company to provide timber for ties between the Little Blackfoot and the Idaho line. Mills were constructed at the confluence of the Blackfoot and Clark Fork Rivers and at several other locations on the Clark Fork. [Source: *Missoulian*, August 19 and 26, 1881 as cited in Browman, p. 3.] Supplies for the Company were carried down the Flathead River and Clark Fork River by bateaux and up the Clark Fork from Cabinet Landing to Thompson Falls by steamboat. In 1882,

lumber was rafted down the Clark Fork, and, during the winter of that year, it was transported on ice between the construction camps. (*Missoulian*, November 11, 1881, May 19, 1882, June 9 and 30, 1882, July 7, 1882, August 18, 1882, September 8 and 29, 1882 and February 9, 1883 as cited in U. S. Army Corps of Engineers, "Clark Fork River Navigability Report," p. 15.) A February 24, 1882 item in the *Missoulian* refers to logs being floated down the Missoula and Pend Oreille Rivers to Weeksville. [Source: the *Missoulian*, February 24, 1882.]

From 1900 to 1925, drives occurred on the Clark Fork River, originating on Nine Mile Creek, White Pine Creek, Trout Creek, Vermilion River and Bull River. According to the U. S. Army Corps of Engineers Clark Fork Navigability Study, most of the logs that were driven down these tributaries were floated down the Clarks Fork River to the town of Clark Fork in Idaho. From there they were towed on Pend Oreille Lake to Dover or to the Hope Lumber Company plant at Hope, Idaho. A 1907 item in the *Sander County Ledger*, (Thompson Falls) stated that:

> the Hope Lumber Company's men arrived here last week to drive the logs out along the river between Eddy and the Idaho line to Hope. The men expect that it will take about four weeks to complete the drive. [Source: *Sanders County Ledger*, April 19, 1907 as cited in Heritage Research Center "Report on Western Montana Historical Navigations" prepared for the Montana Department of State Lands, 1984, p. 46.]

Another entry in the *Sanders County Ledger* in 1914 mentioned expert loggers breaking up a log jam at Heron, with the intention of driving "the logs down the river to the sorting works at the mouth of the river." (Pend Oreille Lake), [Source: *Sanders County Ledger*, March 13, 1914, as cited in Heritage Research Center, "Report on Western Montana Historical Navigation", prepared for the Montana Department of State Lands pp. 47-48.] The log drives down the Clark Fork from Missoula during these years carried from 10 to 50 million board feet per year. Correspondence with Clarence C. Strong of Missoula and Floyd W. Viche of Mineral County Commissioner's office at Superior, Montana, February – March 1974 as cited in U. S. Army Corps of Engineers, "Clark Fork River Navigability Report."

In 1910 in *Steele, Lenham and Maker vs. the Northwest Development Company and Edward Donlan*, the U. S. Court determined Clark Fork at the Columbia River is a non-navigable river, and that at the time the Northwest Development Company was owner of both banks of the river as it flows through the whole of Township 21 North, Range 29 West, that the Company was the sole owner of the river bed in that township. [Source: *Sanders County Ledger*, July 22, 1910 as cited in Heritage Research Center "Report on Western Montana Historic Navigation" prepared for Montana Department of State Lands, 1984, p. 47.]

In 1932 the U. S. Army Corps of Engineers, Seattle District, designated the Clark Fork River

between its mouth at Pend Oreille Lake to the Northern Pacific Railway bridge near the town of Clark Fork a distance of about 4 miles) as a navigable waterway. [Source: U.S. Army Corps of Engineers "Clark Fork Navigability Report," p. 9.]

The "Report on Navigability of the Clark Fork of the Columbia River" prepared by the U.S. Army Corps of Engineers in about 1975, regarded the Clark Fork as a navigable waterway as far upstream as the mouth of the Blackfoot River. It did not consider the river above the mouth of the Blackfoot as capable of navigation.

The Montana Department of Fish, Wildlife and Parks considers the Clark Fork River a navigable waterway from Warm Springs, about 15 miles South of Deer Lodge) Idaho border.

Summary: There are recorded instances of the Clark Fork River being navigated in small boats from as high up as Deer Lodge, Montana. Log drives began west of Missoula and ran down the river to the river's mouth at Lake Pend Oreille. Thompson Falls was the historical head of steamboat navigation.

* * *

Madison River

(Tributary of the Missouri River)

The Madison River has experienced considerable use historically by explorers, trappers, miners, farmers and loggers, and is generally considered to have high potential for navigation. However, recorded entrances of commercial navigation are few.

In 1913, the Madison River Lumber Company cut timber on the Upper Madison at the mouth of the West Fork of the Madison and floated from 700,000 to 1 million board feet of timber from that area to the company's mill at Varney, a distance of 55 miles. [Sources: (Virginia City) *Madisonian*, May 9, 1913, July 4, 1913, July 25, 1913, August 8, 1913, September 19, 1913; Letter, Floyd W. Wilcox to Alan Newell, September 8, 1974, as cited in Alan Newell and Gary Williams, "Madison River Navigation Study," prepared for the U.S. Army Corps of Engineers, Omaha District, 1974, pp. 8-10.]

The construction of Madison Dams at Ennis (No. 1 in 1900 and No. 2 in 1906) and the construction of Hebgen Dam below West Yellowstone have limited navigation of the river, although barges were used on Hebgen Lake in 1914 to transport supplies to the site at the dam from West Yellowstone.

The federal government does not consider the Madison River a navigable stream. However, in 1948, the Federal Power Commission required the Montana Power Company to license its power generating

facility at Hebgen Dam under authority of section 4(e) of the Federal Water Power Act of 1935 which empowers the federal government with authority over non-navigable streams (in this case, the Madison) whose flow affects the navigable status of navigable streams (in this case, the Missouri River below Fort Benton). [Source: Opinions and decisions of the Federal Power Commission, Vol. 7, January 1, 1948-December 31, 1948 (Washington:1950), as cited in Newell and Williams, p. 13.] Even though the federal government does not consider the Madison River as navigable, recent state court decisions indicate a trend toward declaring a stream navigable on the basis of its recreational use. Both Hebgen Lake and the Madison River experience heavy recreational use. [Source: Newell and Williams, pp. 11-16.] The Montana Department of Fish, Wildlife and Parks considers the Madison River as a navigable stream from Quaker Lake to its confluence with the Missouri River.

Summary: Commercial navigation has occurred on the Madison River in connection with log drives between the mouth of the West Fork of the Madison (the recorded high point of navigation) and Varney. Hebgen Lake also has been navigated. Without the obstruction caused by Madison Dams 1 and 2 below Ennis. It is safe to assume that the Madison could have been navigated from the mouth of the West Fork to its confluence with the Missouri River.

* * *

Missouri River

The Missouri River is generally considered a navigable stream from the Montana/North Dakota border to its headwaters at Three Forks. There is considerable historical documentation of commercial navigation on the river in Montana. Lewis and Clark navigated this river in pirogues and bateaux to the Great Falls in 1805. (See the numerous editions of "The Journals of Lewis and Clark".) At least one party descended the Missouri from Three Forks to the existing state line in 1806. Manuel Lisa traveled up the Missouri to the mouth of the Big Horn River in 1807 and returned from it to St. Louis in 1808. His St. Louis Missouri River Fur Company sent an expedition up the Upper Missouri River in 1810. There is a record of one party of the expedition floating an indeterminate distance from Three Forks toward the Great Falls that year. [Source: Thomas James, *Three Years Among the Indians and Mexicans* (St. Louis:1966), p. 66, as cited in Alan Newell and Gary Williams, *Missouri River Navigation Study* Loman, Montana, to Three Forks, Montana, prepared for U. S. Army Corps of Engineers, Omaha District, 1974, pp. 8-9.] The fur trading companies made extensive use of the Missouri River from the time of Manuel Lisa's first trip up the Missouri until the 1860's.

Light-draft steamboat, the "Chippewa", was the first steamboat to travel to Fort Benton, arriving there in 1860. [Source: Hiram Martin Chittenden, *History of Early Steamboat Navigation on the Missouri River; Life and Adventures of Joseph La Barge*, Vol. 1

(Minneapolis,MN:1962), pp. 219-221, as cited in Alan Newell and Gary Williams "Missouri River Navigation Study, Loma, Montana to Three Forks, Montana," prepared for the U. S. Army Corps of Engineers, Omaha District, 1974, p. 11.] Between 1860 and 1880, about 400 steamboats arrived at Fort Benton. [Source: Federal Power Commission, *Opinion and Decisions of the Federal Power Commission*, Vol. VIII, January 1, 1948, December 31, 1948, (Washington D.C.:1950), p. 171, as cited in Newell and Williams, pp. 11-12.]

Commercial navigation of the Missouri above the Great Falls developed about the same time steamboat traffic to Fort Benton was coming to an end. A. M. Holter's Lumber Company rafted sawed timber from its lumber mill on Stickney Creek, which was 70 miles upstream from Great Falls. [Source: Great Falls *Tribune*, February 18, 1888; A. M. Holter, "Pioneering Lumbering in Montana; Contributions to the Historical Society of Montana (Vol. VIII, Helena:1917), pp. 270, 271; the *Fort Benton River Press*, April 13, 1881, as cited in Newell and Williams, p. 14.) The Holter Company rafted about 300,000 feet of lumber from its mills on Stickney and Megher Creek to Great Falls in 1885 and floated logs to Great Falls from those creeks until 1891. [Source: Holter, "Pioneer Lumbering in Montana", p. 272; the Great Falls *Tribune*, August 9, 1890, as cited in Newell and Williams.]

William F. Wheeler and a crew of five used a rowboat to float the Missouri from Stubbs Ferry (near

Helena) to the Great Falls in 1878 in an effort to determine if its upper reaches were navigable. [Source: Stanley K. Davison, "White Hopes of the Big Muddy," *Montana, The Magazine of Western History* (Spring 1959), p. 2; Helena *Weekly Herald*, September 26, 1878, as cited in Newell and Williams, p. 18.] A large steamboat, the *Fern*, floated from Twin Bridges on the Beaverhead, down the Beaverhead, Jefferson, and Missouri to Townsend in June 1887. Three Forks, which the *Fern* passed by on its descent, constitutes the highest point of navigation. [Source: Davison, White, *Hopes on the Big Muddy*, pp. 5 & 6, as cited in Newell and Williams, p. 19.] Between September 28 and November 7, 1887, the *Fern* floated from Townsend to Great Falls. [Source: Ibid., and the Great Falls *Tribune*, November 9, 1887, as quoted in Newell and Williams, p. 19.]

The U.S. Army Corps of Engineers has declared the Missouri River navigable from the Montana/ North Dakota State line to Three Forks, Montana. The United States Coast Guard exercises jurisdiction over the Missouri River to a point 263 miles above Fort Benton, Montana (33 CFR 238-1, 1967). The Federal Power Commission, which licenses dams, considers the Missouri River as a navigable river to Three Forks, Montana. [Source: Federal Power Commission Reports, Vol. VII, January 1948-December 1948, Washington:1950.] The case of Montana Power Company vs. Sutherland 74 (Mont. 587) established the Missouri as navigable in Lewis and Clark County and the state case of Gibson vs. Kelley (15 Mont. 417)

established that the Missouri River is navigable in Choteau County at T23North, R7East. (Newell and Williams, pp. 21-22.) The Montana Department of Fish, Wildlife and Parks considers the Missouri River as a Class I navigable stream from Three Forks to the Montana/North Dakota border.

Summary: The Missouri River has been navigated in connection with a variety of activities and by a variety of river crafts from its headwaters at Three Forks to the Montana/North Dakota border. It also has been declared a navigable waterway between these points by the federal government.

* * *

Swan River

(Tributary of Flathead Lake)

The Swan River between Swan Lake and Bigfork on Flathead Lake was used to float about 100 million feet of timber from Swan Lake to Flathead Lake between 1914 and 1919. Logging and the logging drives were supervised by J. E. Craney of the Somers Lumber Company. [Source: Henry Elwood, *Kalispell, Montana, and the Upper Flathead Valley* (Kalispell,MT:1980), p. 200.]

In the Swan Lake area, logs were hauled by railroad, and some floated, to the head of Swan Lake where they were decked, rolled into the river, and floated across the lake to a boom on the lower end of Swan Lake. From here, the boom was opened and the logs were floated 20 miles down the Swan River to

Flathead Lake at Bigfork. They were again boomed and hauled by tug to the Somers mill. [Source: Martha Craney Wiberg and Edmund B. Craney, "Swan Lake, Montana: 1914-1919"; *The Columbia River and Oregon Timberman*, September 1918, from the Clarence Strong Papers, pages unnumbered.]

Summary: Swan River was navigated for a distance of approximately 20 miles from its mouth to Swan Lake. Swan Lake itself was navigated in connection with the same commercial floating of timber.

REPORT ON NAVIGABILITY OF THE CLARK FORK OF THE COLUMBIA RIVER, IDAHO AND MONTANA

1. *Name of waterbody*: Clark Fork of the Columbia River. The Clark Fork is situated within the upper Columbia River basin located in western Montana and the panhandle of northern Idaho. The Clark Fork rises west of the Continental Divide and flows generally westward across the Montana-Idaho border, emptying into Pend Oreille Lake in northern Idaho. The Clark Fork is about 351 miles long, of which approximately 11 miles are situated in the State of Idaho and 340 miles in the State of Montana. (See Appendix 1 for basin and vicinity maps.)

2. *Tributary to*: The Clark Fork empties into Pend Oreille Lake, Idaho, the outlet of which flows across the Washington-Idaho line and then northerly across the international boundary to its mouth on the Columbia River. Pend Oreille Lake and its outlet, the Pend Oreille River, are navigable waters of the United States.

3. *Physical characteristics*:

a. *Type*: River.

b. *Area*:

The Clark Fork drains all of Montana west of the Continental Divide except for a small area tributary to the Kootenai River in the northwest corner of the state. The Clark Fork rises in the Silver Bow Mountains near Butte, Montana. It flows generally

northward to Garrison, Montana, where it turns to the northwest and maintains this general course for about 175 miles until it reaches St. Regis, Montana, where it turns abruptly to the northeast. The Clark Fork continues northeasterly for about 26 miles until it is joined by the Flathead River near Paradise, Montana, at which point the Clark Fork resumes its northwesterly course across the Montana-Idaho border and into Pend Oreille Lake. The outlet of Pend Oreille Lake, the Pend Oreille River, flows westward from the lake to the Washington-Idaho line and then northerly to the international boundary. Just north of the boundary, the Pend Oreille River resumes its westward course and empties into the Columbia River.

There are more than 150 streams tributary to the Clark Fork. The three principal tributaries of the Clark Fork are the Flathead, Blackfoot, and Bitterroot rivers. The Flathead River is the largest and most northerly tributary. Flowing south through Flathead Lake, the Flathead River turns westward at Dixon, Montana, and enters the Clark Fork near Paradise, Montana. The Blackfoot River is the uppermost important tributary and flows in a westerly direction to join the Clark Fork near Missoula, Montana. The northwest flowing Bitterroot River joins the Clark Fork just downstream of Missoula, Montana.

The Clark Fork is about 1,050 feet wide at the mouth, narrowing to about 140 feet at Cabinet Gorge near the Idaho-Montana border. Above Cabinet Gorge Dam, the Clark Fork gradually widens to about 500

feet near the city of Thompson Falls. Above Thompson Falls Reservoir, the Clark Fork begins to narrow again and is about 400 feet wide at Superior and about 300 feet wide near Missoula. The Clark Fork continues to narrow above Missoula to its headwaters about 28 miles above Deer Lodge, Montana. The Clark Fork is about 50 feet wide at Deer Lodge.

c. *Approximate discharge volumes*: Discharges for the Clark Fork are measured at several locations in the States of Idaho and Montana. Data for the three locations specified below were compiled from 1972 water resources data published by the U. S. Department of the Interior, Geological Survey.

(1) *At White Horse Rapids, 0.4 miles downstream from Cabinet Gorge Dam, Idaho*:

Maximum discharge:	190,000 c.f.s. (10 June 1972)
Minimum discharge:	762 c.f.s. (2 Sept 1962)
Average discharge:	22,350 c.f.s. (44 years of record, 1928-1972)

(2) *2.4 miles southeast of Plains, Montana, 6.0 miles downstream from Flathead River*:

Maximum discharge:	134,000 c.f.s. (5 June 1948)
Minimum discharge:	3,200 c.f.s. (8 Feb 1936 and 10 Dec 1940)
Average discharge:	20,000 c.f.s. (62 years of record, 1910-1972)

(3) *1.0 miles downstream from Bitterroot River, 4.5 miles west of Missoula, Montana*:

Maximum discharge:	52,800 c.f.s. (23 May 1964)
Minimum discharge:	388 c.f.s. (18 Jan 1933)
Average discharge:	5,448 c.f.s. (43 years of record, 1929-1972)

d. *Fall per mile*: The Clark Fork falls from approximate elevation 4,500 feet near Deer Lodge, Montana, to 2,062 feet at Pend Oreille Lake, Idaho. Total fall from Deer Lodge to Pend Oreille Lake is 2,438 feet, averaging 7.5 feet per mile.

e. *Extent of tidal influence*: Not applicable.

f. *Water surface elevations*:

The normal full pool elevations of reservoir areas on the Clark Fork are as follows:

Project	Normal Full Pool
Cabinet Gorge Dam	2175.0 feet MSL, USGS datum
Noxon Rapids Dam	2331.0 feet MSL, USGS datum
Thompson Falls Dam	2396.0 feet MSL, USGS datum
Milltown Dam	3260.0 feet MSL, USGS datum

g. *Description of improvements to navigation not listed in paragraph 5 below*: Seattle District has no record of any navigational improvements being

made to the Clark Fork other than channel and flood control improvements listed below:

(1) Concrete wall and riprap extensions for bank protection at Missoula completed by the City of Missoula circa 1940.

(2) Sanders County expended $40,000 for groins and riprap from 1930 to 1940 at Plains, Montana.

4. *Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce*: Four power installations are situated on the Clark Fork as follows:

a. Cabinet Gorge Dam, located about half a mile below the Montana-Idaho state line, completed by the Washington Water Power Company in 1953.

b. Noxon Rapids Dam, located about 20 miles above Cabinet Gorge Dam, completed by Washington Water Power Company in 1960.

c. Thompson Falls Dam, located at Thompson Falls about 38 miles above Noxon Rapids Dam. Present installation completed by the Montana Power Company in 1916.

d. Milltown Dam, located at the mouth of the Blackfoot River, originally constructed by W. A. Clark in 1907. It is now operated by the Montana Power Company.

None of the above dams has locks for through navigation.

In addition to the four power installations cited above, 75 bridges cross the Clark Fork from its mouth in Pend Oreille Lake to its headwaters near Butte, Montana. Types of bridges and quantity of each are as follows:

Type	Qty
Farm bridge	1
Foot bridge	4
Street bridge	8
Highway bridge	10
County road bridge	15
Railroad bridge	37

5. *Authorized projects*:

a. *Nature condition and location of any improvement made under projects authorized by Congress*: A project adopted 17 May 1950 provided for flood protective works to prevent flood damage within the city limits of Missoula. The work consisted of levees, floodgate structure, floodwall, and extension of an existing State highway levee. The project was completed in 1966.

b. *Description of projects authorized but not constructed*: Not applicable.

c. *List of known survey documents or reports describing the waterbody*:

(1) Preliminary examination report contained in Annual Report of the Chief of Engineers for 1891, Part 5, pp. 3250-3251.

(2) House of Representatives Doc. No. 103, 73rd Congress, 1st Session, 1932, "Columbia River and Minor Tributaries."

(3) House of Representatives Doc. No. 531, 81st Congress, 2nd Session, 1950, "Columbia River and Tributaries, Northwestern United States."

(4) House of Representatives Doc. No. 403, 87th Congress, 2nd Session, 1963, "Columbia River and Tributaries."

6. *Previous Corps of Engineers determinations on navigability*:

In 1932 the Clark Fork was designated a navigable waterway of the United States from its mouth in Pend Oreille Lake, Idaho, to the Northern Pacific Railway bridge near the town of Clark Fork, a distance of 4 miles. This designation was made based upon a report of navigability of the Clark Fork above Pend Oreille Lake prepared by the Seattle District in 1932. A copy of the report and indorsements thereto is attached as Appendix 2.

Head of navigation was established at the Northern Pacific Railway bridge as it was considered the practical head of navigation for tugs and light-draft boats. The report did indicate, however, that between 1900 and 1929 logs were floated down the Clark Fork during the spring high water to sawmills on Pend Oreille Lake. Approximately board 5 million board feet of timber were floated during the last drive in 1929. The report also indicated that logs floated on

the Clark Fork had been floated from as far upstream as Dixon, Montana, on the Flathead River. The logs were splashed over Thompson Falls Dam, originally constructed circa 1912 at Thompson Falls Rapids, about 69 miles above Pend Oreille Lake, No bridges were obstructive to the log drives. (Refer to paragraphs 4 and 7 of the 1932 report, Appendix 2.)

7. *Past or present interstate commerce*:

a. *Past*:

The Clark Fork report of 1932 (Appendix 2) historically documented navigation on the Clark Fork from the mouth at Pend Oreille Lake upstream to Paradise, Montana. Navigation consisted of 4 small boats on the first 4 miles of the river and the floating of logs originating on the Flathead River down the Clark Fork to Pend Oreille Lake.

Additional research done by the Seattle District in conjunction with the preparation of this report revealed that steamboat navigation on the Clark Fork occurred as far upstream as Thompson Falls, and that other forms of commercial navigation regularly occurred as far upstream as the mouth of the Blackfoot River. A summary of our findings relating to the development of waterborne transportation on the Clark Fork follows.

Prior to settlement of Montana by white men, Indians were using dugout canoes on several of the region's waterways, including the Clark Fork. Some independent fur trappers and traders carried furs on

the river, one of whom was David Thompson of the North West Company. During 1808-1809, Thompson established fur posts near the mouth of the Clark Fork at Pend Oreille Lake (Kullyspell House) and near the mouth of the Thompson River (Saleesh or Flathead House). Following establishment of these posts, Thompson traded with the Flathead Indians whose camp was located upstream near the mouth of the Flathead River. On at least two occasions after trading with the Flatheads, Thompson canoed from their camp to Pend Oreille Lake, portaging at Thompson Falls and Rock Island Rapids. (Reference M. Catherine White, ed. *David Thompson's Journals Relating to Montana and Adjacent Regions, 1808-1812* (Missoula: Montana State University Press, 1950), pp. c-cxx and 43-222; Olga Weydemeyer Johnson. *Flathead and Kootenay.* (Glendale, California: Arthur H. Clark Co., 1969), pp. 57-58, 181, 185-186.)

In 1853, Governor Isaac I. Stevens conducted an expedition to explore and survey a railroad route from the headwaters of the Mississippi River to the Pacific Coast. Dr. George Suckley, surgeon and naturalist for the expedition, was given the task of navigating the Clark Fork and recording the geographical features of the stream, its valley, and its resources, as well as learning the customs, habits, and manner of life of the local Indians. On 15 October 1853, Dr. Suckley and three others left Fort Owen* on the

---

* Fort Owen, established in 1850 and situated just north of Stevensville, was once the major trading center for Indians and

(Continued on following page)

Bitterroot River in a boat constructed of three bullock hides stretched over a frame. Dr. Suckley and his group traveled down the Bitterroot and Clark Fork, eventually arriving at a Jesuit mission located on the upper end of Pend Oreille Lake. From there they continued overland to Fort Colville, where they transferred to boats and journeyed down the Columbia River to the Pacific Coast. (Refer to Hamilton, James McClellan. *From Wilderness to Statehood, A History of Montana,* Portland: Binfords & Mort, 1957, p. 114.)

Following Governor Stevens' expedition, the Mullan Road was constructed through the area between 1858 and 1860.** Completion of the Mullan Road facilitated heavy immigration to Montana beginning in 1862 when rich gold deposits were found in the western mountain gulches. People entering the region made immediate and varied use of the area's waterways. Flour mills and several small sawmills were run by water power; passengers and freight were transported by steamers and a variety of smaller boats; mail and hay were transported in small boats; ore was moved by barges; and railroad ties and logs were floated on many of the streams.

---

whites throughout the Clark Fork watershed. Fort Owen was originally St. Mary's Mission, established by Father Peter J. DeSmet in September 1841.

** The Mullan Road provided the principal northern route for travel between the Missouri and Columbia rivers until the completion of the Northern Pacific Railway through Montana in 1883.

Between the 1860's and 1870's, flour mills were in operation on the Clark Fork at Frenchtown and Missoula. Small sawmills, which sprung up wherever gold camps came into existence, were located on the Clark Fork at Missoula, and near Superior and Frenchtown. Several other flour mills and sawmills were located on creeks tributary to the Clark Fork. (Refer to Burlingame, Ralph and K. Ross Toole. *A History of Montana,* Vol. II, New York: Lewis Historical Publishing Company, Inc., 1957, p. 4; correspondence from Ludvig G. Browman, Missoula County Commissioner, 21 February 1974.)

Steamboats were put into service on the Clark Fork in 1866, evidenced as follows:

> "The Oregon Steam Navigation Company attempted to extend its business from the lower Columbia in 1865 by building the MARY MOODY on Lake Pend d'Oreille, and sending it in 1866 to the Cabinet Landing, just inside the present state boundary. In 1867 two other boats were added which ran in relay, the CABINET running from Cabinet Landing to Rock Island Rapids, and the MISSOULA taking the passengers and freight on to Thompson Falls, the upper limit of navigation. These boats operated until 1870. . . ."
>
> (*A History of Montana,* Vol. II, p. 70)

Additional references to the above-quoted steamboat operations are contained in *The Montana Almanac*

1959-60, Missoula: Montana State University Press, 1958, p. 252; *Rocky Mountain Gazette,* 18 August 1866; *Helena Herald,* 2 May 1867, 5 June 1867, 12 September 1867, 13 February 1868; *Deer Lodge Independent,* 19 June 1868; E. W. Wright. *Lewis & Dryden's Marine History of the Pacific Northwest* (first published 1895 by Lewis & Dryden Printing Co. and reprinted 1967 by Superior Publishing Co., Seattle, Washington).

Though Thompson Falls was the upper limit for steamboat navigation on the Clark Fork, other forms of navigation were conducted above this point between the 1860's and 1870's as follows:

- Mail was carried by boat from Deer Lodge to Missoula on one occasion in 1866. (*Missoula Pioneer,* 13 July 1872; *New Northwest,* 13 July 1872)

- In 1866 two men went upriver to cut wood for a ferryboat and traveled downriver by raft from the mouth of the Blackfoot River to Missoula. (*History of Missoula County and City* by Frank Woody, 1897)

- In 1870, Henry Buck and others built three boats and floated from Lincoln on the Blackfoot River to Frenchtown, and packed the rest of the way to the Cedar Creek mines near Superior. (*Helena Herald*, 15 March 1870)

- Other parties heading for the mining areas near Superior traveled by boat or raft from Missoula circa 1870. Boats also carried hay and

lumber from St. Regis to Superior. (New Northwest, 4 March 1870; Missoula Pioneer, 24 February and 2 March 1871)

• In 1872 a surveying party of Northern Pacific Railway engineers went by boat from Missoula to the junction of the Clark Fork and Flathead rivers (Missoula Pioneer, 13 July 1872)

Mining and the rapid settlement of the Montana plains area had created a market for heavy timbers in the 1860's, but in the 1870's small sawmills in Montana fell on hard times as the mills were closely associated with the gold camps and gold was no longer drawing people to new camps. In the 1880's, however, the lumber business was not only revived but put on a completely new basis for the following reasons:

(1) The Utah Northern and Northern Pacific railroads were built into the state, creating a sudden demand for building lumber and ties.

(2) Placer mining was replaced by hard rock or quartz mining, which created an additional demand for mine timbers and building lumber.

One merchandising firm which took early advantage of the railroads' requirements for millions of ties and vast quantities of timber for bridges and buildings was Eddy, Hammond and Company. This company was contracted by the Northern Pacific Railway to furnish all kinds of supplies, including timber, ties, and tunnel timbers, for use between the

Little Blackfoot River and the Idaho line. A sawmill was started at the mouth of the Blackfoot River in 1881, and soon afterwards Eddy, Hammond and Company bought or built a number of additional sawmills up and down the Clark Fork.

During construction of the Pacific Northern Railway, supplies provided by Eddy, Hammond and Company were carried down the Flathead River and the Clark Fork by batteaux and carried up the Clark Fork by steamboat from Cabinet Landing to Thompson Falls. Lumber was rafted down the Clark Fork in 1882 and, for a brief time during the winter of this same year, teams drove on ice between the construction camps. (Refer to *A History of Montana,* Vol. II, p. 5; *The Missoulian,* 11 November 1881, 19 May 1882, 9 and 30 June 1882, 7 July 1882, 18 August 1882, 8 and 29 September 1882, 9 February 1883.)

By 1890, large sawmills had been established by various companies at Libby, Eureka, Troy, Missoula, Bonner, Hamilton, and elsewhere to meet the burgeoning lumber demands of mining and railroad interests. The following data from *A History of Montana,* Vol. II, illustrates the extent of lumber requirements for the Anaconda Copper Mining Company situated near Butte:

> "As early as 1884, sawmills west of the divide were supplying the 4-year-old Anaconda Copper Company alone with 300,000 cords of wood for smelter fuel. At the going rate of $5.00 per cord, this represented a million and a half dollars . . . for smelter fuel

> alone. By 1888 the Anaconda Company alone was using 40,000 feet of timber per day in the mines, exclusive of the smelter, and the company's lumber contracts totaled well over a million dollars a year."
>
> (p. 5)

By 1898, there was a marked tendency for large mining interests to acquire the ownership of sawmills and timberland. The Anaconda Company set up its own lumber department and began buying vast timber acreages from the Northern Pacific Railway as well as from private concerns. Early purchases by Anaconda included the Eddy, Hammond and Company sawmill at Bonner and 90,000 acres of timberland situated mainly in the Blackfoot valley, and an additional 700,000 acres of timberland from the Northern Pacific Railway. Almost the entire lumber demand of the Butte mining district was supplied by the area around Missoula, and large log drives were conducted on both the Bitterroot and Blackfoot rivers. (Refer to *A History of Montana,* Vol. II, pp. 6-8; U. S. Department of the Interior, Bureau of Reclamation, Reconnaissance Report, "Clark Fork Basin, Montana", Boise, Idaho, June 1959, pp. 114 and 123; correspondence with Clarence C. Strong of Missoula, a retired U. S. Forest Service employee who has done considerable research on logging and lumbering in Western Montana, March 1974.)

Log drives were also conducted on the Clark Fork below Missoula from about 1900 to 1925. Drives

originated on Ninemile Creek, Flathead River, White Pine Creek, Trout Creek, Vermilion River and Bull River. Nearly all the logs driven down these tributaries went on into Idaho via the Clark Fork and were boomed in the vicinity of the town of Clark Fork, Idaho, for towing on Pend Oreille Lake to a large sawmill at Dover or to the Hope Lumber Company plant at Hope, Idaho. The total quantity of logs floated on the Clark Fork below Missoula varied from 10 to 50 million board feet per year. (Reference correspondence from Clarence C. Strong of Missoula, and Floyd W. Viche of Mineral County Commissioners' office at Superior, Montana, February-March 1974.)

By letter dated 20 February 1974, Montana State Department of Natural Resources and Conservation indicated that "the Clark Fork River . . . especially from Missoula downstream, has been used for the purpose of transporting logs and holding timber in and near local lumber operations."

Ore was also moved on the Clark Fork as follows: Beginning about 1890, ore from the Iron Mountain mine, located 3½ miles north of Superior, was hauled by wagon to the Clark Fork, loaded on barges, floated to Paradise, and then railed to Helena. From Helena, some of the ore was further railed to the East Coast, loaded on ships, and transported as far distant as Belgium. Ore was moved in this manner until about 1908. (Reference Report to National Mining Congress of 1892, on mines of Montana, by J. A. McKnight; correspondence with Floyd W. Viche, February 1974.)

Several sources other than those already cited in this report were researched to determine the historical aspects of navigation on the Clark Fork. These additional sources further substantiated the findings reported above.

b. *Present*

The Clark Fork is used extensively by recreationists downstream of Missoula for floating in rubber rafts and small boats. Fishing and scenic trips are conducted by licensed guides. The reservoir areas behind Cabinet Gorge Dam, Noxon Rapids Dam, and Thompson Falls Dam are particularly popular for fishing and recreational boating.

The U. S. Forest Service office at Missoula, Montana, indicates that there has been a considerable increase in recreational boating on the Clark Fork during the past 5 years and that this trend is expected to continue.

8. *Potential use for interstate commerce if applicable*:

The Seattle District has no data indicating that commercial navigation on the Clark Fork will reoccur in the foreseeable future. The Clark Fork does, however, have the capacity to accommodate some forms of commercial navigation on portions of the waterway as far upstream as the mouth of the Blackfoot River, evidenced by past and present usage documented in paragraph 7 of this report. The Clark Fork does not have the capacity to accommodate commercial navigation above the Blackfoot River.

9. *Nature of jurisdiction known to have been exercised by Federal or State agencies, if any*:

The Corps of Engineers has exercised jurisdiction over the Clark Fork under the River and Harbor Act of 3 March 1899 since 1932 when the waterway was designated a navigable waterway of the United States. Head of navigation was established at the Northern Pacific Railway bridge about 4 miles above the mouth.

The United States Coast Guard has made no formal determination with respect to navigability of the Clark Fork, and the Seattle District has no knowledge of other Federal agencies exercising jurisdiction over the river.

By letter dated 13 March 1974, Idaho Department of Public Lands advised that "the State of Idaho considers the Clark Fork of the Columbia navigable downstream from the state line to its mouth including the meandered delta channels which naturally exist. The State's jurisdiction includes that portion of the river between the natural and ordinary high water lines as such existed on July 3, 1890."

The State of Montana has taken no position on the navigability of the Clark Fork.

10. *State or Federal court decisions relating to navigability of the waterbody, if any*: There are no known Federal or State court decisions relating to the navigability of the Clark Fork.

11. *Remarks*:

In 1932 the Clark Fork was designated a navigable waterway of the United States in accordance with criteria for navigability as defined at that time. Head of navigation was established at the Northern Pacific Railway bridge situated near the town of Clark Fork, Idaho, about 4 miles above the mouth. This designation was made based on the finding that the Northern Pacific Railway bridge was considered the practical head of navigation for tugs and light draft vessels. (Refer to paragraph 12 of the 1932 report, Appendix 2.)

Our research has shown that steamboat navigation occurred on the Clark Fork as far upstream as Thompson Falls, Montana, and that other forms of commercial navigation occurred as far upstream as the mouth of the Blackfoot River. In general, furs, logs, railroad ties, passengers, freight, and ore were moved on various sections of the Clark Fork below the Blackfoot River between the mid-1860's and 1925. On one occasion in 1866, mail was transported by boat from Deer Lodge to Missoula. Our research further showed that extensive recreational boating is presently conducted on the Clark Fork downstream of the Blackfoot River.

MADISON RIVER NAVIGATION STUDY

Manuscript Prepared by:
Alan Newell
&
Gary Williams

Presented to:
U.S. Army Corps of Engineers
Omaha District
Contract No. DACW45-74-C-0138
October 25, 1974

PREFACE

The following report summarizes the physical, historical, and legal condition of the Madison River in southwestern Montana, as it pertains to commercial navigation. The authors wish to acknowledge the assistance of a number of state and federal agencies in the preparation of this manuscript: the Montana Water Resources Board, the Montana Fish and Game Department, United States Department of the Interior (Geological Survey), Department of Agriculture (Forest Service), the Montana State Historical Society, the University of Montana Library and Archives, and Montana State University's Library and Archives. Special thanks goes to Chester Hagedorn, Beaverhead National Forest, and William Schowe, Sheridan, Montana, whose assistance was immeasurable.

1. *Name and Description of Waterbody*:

Madison River. The Madison River forms in Yellowstone National Park at the juncture of the

Gibbon and Firehole rivers. It flows a distance of one hundred and forty (140) miles from that point to Three Forks, Montana, where it joins with the Gallatin and Jefferson rivers to form the Missouri River. The course of the river lies generally in a westerly direction from Yellowstone Park to Cliff Lake, then north to Three Forks.

The river basin comprises five distinct natural subdivisions, draining approximately 2,500 square miles. The headwater region, composed of high plateaus and mountains, lies in Yellowstone National Park and is outside the purview of this report. The upper canyon section of the Madison lies in a gorge walled with massive rock. [Hebgen Dam is situated in this section of river.] The middle valley section is a basin with a width of between eight (8) and ten (10) miles, bordered on the west by the Jefferson mountains, and on the east by the Madison Range. The lower canyon section is a narrow, rock-walled gorge similar to the upper canyon. Finally, the Madison River terminates in a low, wide plain which is almost level. The river at this point falls much less radically than upstream and has the appearance of being almost sluggish.

2. *Tributary to*:

   Missouri River

3. *Physical Characteristics*:

   a. Type: River.

   b. Length: One hundred and forty (140) miles.

c. Approximate discharge volumes (below Ennis Lake and McAllister, Montana, 1938-1972):

Maximum: 9,550 c.f.s.

Minimum: 210 c.f.s.

Mean: 1,726 c.f.s. (34 year record)

(see Appendix A)

d. Fall per mile:

29 feet per mile in the upper canyon

16 feet per mile in the lower canyon

e. Obstructions to navigation:

Three Forks to West Yellowstone

Bridges.....23

Power Lines.....16

Dams.....2
(Madison Dam and Hebgen Dam)

Old bridge pilings at Ennis Earthquake Lake land fill

Numerous shallows, rapids and boulders appear on the Madison River after the spring run-off. These physical obstructions increase and become more dramatic as one travels upstream. They are especially marked in the narrow canyon of the Upper Madison at the entrance to Earthquake Lake.

(see Appendix B)

4. *Authorized Projects*:

   a. Improvements for navigation: There have been no improvements specifically designed for navigation on the Madison River. However, the Corps of Engineers has made emergency repairs for flood control on the Madison River. Two hundred, forty-seven thousand dollars ($247,000.00) was spent in 1950 for flood control on the Madison near Three Forks. The 1959 Earthquake on the upper Madison required the Corps to expend $1,715,000 for emergency flood control. These two projects could conceivably effect potential navigation on the Madison River.[1]

   b. Projects authorized but not constructed: No projects for navigation are currently authorized on the Madison River. (Refer to Appendix B for a list of projects which could affect navigation on the Madison.)

   c. Surveys; The only survey of the Madison River specifically mentioning navigation is the examination of 1932 by the Corps of Engineers. U.S. Congress. House. *Jefferson, Madison, and Gallatin Rivers, Montana.* House Doc. no 193, 72nd Congress, 1st sess., Washington, D.C.: 1932. This report concluded that the primary use of water in the Madison River should be for irrigation. It proposed no projects.

---

[1] Corps of Engineers. WATER RESOURCES DEVELOPMENT IN MONTANA, (Washington: 1961), pp. 18-20.

The following is a listing of early explorations and surveys tangentially associated with the Madison River.

DeLacy, Walter W. "A Trip up the South Snake River in 1863," *Contributions to the Historical Society of Montana.* Vol. I. Helena, Montana: 1902.

Hayden, F.V. *Preliminary Report of the United States Geological Survey of Montana.* Fifth Annual Report. Department of Interior. Washington, D.C.: 1872.

___. *Sixth Annual Report of the United States Geological Survey of the Territories.* Department of Interior. Washington, D.C.: 1873.

Jones, William A. *Report Upon Reconnaissance of Northwestern Wyoming, Including Yellowstone National Park, Made In Summer of 1873.* War Department. Washington, D.C.: 1874.

Raynolds, W.F. *Report on the Exploration of the Yellowstone and Missouri Rivers In 1859-1860.* 40th. Cong., 2nd sess., Senate Ex. Doc. 77, Vol. 2. Washington, D.C.: 1868.

U. S. Department of the Interior. Bureau of Reclamation. *Missouri River Basin.* Senate Doc. 191, 78th Cong., 2d sess. Washington, D.C.: 1944.

U. S. Department of the Interior. Bureau of Reclamation. *Reconnaissance Report on Madison River Basin.* Sub Basin Report 8. Great Falls, Montana: 1942.

5. *Past and Present Commerce*:

The Madison River Valley has had a relatively short, but productive historical career. The valley served the development of Montana as a thoroughfare for trappers and explorers during the nineteenth century and as the cradle of mineral and agricultural development in the state. The primary role of the Madison River in this scenario was one of providing water for power and irrigation. However, while the river principally offered sustenance for early miners and cattlemen in the area, it did serve briefly as a vehicle for transporting logs from the upper end of the valley to a sawmill near Ennis, Montana. The history of this navigation of the Madison River intertwines with the history of the economic development of southwestern Montana.

The first white men to venture into the region of the Madison Valley traveled with the expedition of Lewis and Clark. Meriwether Lewis and William Clark reached the Three Forks of the Missouri on July 25, 1805. At this juncture, they examined the three courses of travel available to them, finally deciding on the most westerly, the Jefferson River.

> a fine morning – we proceeded on a few miles to the three forks of the Missouri – those three forks are nearly of a Size, the North fork appears to have the most water and must be Considered as the one best calculated for us to assend (sic). Middle fork is quit (sic) as large about 90 yds wide. The South fork is about 70 yds wide and falls in about

> 400 yards below the midle (sic) fork – those forks appear to be verry (sic) rapid and contain some timber in their bottoms which is verry extencive (sic).[1]

The expedition of Lewis and Clark, in its effort to find a continuous waterway to the Pacific, failed to discover the richness of the Madison Valley. However, reports of the journey soon reached restless Americans in the East, anxious for the opportunity to make their fortunes in this virgin territory.

Early interest in the Madison River stemmed from its reputation as a choice beaver stream. No conclusive evidence of navigation on the Madison River by fur trappers is available. However, it is certain that the valley was trapped during the early nineteenth century, and that the river served as a guide for British and American trappers traveling into the Snake River country.

The Missouri Fur Company operated by Manuel Lisa located a trading post at the Three Forks of the Missouri in 1810. While the country proved rich in furs, the hostility of the Blackfeet soon drove the traders out of the area. In the fall of 1810, Andrew Henry retreated up the Madison Valley to the headwaters of the Snake River where he established

---

[1] Bernard DeVoto, THE JOURNALS OF LEWIS AND CLARK, p. 165 (Boston: 1953).

Henry's Fort.[2] Finan MacDonald, an employee of the Hudson Bay Company, experienced similar problems with the Blackfeet while traveling through the Madison Valley to the Great Falls of the Missouri in 1823.[3] Finally, the infamous Peter Skene Ogden of the Hudson Bay Company used the Madison River as a guide in his hasty retreat from the Great Salt Lake in 1825.

Many trappers knew the dangers of this forbidding region. However, the abundance of beaver was a compelling attraction. These riches lured the experienced trader Joshua Pilcher, who inherited the Missouri Fur Company from Manuel Lisa in 1821. In 1823, Pilcher attempted to capture the trade of the Madison Valley by sending Michael E. Immel and Robert Jones to the Three Forks. While the pair successfully trapped the Three Forks area, their deaths at the hands of the Blackfeet farther east on the Yellowstone River, drove the Missouri Fur Company from the region. The formidability of the Blackfeet, coupled with the development of the rendezvous system and the shifting of fur trade activity to the

---

[2] There is disagreement over the route of Andrew Henry after his abandonment of the Three Forks post. It is not definite whether he traveled up the Gallatin Valley or the Madison Valley. However, the strongest possibility is for the Madison route. See Paul C. Phillips, THE FUR TRADE, vol. II (Norman: 1961), p. 264.

[3] William H. Goetzmann, EXPLORATION AND EMPIRE: THE EXPLORER AND THE SCIENTIST IN THE WINNING OF THE AMERICAN WEST (New York: 1966), p. 89.

central Rocky Mountains, effectively curtailed any further exploitation of the Madison River Basin until the mid-nineteenth century.[4]

The Blackfeet Treaty of 1855 forced these fierce warriors to allow white intrusion of their lands and opened the way for permanent settlement in the Madison Valley. The discovery of gold in Alder Gulch followed the treaty, preluded the establishment of the first town in the area and created a market for the agricultural produce soon to flourish in the valley.

Granville Stuart, an early pioneer to Montana, led an expedition in 1863 from Bannack City (in southwestern Montana), along the banks of the Yellowstone River in search of new gold deposits. The expedition consisted of two parties, which were directed by Stuart to meet at the mouth of the Beaverhead River and to proceed together to the Yellowstone. The parties failed to meet on the appointed day, and Stuart decided to travel to the Yellowstone with only the first group. The second party, after realizing that it had missed the Stuart group, also left for the Yellowstone; but, after a skirmish with Crow Indians, decided to return to Bannack City. They crossed the Gallatin Valley, ascended the Madison River along its banks, crossed the Tobacco mountains, and entered the Ruby Valley, where they unexpectedly found gold at Alder Gulch. The fortuitous miners, unable to keep the discovery a secret following their return to Bannack

---

[4] Phillips, THE FUR TRADE, p. 395-402.

City, initiated the beginnings of local government in Alder Gulch in an effort to bring order to the chaos of a new mining boom. This activity in Alder Gulch soon resulted in the establishment of Virginia City in 1863. By 1864, this mining town boasted of over 6,000 residents. Virginia City became the capital of Montana Territory in 1864 and remained so until 1875.[5]

The mineral wealth of Madison county attracted settlers to the area, and produced the first signs of prosperity. However, it was the agricultural development of the valley which supported the numerous mining camps and lent stability to the patterns of settlement in this region. Miners often found the physical exertion of mining not compensitory with the rewards. Thus, many, after a brief sojourn in the gold fields, turned their capitalistic proclivities towards more stable endeavors, such as stock-raising and farming. Stock-raising in the Madison Valley developed to such an extent in the 1860's and 1870's, that it soon rivalled mining in terms of importance.[6]

The Madison River and its tributaries figured prominently in the development of the economy of the valley; the principal use of most basin water being

---

[5] Merril G. Burlingame, "The Mining Frontier in Montana", MONTANA'S PAST, edited by Michael Malone and Richard Roeder (Missoula: 1973), pp. 92-92.

[6] Burlingame, "The Mining Frontier in Montana", pp. 113-115, and HISTORY OF MADISON COUNTY, 2 vols., Typescript, Montana Historical Society, Helena.

directed towards irrigation. However, the Madison River proper was not the main source of this water.

> Irrigation is the largest water use in the Madison River Basin. However, the main flow of the Madison is not the principal source of water supply. The tributary streams are furnishing irrigation water for 26,330 of the 43,010 acres of irrigated land.[7]

The Madison River's prime function historically was in the area of power development. Madison Dam no. 1 and 2 at Ennis, Montana, constructed in 1900 and 1906 respectively, and Hebgen Dam below West Yellowstone, Montana, constructed in 1915, regulated the water flow of the Missouri River power generating system. (The Montana Power Company continues to operate these facilities for this purpose.)[8] The construction of these dams presented a substantial burden on the river's potential use for navigation, while offering an opportunity for that particular activity. Barges navigated the reservoir in 1914 hauling supplies from West Yellowstone to the Hebgen Dam site.[9] Moreover, the Madison fulfilled additional requirements for residents of the Valley.

---

[7] Montana Department of Natural Resources and Conservation, THE MADISON RIVER BASIN: A RESOURCE REVIEW (Helena: 1970), pp. 39 and 40.

[8] Montana Department of Natural Resources and Conservation, THE MADISON RIVER BASIN, p. 5.

[9] Interview with William Schowe, retired Ranger Beaverhead National Forest. Held in Sheridan, Montana, August 22, 1974.

The benefits incurred from this use lay in the areas of recreation and logging.

William Wilcox, an individual experienced in the logging industry in New York, began planning a logging operation on the Upper Madison River in 1912. Wilcox and Madison National Forest rangers surveyed the West Fork of the Madison during the summer and the contract for timber was let that fall.[10] Wilcox's plan involved cutting the timber near Lyon ranger station and floating the logs down the river to a sawmill under construction at Varney, Montana (about ten miles south of Ennis). The enterprising easterner hoped to tap the almost virgin forests of the Upper Madison, supplying mining timbers to the Butte mines and saw lumber to the residents of the Madison Valley.[11] Wilcox proceeded to incorporate the Madison River Lumber Company in October, 1912, listing himself as one of the three principal directors.[12]

Timber cutting began on the Upper Madison during the winter of 1912 and 1913 and plans formed in the spring to drive the logs down to the Varney mill. Wilcox imported a number of experienced Canadian and eastern lumberjacks to help in this massive

---

[10] (Virginia City) MADISONIAN, August 2, 1912; October 4, 1912.

[11] (Virginia City) MADISONIAN, March 21, 1913; September 19, 1913.

[12] (Virginia City) MADISONIAN, October 4, 1912.

undertaking, among them his son Gilbert who helped conduct the drive.[13] Yet, the construction of the 900 foot log boom across the Madison and the large mill pond and sawmill required more laborers than could be imported. Thus, lumberjacks from the surrounding area, largely Butte, were hired during the summer of 1913.[14]

The log drive commenced belatedly in July of 1913, after the river had fallen substantially. Perhaps due to this situation and the size of the drive (probably between seven hundred thousand and one million board feet) the drive took two months to reach the Varney mill, fifty-five miles downstream.[15] Wilcox considered the drive a complete success, having sent most of the logs to the millpond at Varney. Obviously some problems with shallows evidenced during the course of the drive. Indeed, for years after this summer of 1913, numerous logs were found along side the banks of the Madison River.[16] However, the size of the drive, coupled with the restricted water flow produced by the construction of Hebgen Dam helped explain any difficulty in driving the logs. (Refer to Appendix A.)

---

[13] (Virginia City) MADISONIAN, May 9, 1913; September 19, 1913.

[14] (Virginia City) MADISONIAN, July 25, 1913.

[15] The Virginia City Madisonian issued repeated accounts of the progress of the log drive during the summer of 1913. See issues for July 4, 1913, August 8, 1913 and September 19, 1913.

[16] Interview with William Schowe.

This situation involving the dam prevented further log driving on the Madison after 1913.

> As for the log drive: It was, or I would say, successful in that they got all the logs down to the mill pond, but they did not try a second drive, as most of the timber left was above the Hebgin (sic) Dam, and the power company practically refused to put the logs over the Dam. There would not have been much of a problem of driving the logs if the Power Company had not shut the water off at the Dam too soon, but I suppose that was one way of getting the lumber company out of their hair.[17]

The logging operations of the Madison River Lumber Company did provide the residents of the Madison valley with a considerable amount of sawed timber. Wilcox continued to advertise the sale of lumber from his mill at Varney throughout the fall and winter of 1913 and 1914. He claimed to be able to produce approximately 25,000 board feet per day and as late as June of 1914, the company was still removing logs from the river.[18] However, with the removal of most of the timber from Lyon, and the inaccessibility of the remaining timber above Hebgen

---

[17] Letter, Floyd W. Wilcox to Alan Newell, September 8, 1974.

[18] (Virginia City) MADISONIAN, November 14, 1913; June 26, 1914.

Dam, the lumber company was forced into indebtness. It ceased operations around 1916.[19]

[Photo Omitted]

The Madison River historically and presently also is noted for its recreational qualities. The Montana Department of Fish and Game classifies the river a "blue ribbon" trout stream and it is reknowned throughout the United States for its abundance of fish.[20] This situation places increasing demand on the resources of the Madison River.[21] It also provides the opportunity for the development of a major industry in the Madison Valley.

Twenty-two guides use the river continuously providing float trips and fishing trips for residents and tourists to Montana. (Refer to Appendix C.)

---

[19] (Virginia City) MADISONIAN, June 2, 1916. Letter, Floyd W. Wilcox to Alan Newell.

[20] U.S. Department of Interior, Fish and Wildlife Service, "Progress Report Stream Fishery Investigations for Summer, 1950, Madison River, Montana." MISSOURI RIVER BASIN STUDIES (Billings: 1951) and Montana Department of Natural Resources and Conservation. THE MADISON RIVER BASIN, pp. 46-47.

[21] Historically, the Madison River Valley was used chiefly by residents. However, in recent years, increasing numbers of out-of-state residents have looked to Madison valley as either a summer retreat or an investment for retirement. This has resulted in at least one major complex of subdivisions; Shining Mountains Development Project. This condition could result in a serious strain on the resources of the Madison River. See Montana Department of Natural Resources and Conservation, THE MADISON RIVER BASIN, pp. 48-49.

Historically this type of river use has been narrowly viewed as commerce. However, it is clear that the livelihood of a number of Montananas relies on the recreational use of the Madison River. There are state legal decisions which evidence the increasing judicial awareness of the importance of this industry. (Refer to section 8 on legal opinions.)

The historic and present use of the Madison River demonstrates the river's importance to residents of the valley. The river has been used most often as either a source of irrigation or power. The primacy of these uses during the twentieth century has restricted development for navigation. However, the Madison's relatively short and productive career as a waterway for timber driving supports the belief that the river has substantial potential as a navigable river. The Madison River retains its character of navigability by supporting a lively recreation industry.

6. *Potential Use for Commerce*:

The Madison River, in its natural condition, supports a flourishing recreation industry. The Montana Department of Natural Resources predicts that this industry will "show a strong increase" in the next few years.[1] No improvements to the river would be necessary for the continued growth of this industry.

---

[1] THE MADISON RIVER BASIN: RESOURCE REVIEW, Montana Department of Natural Resources and Conservation (Helena: 1970), p. 21.

It would be possible, if enough water was available from Hebgen Dam, for a resurgence of log driving on the Madison River. However, it is unlikely that this will occur. Development of the industry would undoubtedly result in conflict with the use of the Madison as a control on the Missouri River generating stations. Additionally, the driving of logs would require a substantial number of laborers and would demand that the logs be "handled" more often than the current method of transport. These factors make the cost of river-driving timber prohibitive.[2]

7. *Nature of Jurisdiction Exercised by Federal Agencies*:

The historical view of the Madison River purports that it is a non-navigable river. Thus, the river has not been regulated for interstate commerce by any federal agency. However, the Federal Power Commission does exercise jurisdiction over the Madison River by authority of the 1935 Federal Water Power Act.

The Federal Power Commission in 1948 decided that, pursuant to the judicial precedent of exercising authority over a non-navigable stream affecting a navigable stream (United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690) the Madison River lay within the purview of Section 4(e) of the 1935 Act.

---

[2] Interview with Chester Hagedorn, ranger, Beaverhead National Forest and House Doc. 193, JEFFERSON, MADISON AND GALLATIN RIVERS, MONTANA, (Washington: 1932).

The FPC concluded that the Madison was an integral part of the Montana Power Company's Missouri generating system, and that its flow affected the ability to navigate the Missouri below Fort Benton.

> Moreover, if the total storage of Hebgen were to be released with maximum rapidity, and upon arrival of the wave caused thereby, successive similar releases were made at each downstream reservoir, it is obvious that a tremendous increase in flow at Benton would result. Conversely, it would be possible to fill the empty reservoirs in such a manner as to expose the bed of the Missouri at and below Benton for a considerable time. Such a potential ability to affect navigable capacity is sufficient to bring the reservoirs within the purview of Section 4(e) and 4(g).[1]

The Commission thereby required the Montana Power Company to license its facility on the Madison River.

The Corps of Engineers has directed flood control operations on the Madison River. However, it is presently considered a non-navigable river.

---

[1] Opinions and decisions of the Federal Power Commission, vol. 7, January 1, 1948 – December 31, 1948, (Washington: 1950).

8. *State and Federal Decisions*:

The United States Court of Appeals, District of Columbia Circuit, inferred the navigable status of the Madison River in a 1950 case; Montana Power Company vs. Federal Power Commission (185 F2d 491). The court ruled that Hebgen Dam was subject to FPC regulation on the grounds that it occupied public land, and not because it was situated on a navigable river.

The appeals court considered the Madison a non-navigable river.[1] The historical evidence presented in this report obviously was not available to court. Despite this negative ruling, there have been a number of state court decisions relating to navigability which could affect the status of the Madison River. It is not within the purview of this report to develop a legal history of navigability; however, a few comments regarding a recent Montana decision should be offered.

The classification of navigability historically relied on the commercial use of a particular waterway. Examples of such commerce often have been viewed rather narrowly (i.e. boats, barges, canoes, etc.). Despite this judicial trend, the twentieth century has witnessed a change in the interpretation of commerce. The change reflected an awareness of the

---

[1] Federal Reporter, 2d. Series, 1950, p. 496.

importance of recreational use of waterways.[2] (See Smart vs. Aroostock Lumber Col. 103 Me. 37, 68 Atl. 527, 1907). A recent decision by a Montana district court evidenced this expanded interpretation.

The decision in the case of The Montana Wilderness Association vs. The Board of Health and Environmental Sciences of the State of Montana (Montana District Court, 1st Judicial District, July 2, 1974, no. 37154) concluded that the West Gallatin River in Montana was a navigable river, having supported log drives from 1904-1907. The Gallatin thereby met the traditional test of navigability. However, the Montana court also considered the fact that the Gallatin River was used extensively for recreational purposes. Citing the decisions in People vs. Mack (19 Cal. App. 3rd. 1040), Southern Idaho Fish and Game Association vs. Picabo Livestock Co. (5th Jud. Dist., Idaho, June 15, 1972, 2E.L.R. 20472), and State vs. Bunkowski (503 p. 2d, 1231), the court inferred that recreational use of a river was a valid test of navigability.

> From the proof here-offered, there is no question in my mind but that this stream has been navigable for years and has been used for boating in connection with just the pleasure of seeing the area, and for fishing,

---

[2] Smart vs. Aroostock Lumber Co. 103 Me. 37, 68 At. 527, 1907.

> trapping, gaming, and fowling, those various attributes for which the river is 'natural.'[3]

Thus, a river which supports a lively recreation industry might also meet legal navigability standards.

This decision could have a direct affect on the status of the Madison River. The Madison supports the same type of recreational operations as does the West Gallatin. Furthermore, evidence of early log driving on the Madison places the river in a similar historical position.

9. *Recommendation*:

Historical evidence supports the contention that the Madison River is navigable from the mouth of the West Fork to Varney (approximately 55 miles). The location of a sawmill at Varney was understandable, as the existence of Madison Dams 1 and 2 obstructed access to the river below Ennis. It seems reasonable to assume that, without this obstruction, the Madison could have been navigated to its juncture with the Missouri at Three Forks, Montana.

Hebgen Lake also must be considered a navigable waterbody. The lake was used in 1914 by barges transporting supplies from West Yellowstone to the damsite. Furthermore, Hebgen Lake supports a rather large recreational industry, providing fishing for valley residents and out-of-state tourists.

---

[3] Southern Idaho Fish and Game vs. Picabo Livestock Co. 5th Jud. Dist., Idaho, 2 E.L.R. no. 20472.

The section of river below Earthquake Lake to the entrance of the West Fork (approximately 10 miles) has a nebulous status in terms of navigability. There is no historical evidence of navigation on this stretch of the river. Additionally, the restricted flow of water, especially at the approach to the canyon, indicates that the river suffers from the existence of the Earthquake Lake land fill and Hebgen Dam. However, the navigable character of the river above and below this portion justifies a recommendation of navigability for the entire Madison.

Historical material documents navigation on only one section of the Madison River. Yet, the potential use of the river for navigation is tied intricately to the obstructions of the Madison Dam, Earthquake fill and Hebgen Dam. This situation warrants a recommendation of navigability for the entire Madison River from its boundary with Yellowstone Park to its confluence with the Missouri River.

* * *

MISSOURI RIVER NAVIGATION STUDY
(LOMA, MONTANA, to THREE FORKS, MONTANA)

Manuscript Prepared by:

Alan Newell

&

Gary Williams

Presented to:

U.S. Army Corps of Engineers
Omaha District

Contract No. DACW45-74-C-0138

August 12, 1974

PREFACE

The following report summarizes the physical, historical, and legal condition of the Missouri River from Loma, Montana, to Three Forks, Montana, as it pertains to commercial navigation. The authors wish to acknowledge the assistance of a number of state and federal agencies in the preparation of this manuscript: the Montana Water Resources Board, the Montana Fish and Game Department, United States Department of the Interior (Geological Survey), the Department of Agriculture (Forest Service), the Montana State Historical Society, University of Montana's Library and Archives, Montana State University's Library and Archives, Great Falls TRIBUNE, Dillon EXAMINER, and the Fort Benton RIVER PRESS. Their assistance has been greatly appreciated.

1. *Name of Waterbody*: Missouri River (above Loma, Montana).

2. *Tributary to Mississippi River*: The Missouri River forms at the confluence of the Gallatin, Jefferson, and Madison Rivers at Three Forks in southwestern Montana. The river flows in a northeastward direction to approximately thirty (30) miles beyond Fort Benton, Montana, and then in an easterly and southeasterly direction to its juncture with the Mississippi River, approximately seventeen (17) miles above St. Louis, Missouri. The course of the Missouri River from Three Forks lies through mountain valleys and deep canyons. Approximately twenty (20) miles north of Helena, Montana, it enters a gorge called the "Gates of the Mountains," emerging into rolling prairie about thirty-five (35) miles south of Great Falls, Montana. Thirty-five (35) miles above Fort Benton, the Missouri pours over the great falls and follows a course through a deep canyon past Fort Benton to the mouth of the Marias River. Below the Marias, the river flows through less abrupt slopes and bluffs, eventually widening at its confluence with the Yellowstone River.

3. Physical Characteristics:

a. Type: River.

b. Length: Three Forks to juncture with Mississippi, 2,475 miles.

c. Approximate discarge volumes:

Maximum: 900,000 c.f.s.

Minimum: 96,300 c.f.s.

Mean: 12,500 c.f.s.

d. Fall per mile:

Loma to Fort Benton (20 miles upstream): 1.75 feet per mile

Fort Benton to Belt Creek (32 miles upstream): 5 feet per mile

Belt Creek to Sun River (17 miles upstream) – Great Falls section: 520 feet per mile

Sun River to Cascade (55 miles upstream): 0.5 feet per mile

Cascade to Stubbs Ferry (74 miles upstream): 3.8 feet per mile

Stubbs Ferry to Three Forks (85 miles upstream): 4.6 feet per mile

e. There are numerous obstructions to navigation on the Missouri River above Loma, Montana. These include power lines, dams, highway and railway bridges, and ferry guide wires. The following is a numerical assessment of obstructions between geographic points. Please see Appendix A for a complete description.

Ferries: Loma Ferry at Loma, Montana

Fort Benton Ferry approximately two miles above Fort Benton.

Power Lines: Loma, Montana, to Great Falls, Montana———— 5

Great Falls, Montana to Cascade, Montana———10

Cascade, Montana, to Townsend, Montana———21

Townsend, Montana, to Three Forks, Montana----8

Dams: Fort Benton to Three Forks---10

Bridges: Loma, Montana, to Great Falls, Montana———— 2

Great Falls, Montana, to Cascade, Montana----------7

Cascade, Montana to Townsend, Montana----------14

Townsend, Montana, to Three Forks, Montana---------- 3

Additional Obstructions: Irrigation pipe line at Toston, Montana.

Abandoned, guide wire for ferry at Cascade, Montana.

4. *Authorized Projects*:

a. Improvements to navigation: Improvements specifically designed for aiding

navigation on the Upper Missouri River began in 1876; $20,000 being appropriated for that purpose. This activity continued intermittently until 1912.

The bulk of the work on the Upper Missouri consisted of the construction of wing dams for channel regulation, the removal of snags, and bank improvements at Fort Benton. The alteration of rapids and shoals on the "rocky river" between Carroll and Fort Benton received heavy emphasis. However, some open river work between Stubbs Ferry and Cascade, and channel regulation between Cascade and Great Falls occured in the period prior to 1912. In 1881, rocks were removed and wing dams constructed at the two worst rapids above Cascade. The River and Harbor Act of 1894, authorized navigation improvements on the Missouri between Fort Benton and Stubbs Ferry. Accordingly, between 1895 and 1898, nineteen (19) wing dams were constructed on this stretch of the river. Despite these efforts, interest in navigation waned, and no further improvements were made above Fort Benton after 1899.[1]

Concern for improvement of the Upper Missouri lessened after 1912. A Corps of Engineers' report for 1911 recommended that while improvements should be made, the

---

[1] ANNUAL REPORT OF THE CHIEF OF ENGINEERS, part II (Washington: 1915), pp. 1894-1897.

extent of navigation did not warrant large expenditures of money.

> No permanent and effective improvement with a view to through navigation can be expected to result except from continuous and systematic improvement, the cost of which would be very great, and in the opinion of the board will not be justified at least until the tributary country has become more densely populated and a large and valuable commerce created along its banks demanding through navigation, and the river has been effectively improved for the same character of navigation below Sioux City.[2]

The Corps report offered as an alternative to river improvements solely for navigation, a combination of expenditures for navigation and flood control. The Missouri River Navigation and Erosion Control Project of 1912 evidenced this changing emphasis. The projected authorized expenditures of between $750,000 and $150,000 annually for the removal of snags and bank protection. Expenditures

---

[2] U.S. Congress. House.. PRELIMINARY EXAMINATION OF THE MISSOURI RIVER FROM SIOUX CITY, IOWA, TO FORT BENTON, MONTANA. House Doc. #91, 62d Congress, 1st sess., 1911, p. 7.

were made intermittently through the 1930's, eventually totalling $3,768,000.[1]

b. Surveys of Upper Missouri River Pertaining to Navigation:

U.S. Congress. ANNUAL REPORT OF THE CHIEF OF ENGINEERS, Ex. Doc. #1, part 2, 40th Cong., 3d sess., 1868.

Roberts, Thomas. REPORT OF A RECONNAISSANCE OF THE MISSOURI RIVER IN 1872 (n.p.: 1875).

U.S. Congress. REPORT OF THE CHIEF OF ENGINEERS, vol. II, part 2, Ex. Doc. #1, 48th Cong., 1st sess., 1883.

U.S. Congress. REPORT OF CHIEF OF ENGINEERS, Appendix AAA, part 6, 1891.

U.S. Congress. ANNUAL REPORT OF THE CHIEF OF ENGINEERS, vol. II, part I-VI, Ex. Doc. #1, 52d Cong., 1st sess., 1891.

U.S. Congress. ANNUAL REPORT OF THE CHIEF OF ENGINEERS, vol. II, part 3, Ex. Doc. #1, part 2, 53d Cong., 3d sess., 1894.

---

[1] Pamphlet, "The Corps of Engineers in Montana," (Omaha: 1950), p. 16.

U.S. Congress. House. EXAMINATION OF MISSOURI RIVER FROM SIOUX CITY, IOWA, TO FORT BENTON, MONTANA, vol. VIII, 62d Cong., 1st sess., H. Doc. #91, 1911.

U.S. Congress. MISSOURI RIVER. H. Doc. #238, 73d Cong., 2d sess., 1935.

U.S. Bureau of Reclamation. MISSOURI RIVER BASIN (n.p.: 1944).

U.S. Congress. MISSOURI RIVER BASIN, H. Doc. #475, 28th Cong., 2d sess., 1944.

Missouri Basin Inter-Agency Committee. COMPREHENSIVE FRAMEWORK STUDY MISSOURI RIVER BASIN. 7 vols. (Washington: 1969).

5. *Past and Present Interstate Commerce*:

The Missouri River fascinated explorers, voyageurs, and engages of many nations during the seventeenth and eighteenth centuries. This great waterway, rising in the Red Rock Lakes of Montana and flowing 2,868 miles to its juncture with the Mississippi River, promoted exploration and exploitation of an inland empire rich in furs and minerals. The discovery of the Missouri also supported the expectation of finding a navigable passage to the western sea. French, Spanish, British, and American entrepreneurs ascended the "Big Muddy" not only to reap the harvest of natural abundance, but to reveal

the long sought "passage to India."[1] The result of this activity placed an early and profound importance on the navigability of the Missouri River. As a navigable waterway from the Mississippi to the Three Forks in Montana, a distance of 2,475 miles, the river supported the development and passage of various Montana frontiers.

The commercial importance of the Missouri River appeared a remote possibility upon its discovery in 1673 by Louis Jolliet and Father Jacques Marquette. The water's rapidity astounded the two Frenchmen, who recognized the difficulty one would have ascending it. However, following this discovery, the French undauntedly extended a system of forts throughout the Missouri country, St. Louis being located in 1700. Their primary aim during the eighteenth century was to exploit the Missouri's resouces, to search for the elusive gold mines of Coronado, and to block Spanish efforts to extend eastward from New Mexico.[2]

The explorations of Pierre La Verendyre and his sons, Louis and Francois, during the 1730's and 40's

---

[1] The belief in a water passage from the east to the west, across the United States has been a consistent theme in American history. Americans in the early 19th century believed that this waterway would allow the young republic to capture the commercial richness of the Far East. See Henry Nash Smith, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (Cambridge, Mass: 1973) for a full treatment of this idea.

[2] A. P. Nasatir, BEFORE LEWIS AND CLARK: DOCUMENTS ILLUSTRATING THE HISTORY OF THE MISSOURI, 1785-1804 (2 vols.; St. Louis: 1952), p. 8.

demonstrated another objective of French policy. Pierre Verendrye expected the establishment of fur posts in the Lake of the Woods area to serve as outposts in his search for the western sea. His sons furthered this end with their exploration of the Upper Missouri in 1742. French influence in America, despite the lack of Crown support, extended to the mouth of the Platte River at the time of the cession of the Missouri country to Spain in 1763.[3]

The defensive policy of New Spain hampered a continuation of efforts to develop the commercial potentials of the Missouri country. Spain's primary mission during the eighteenth century was to protect its colonial enterprises in the south from plains Indians.[4] However, British invasions into the Upper Missouri country during the 1790's, convinced the Spanish authorities that they must initiate explorations up the Missouri River.[5] The organization of the Missouri Company in 1793 was the most conspicuous attempt to meet this British challenge. The Company also revived interest in the prevasive interest in a water route to the Pacific.[6]

---

[3] IBID., p. 32.

[4] For a discussion of this defensive Spanish policy see Walter Prescott Webb, THE GREAT PLAINS (New York: 1972), pp. 85-138.

[5] David Thompson, a trader for the British North West Company, traveled to the Mandan villages on the Missouri River in 1797. See Nasatir, *BEFORE LEWIS AND CLARK*, p. 95.

[6] IBID., p. 91.

Concern for this western passage and for commercial enterprises continued after the purchase of the Louisiana territory by the United States in 1803. President Thomas Jefferson's instructions to Meriwether Lewis and William Clark upon the commencement of their historic expedition in 1804, evidenced American interest in the navigability of the Missouri River.

> The object of your mission is to explore the Missouri River, and such principal streams of it, as, by its course and communication with the waters of the Pacific Ocean, whether the Oregan (sic), Colorado, or any other river, may offer the most direct and practicable water-communication across the continent, for the purpose of commerce.[7]

Jefferson also expressed concern for the British monopoly of the fur trade in the West and hoped to "break the British monopoly on the northern plains."[8]

Lewis and Clark left the Mandan villages (present day Bismarck, North Dakota) in 1805; ascended the Missouri in pirogues and bateauxs to the Great Falls; portaged around the falls and continued to the Three Forks of the Missouri. Lewis determined at

---

[7] Thomas Jefferson, "Memoir of Meriwether Lewis," HISTORY OF THE EXPEDITION UNDER THE COMMAND OF LEWIS AND CLARK, edited by Elliot Coues (vol. I; New York: 1893), p. xxvi.

[8] Paul F. Sharp, WHOOP-UP COUNTRY: THE CANADIAN-AMERICAN WEST, 1865-1885 (Norman, Okla.: 1973), p. 30.

this juncture that the Jefferson River was the true source of the Missouri and followed this route to "the Forks of the Jefferson."[9] The party then traveled overland to the source of the Columbia and by boat to the Pacific Ocean. On the return trip (1806), the explorers separated on the Bitteroot River; Clark preceding overland to the Jefferson and the Yellowstone; Lewis following the Blackfoot River over the mountains to the Great Falls. Lewis explored the Marias River, eventually joining a detachment Clark had sent down the Jefferson and Missouri with the cached boats from the previous year's journey. On August 12, 1806, the Lewis party reunited with Clark at the confluence of the Yellowstone and Missouri rivers.[10] The expedition failed to discover a continuous waterway leading to the Pacific Ocean. However, Lewis' comment on the navigability of the Missouri River was prophetic.

> I do not beleive (sic) that the world can furnish an example of a river runing (sic) to the extent which the Missouri and Jefferson's rivers do through such a mountainous

---

[9] The Jefferson River ends at Twin Bridges, Montana. The main fork of the river then becomes the Beaverhead River. However, Lewis and Clark continued to call this the Jefferson Fork. Thus, where the Beaverhead ends (Dillon, Montana), Lewis considered this the Forks of the Jefferson. See THE JOURNALS OF LEWIS AND CLARK, edited by Bernard DeVoto (Boston: 1953), pp. 178 & 183.

[10] *IBID.*, p. 452.

> country and at the same time so navigable as they are.[11]

The commercial aspirations of the Lewis and Clark Expedition immediately bore fruit in the fur trading adventures of Manuel Lisa.

Lisa left St. Louis in the spring of 1807 in keelboats bound for the Upper Missouri. He had the good fortune, at the mouth of the Platte River, to meet John Colter, a member of the Lewis and Clark Expedition who had returned in 1806 to trap in the Missouri Country. Lisa persuaded Colter to join his company and to ascend the Missouri once again. The intrepid Spaniard established a fort at the mouth of the Big Horn River, and, in 1808, returned to St. Louis where he formed the St. Louis Missouri Fur Company. The Company, under the direction of Lisa and Pierre Menard, began a momentous trip up the Missouri in the spring of 1810. The trading expedition separated at Lisa's fort on the Big Horn; one group remaining to trade in that area, and another group to trap in the Blackfeet country of the Three Forks. Thomas James, a member of this group, later recorded his trapping experiences at the Three Forks post.

> We had now reached our place of business, trapping for beaver, and prepared to set to work. Dougherty, Brown, Ware and myself agreed to trap in company on the Missouri

---

[11] IBID., p. 184.

> between the Forks and the Falls, which lie several hundred miles down the river to the north, from the Forks. We made two canoes by hollowing out the trunks of two trees and on the third or fourth day after our arrival at the Forks we were ready to start on an expedition down the river.[12]

James proceeded an indefinite number of miles down the Missouri from Three Forks, never reaching the Great Falls, despite his mistake in mileage.

The Missouri Fur Company venture of 1810 secured large profits. However, the hostility of Blackfeet Indians forced the traders at the Three Forks to abandon their post during the fall.[13] The Missouri Fur Company remained in operation until its dissolution between 1828-1830. Some trapping activity in the Three Forks area continued, but no further instances of navigation on the Upper Missouri occured.[14]

Fur trade activity on the Upper Missouri, after the dissolution of the Missouri Fur Company, remained for many years within the purview of the American Fur Company. The Company received incorporation from the New York Legislature in 1808; from that date until 1834, it was under the directorship of John

---

[12] Thomas James, THREE YEARS AMONG THE INDIANS AND MEXICANS (St. Louis: 1916), p. 66.

[13] Hiram Martin Chittenden, THE AMERICAN FUR TRADE OF THE FAR WEST (New York: 1936), pp. 139-144.

[14] IBID., vol. I, pp. 147-48.

Jacob Astor. Astor confined his operations for many years to Astoria, his post on the Pacific Coast. However, war with Britain in 1813 forced him to surrender the post to the numerically superior Northwest Company. The American Fur Company recovered from this loss and, in 1816, began operation in the Great Lakes region. The Company immediately commenced consolidating opposition companies. Astor's retirement in 1834 split the Company into two separate operations; one operated exclusively in the Great Lakes area, the other on the Upper Missouri. The Upper Missouri Outfit soon assumed the common usage of the American Fur Company. This operation conducted a profitable business under the aegis of St. Louis "House of Chouteau" until 1864.

The establishment of fur trading posts on the upper Missouri was a crucial factor in the success of the American Fur Company. The sagacious Kenneth McKenzie established Fort Union at the mouth of the Yellowstone River in 1829. McKenzie dared to open trade with the fierce Blackfeet in 1831, by sending James Kipp to build a fort on the Marias River. David A. Mitchell, American Fur Company, abandoned this first fort (Fort Piegan) in 1832, and located Fort McKenzie six miles upriver from the mouth of the Marias. Difficulties between the volatile Blackfeet and capricious company employees caused the destruction of Fort McKenzie in 1844. However, Alexander Culbertson re-established good relations with the Indians in 1845 by constructing Fort Lewis. But the difficulty of access to the fort by the Blackfeet

caused its removal downriver in 1847. This last fort to be constructed was Fort Benton.[15]

McKenzie initiated another novelty in the fur business during the 1830's. The primary means of supplying the trading posts on the Upper Missouri prior to 1832 was by mackinaws and keelboats, while bullboats, piroques and canoes were used to carry smaller loads. Mackinaws and keelboats usually carried sails and, when winds were favorable, provided a cheap, effective means of transportation. However, the customary means of propulsion on the Missouri depended on the use of the cordelle and pole. (Cordelling referred to lines attached to boats and pulled by the crew on shore.) McKenzie hoped to modernize this system of navigation with the use of steamboats. The ascent of the WESTERN ENGINEER to Council Bluffs in 1819, provided a precedent for this change. The YELLOWSTONE, following an abortive trip to Fort Tecomseh in 1831, ascended the Missouri to Fort Union in 1832.[16]

The use of steamboats on the Upper Missouri revolutionized the fur trade. Steamers left St. Louis in April after the ice "break-up" on the river, and landed trade goods at Fort Union. Furs, moving by

---

[15] For a good discussion of the activities of the American Fur Company see John E. Sunder, THE FUR TRADE ON THE UPPER MISSOURI, 1840-1865 (Norman, Okla.: 1965), pp. 60-64.

[16] Chittenden, THE AMERICAN FUR TRADE, vol. I, p. 338.

mackinaws and keelboats downriver from upriver forts, would then be loaded and shipped to St. Louis, while supplies would ascend the river by the same means.[17]

American Fur Company steamboats carried passengers as well as trade goods. In 1853, the steamer ROBERT CAMPBELL carried members of the Issac Stevens Expedition to Fort Union. Part of the company continued upriver by keelboat to Fort Benton, while Stevens surveyed a route along the Missouri for a transcontinental railroad. This expedition was particularly notable for the resultant treaty of 1855 with the Blackfeet Indians. The treaty was an important step in expanding the trade of the Upper Missouri and in initiating steamboat travel to Fort Benton.[18]

The first steamboat to travel the Missouri River to Fort Benton was the light draft CHIPPEWA which arrived in Fort Benton proper in 1860.[19] This momentous journey aided in opening Montana to settlement and creating the flourishing community of Fort Benton, the "Chicago of the Plains." Steamboats

---

[17] William E. Lass, A HISTORY OF STEAMBOATING ON THE UPPER MISSOURI (Lincoln, Neb.: 1963), pp. 8 and 9.

[18] IBID., pp. 13 and 14, and Fort Benton River Press (no date).

[19] Hiram Martin Chittenden, HISTORY OF EARLY STEAMBOAT NAVIGATION ON THE MISSOURI RIVER: LIFE AND ADVENTURES OF JOSEPH LA BARGE (vol. I; Minneapolis: 1962), pp. 219-221.

arrived at Fort Benton each June during the high water season, and were on their way back to St. Louis by the first of July. After that date, until the "freeze-up," mackinaws would ply the river to the East. Approximately 200 mackinaws carrying 1,200 passengers left Fort Benton each autumn.[20] Steamboats transported millions of dollars worth of freight and hundreds of passengers during the height of navigation on the Missouri. Approximately 400 steamboat arrivals were recorded at Fort Benton between 1860 and 1888.[21] [see Appendix B and C]

Montana in the 1860's appeared to be the "cutting edge" for commercial expansion on the frontier. The discovery of gold at Gold Creek, Grasshopper Creek, Confederate and Alder Gulches in the early sixties, the construction of the Mullan Military Road from Fort Benton to Fort Walla-Walla, and the extension of steamboat travel to Fort Benton combined to insure rapid development of this promising territory. Fort Benton reaped the harvest of this rapid expansion.

A number of transportation lines organized during this period with interests in the trade at Fort Benton. The Montana and Idaho Transportation Line,

---

[20] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 52 and 53.

[21] Federal Power Commission, OPINIONS AND DECISIONS OF THE FEDERAL POWER COMMISSION, vol. VII, January 1, 1948 – December 31, 1948. (Washington: 1950), p. 171.

the St. Louis and Omaha Packet Line, and the ever present American Fur Company, were the major companies competing in the 1860's for the opportunity to carry Montana's gold to the East. In 1863, approximately eight million dollars in gold floated down the Missouri in steamers bound for St. Louis and New York.[22] Five-sixths of Montana's wealth reportedly left the region via the Missouri River in 1860's.[23]

A primary means of travel to the East during the early mining period in Montana was by horse or wagon to Fort Benton and then by steamer or mackinaw downriver. However, some miners and settlers, anxious to reach the States, did hazard the swifter Upper Missouri above Great Falls. Kennedy and Co. operated a line of mackinaws that carried passengers to Fort Benton with a portage around the Great Falls. As many as eighteen mackinaws left French Bar (15 miles north of Helena) bound for Fort Benton in 1867.[24]

The completion of the transcontinental railroad in 1869, and the change from rather simple placer mining to more sophisticated quartz mining altered the patterns of trade at Fort Benton. Mine operators

---

[22] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 32-33, 42-44.

[23] IBID., p. 39.

[24] Hubert Howe Bancroft, THE WORKS OF HUBERT HOWE BANCROFT: HISTORY OF WASHINGTON, IDAHO, AND MONTANA 1845-1889 (San Francisco: 1890), ftn. p. 732.

continued to ship equipment via steamboats to Montana. However, the short season, compared to that of overland travel from the Union Pacific railhead at Corrine, Utah, convinced Montana's entrepreneurs that expensive machinery and supplies should be transported by railroad and wagon. Thus, most of the freight carried on the Missouri River during the 1870's consisted of military supplies and Indian annuities.[25] This activity continued and expanded between 1873 and 1888, the last steamboating era on the Upper Missouri. Freight shipments originated from the Northern Pacific railhead at Bismarck, North Dakota, traveling via steamboat up river to Fort Benton. This commerce was international in character, supplies being shipped over the Whoop-up Trail to Fort Macleod in Canada.[26]

The continued growth of commerce on the north-central Montana plains created a demand for building supplies and fuels. The supply of lumber and cement for Fort Benton and, after 1884, the city of Great Falls, constantly fell short of demand. To fill this increasing need, a number of lumber companies began operations along the Missouri River above Fort

---

[25] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 113-136.

[26] For an extensive treatment of this Canadian-American trade see Sharp, WHOOP-UP COUNTRY, passim. Also, Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 87 and 130, and U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, Appendix V, 48th Cong., 1st sess., 1883, vol. II, part 2, p. 1361.

Benton in the 1870's and 1880's. The pioneer logging companies of A. M. Holter and Brothers and Ira Myers and Company rafted sawed lumber of floated uncut logs down the Missouri from mills above Great Falls, Montana.

A. M. Holter of Helena established a lumber company in 1863 which served the Helena area.[27] The enterprising Montanan expanded his operations in 1881 by constructing a lumber yard at the mouth of the Sun River, opposite the future city of Great Falls.[28] The Company rafted sawed lumber from their mill on Stickney Creek (70 miles upriver from Great Falls) to the Sun River yard and then transported it by wagon to Fort Benton.[29] The firm moved to Great Falls in 1884 and established a yard and planing mill in that infant city. The Company rafted more than 300,000 feet of lumber down the Missouri during 1885 from its mill on Stickney and Wegner creeks.[30] The Holter Lumber Co. floated logs to Great Falls until about 1891 when most of the timber along

---

[27] Helena WEEKLY HERALD, May 12, 1887.

[28] Great Falls TRIBUNE, February 18, 1888.

[29] IBID., also see A. M. Holter, "Pioneer Lumbering in Montana," CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA (vol. VIII, Helena: 1917), pp. 270 and 271, and the Fort Benton RIVER PRESS, April 13, 1881.

[30] Great Falls TRIBUNE, April 3, 1886 and May 14, 1887.

Stickney and Wegner creeks was cut. Logs were then shipped by rail to the yards at Great Falls.[31]

A staunch competitor of the Holter Lumber Co. was Ira Myers and Co. Myers located in Great Falls in 1884, constructing a mill and lumber yard. The firm began operations in the Belt Mountains southeast of Great Falls, cutting timber and floating the logs down the Smith and Missouri rivers to the boom at Great Falls.[32] The extensive operations of the Myers and Holter companies often created problems for the two firms. The Holter boom at the mouth of the Sun River broke in August, 1890, sending logs downriver to be caught in the boom of Ira Myers.[33] A log jam in May, 1893, almost destroyed a bridge across the Missouri at Great Falls, creating problems for the citizenry.[34]

Lumber was an important commodity on the northern plains. However, the flourishing communities along the Missouri required additional supplies. Two barges run by the firm of Davis and Co. left the Townsend shipyards on September 28, 1887, bound for Great Falls with cement.[35] W. L. Martin and Co.

---

[31] Holter, "Pioneer Lumbering in Montana," p. 272; and Great Falls TRIBUNE, August 9, 1890.

[32] Great Falls TRIBUNE, February 18, 1888 and June 5, 1886.

[33] Great Falls TRIBUNE, August 9, 1890 and August 16, 1890.

[34] Great Falls TRIBUNE, May 17, 1893.

[35] Townsend TRANCHANT, May 17, 1893.

experimented in the 1890's with shipping hay in a steamboat on the Missouri above Great Falls.[36] Transport of this nature on the Missouri raised the hopes of leading residents of Great Falls, Helena, and Townsend that the river from Three Forks to Great Falls could be improved for continuous navigation.

The first congressional appropriations specifically for the improvement of navigation on the Upper Missouri to Fort Benton occured in 1876. One million, three hundred and eighty-three thousand dollars ($1,383,000) was spent by Congress between 1876 and 1900.[37] The construction of wing dams, the removal of boulders, and dredging consumed most of this budget.[38] Budget allocations for the newly created Missouri River Commission in 1885, contained $15,000 for a survey of the Missouri River from Great Falls to Three Forks. However, the Commission recommended that since Fort Benton was the practical head of navigation, this money should be re-allocated for improvements below Great Falls.[39] The conclusions of the Missouri River Commission

---

[36] Great Falls TRIBUNE, May 4, 1893.

[37] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 176 and 178.

[38] U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, vol. II, part 1, 52d Cong., 2d sess., 1892-1893, p. 263.

[39] U.S. Congress, House, REPORT OF THE MISSOURI RIVER COMMISSION, Ex. Doc. #1, vol. II, part 4, 49th Cong., 1st sess., 1885, p. 2994.

concerning the navigability of the river above Great Falls met stiff opposition from civil and military engineers, and from entrepreneurs located in the Missouri River basin.

A party of enterprising individuals located Gallatin City at the Three Forks of the Missouri in 1863. The pioneers envisioned a metropolis rising on the eastern slope of the Rocky Mountains and thriving from a prosperous steamboat line running between Three Forks and the falls of the Missouri.[40] However, the first realistic attempt to consider the demands of navigation on the Missouri above the falls fell to the aegis of Thomas Roberts, a civil engineer in the employ of the Northern Pacific Railroad.

Roberts surveyed the Missouri River from Gallatin City to the Great Falls during July and August, 1872. His mission involved a determination of the upper river's suitability for steamboat navigation. Roberts reported that the only serious obstruction to navigation was Half-Breed Rapids.[41] The fledgling engineer optimistically asserted that the Missouri from the Three Forks to the Great Falls could be navigated by steamboats, and that a narrow gauge railroad around the falls would provide effective service not only to Fort Benton, but to the proposed main line of the Northern Pacific at Three Forks.

---

[40] Kalispell TIMES, October 23, 1941.

[41] Thomas Roberts, REPORT OF A RECONNAISSANCE OF THE MISSOURI RIVER IN 1872 (Washington: 1875), p. 48.

> I regard the immediate business prospect of this little railroad and steamer line as of secondary consequence. The fact that boats can run to the Three Forks, to the crossing of the main line of the Northern Pacific Railroad is important. Thousands of square miles of territory in the Crow Creek, Main Missouri, Prickly Pear, Dearborn, Sun, and Teton Valleys would be immediately enhanced in value by the prospect of such a connection, while it would for some time, if not altogether, obviate the necessity of a branch from the main line to Helena.[42]

Roberts considered the water flow of this portion of the Missouri to be sufficient for navigation and predicted that if boats began running on the river, citizens of the area would begin to make supplementary improvements.[43]

Captain Edward Maguire of the U.S. Army Corps of Engineers echoed Thomas Roberts' conclusions following an extensive survey of the Missouri River from Stubbs Ferry (12 miles from Helena) to the mouth of the Sun River in 1880. Maguire claimed that, while no steamboat had ever plyed that portion of the river, it would be possible for one to do so. Maguire failed to survey the river from Stubbs Ferry to Three Forks (73 miles) but concluded that it was certainly as navigable as the portion which he did

---

[42] IBID., p. 52.

[43] IBID., p. 50.

travel.[44] Minor improvements on this section of the river followed the report of Captain Maguire. However, it was not until 1890, that the Missouri River Commission finally made its own survey of the river from Stubbs Ferry to the Sun River. Captain Charles F. Powell confirmed Maguire's conclusion after the 1890 examination as to the navigability for light-draft boats and he recommended that improvements be made on that section of the Missouri River.[45]

The surveys of the Missouri River above Great Falls boasted prospects for full development of that waterway. The surveys coincided with continued attempts by Montanans to establish regular transportation service on the "Big Muddy." Various schemes to place steamboats on the far reaches of the Missouri materialized during the 1870's and 1880's. Some of these plans succeeded.

William F. Wheeler, a former marshal for Montana Territory, built a row-boat in 1878 for the purpose of exploring the upper portions of the river. The intrepid captain and a crew of five launched their craft from Stubbs Ferry on September 12, 1878. The

---

[44] U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, vol. II, part 2, Appendix V, 48th Cong., 1st sess., 1883, p. 1340.

[45] U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, vol. II, part 3, 52d Cong., 2d sess., 1892-1893, p. 1905.

group, known as the Montana Steam Navigation Company, plyed the river for nine days after which they attested to its navigability.[46] That same year (1878), the Montana Steam Navigation Company merged with its rival, the Upper Missouri Navigation Company, forming the Montana Navigation Company.[47] The new firm fixed its capital at $100,000. Completion of the Northern Pacific Railway through Helena in 1883 dampened the aspirations of steamboaters in central Montana. However, a couple of irreconcilable navigators continued to further develop the Upper Missouri. "Admiral Wheeler" continued his fearless voyages by commanding two excursions down the Missouri in 1883 and 1884.[48] Yet steamboat travel on the river remained within the purview of two pioneer boaters; Judge Nicholas Hilger and Dr. Asa Davison.

Judge Hilger purchased a small, shallow draft steamboat in Iowa in 1886. The ROSE OF HELENA was shipped to Townsend by rail in May of that year and floated down to Hilger's ranch at the Gates of the Mountains. A year later, May, 1887, Hilger launched

---

[46] Stanley R. Davison, "White Hopes of the Big Muddy," MONTANA, THE MAGAZINE OF WESTERN HISTORY (Spring, 1959), p. 2; Helena WEEKLY HERALD, September 12 and 19, 1878.

[47] Davison, "White Hopes of the Big Muddy," p. 3.

[48] Fort Benton RIVER PRESS, July 11, 1883 and June 11, 1884.

the ROSE on the Missouri and proceeded downriver to Great Falls. The downstream voyage was uneventful, but the return over Half-Breed Rapids proved hazardous. The under-powered ROSE barely ascended the obstacle. Judge Hilger concluded that regular service between Three Forks and Great Falls would be impossible for the ROSE. However, he hoped that Asa Davison's steamer, the FERN, could operate in conjunction with the ROSE in providing transport to Great Falls.[49]

The FERN was a much larger steamboat than the ROSE. Davison built the boat during 1886, just north of Twin Bridges, Montana, on the banks of the Beaverhead River. He floated the steamer down the Beaverhead, Jefferson, and Missouri to Townsend in June, 1886.[50] Davison launched the FERN from Townsend on September 28, 1887, bound for Great Falls. The staunch vessel arrived at Great Falls on November 7, after a difficult trip down the river. The experience convinced Davison that he should withdraw from the steamboat business. He sold the FERN in 1887, and returned to his medical practice in Dillon.[51]

The FERN and a number of other boats (MINNIE, FRANCES, and SWAN) operated on the

---

[49] Davison, "White Hopes of the Big Muddy," p. 11; Great Falls TRIBUNE, April 10, 1895.

[50] Davison, "White Hopes of the Big Muddy," pp. 5 and 6.

[51] IBID., and Great Falls TRIBUNE, November 9, 1887.

Upper Missouri from Great Falls to Half-Breed Rapids during the late 1880's and early 1890's. In 1891, the FERN hauled 4,500 cords of wood, 79 tons of wool, 250 tons of hay, 5 tons of vegetables, and some 500 passengers.[52] Yet, Hilger's hope for steamboat traffic from Three Forks to Great Falls never materialized. Eventually both the FERN and the ROSE OF HELENA were lost on the Upper Missouri.

Steamboat traffic on the Missouri River to Fort Benton and above Great Falls declined radically after 1888. The construction of the Northern Pacific Railroad across Montana in 1883, the Montana Central Railroad from Helena to Great Falls in 1886, and the Great Northern Railway across the "High Line," reduced the importance of river navigation in Montana. Issac P. Baker and the Benton Transportation Co. continued to operate on the Upper Missouri until 1924.[53] However, few steamboats ascended the river as far as Fort Benton. Aspirations for a rejuvenation of the steamboat trade rose in 1908, when the steamer OK navigated the river to Fort Benton. However, the craft was beached by the flood of that year and later burned.[54] Practically speaking, after 1888, Great Falls and not Fort Benton was the commercial center of northcentral Montana.

---

[52] Davison, "White Hopes of the Big Muddy," p. 15.

[53] Lass, STEAMBOATING ON THE UPPER MISSOURI, p. 153.

[54] Kalispell TIMES, June 7, 1938.

The Missouri River played an important role in the settlement and commercial development of the western United States. Traffic on the river, from Loma, Montana, to Three Forks, Montana, whether by canoe or steamer, figured prominently in the expansion of fur trading, freighting, mining, and lumbering. The "Big Muddy" never satisfied the aspirations of those who sought a continuous water passage from the Mississippi to the Pacific Ocean. Yet, it did fulfill Thomas Jefferson's hopes for the western frontier by revealing and transporting the resources of this vast land.

6. *Potential Use for Interstate Commerce either in the Present Or Improved Condition:* The period of extensive navigation on the Upper Missouri River ended in the late 1880's. The river since that time has witnessed only sporadic incidents of commercial traffic; while the development of rail, highway, and air transport has proved a more effective means of transport. The construction of dams without locks downriver from Fort Benton has effectively curtailed any potential use of this section of river for interstate commerce.

The Upper Missouri, after 1890, has been used more for recreation, power, and irrigation than for commerce. The numbers of pleasure boats plying the river from Great Falls to Canyon Ferry, and the proposals for irrigation and flood control projects, evidences the assumption that this situation will continue (see Appendix A). Future development of the

Upper Missouri River will center on recreation and agriculture, not on navigation and commerce.[1]

7. *Possible Future Development of Navigation*: Future navigation on the Upper Missouri River will depend on the continued expansion of recreation in the area. The commencement of boat tours, such as exist at the "Gates of the Mountains," could be one area of development. The river could conceivably be used for the transport of agricultural products between Cascade and Great Falls. However, the existence of inexpensive and efficient highway transport precludes this possibility.

8. *Federal Agencies Exercising Jurisdiction*: The United States Coast Guard exercises jurisdiction over the Missouri River to a point 263 miles above Fort Benton, Montana (33 CFR 2.38-1, 1967). The Federal Power Commission, for the purpose of licensing dams, considers the Missouri River to be navigable as far as Three Forks, Montana (FEDERAL POWER COMMISSION REPORTS, vol. VII, Jan. 1948 – Dec. 1948, Washington: 1950).

9. *State and Federal Decisions*: There has been one federal decision clearly establishing the navigability of the Missouri River to Three Forks, Montana. This was the case of Montana Power Company vs. Federal Power Commission (185 F2d 491). In addition, there

---

[1] Missouri Basin Inter-Agency Committee, COMPREHENSIVE FRAMEWORK STUDY, vol. I, (Washington: 1969), pp. 166-173.

have been two state decisions which affect the navigable status of the Upper Missouri. The case of Herrin vs. Sutherland established that the Missouri was navigable in Lewis and Clark county (74 Mont. 587). A more limited decision was rendered in the case of Gibson vs. Kelly which established that the Missouri River as navigable in Chouteau county at T 23 North, R 7 East (15 Mont. 417).

10. *Recommendation*: Historical evidence supports the contention that the Missouri River is a navigable waterway from Loma, Montana, to Three Forks, Montana. This section of river was used extensively for commercial purposes between 1860 and 1900. The presence of numerous dams on the Missouri above Fort Benton coupled with the obvious advantages of rail and highway transport restricts the future use of this section of river for commerce. However, the fact that the Upper Missouri was so heavily used for commerce in the past directs that it be classified a navigable river.

* * *

[LOGO] DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314

REPLY TO
ATTENTION OF:

25 OCT 1974

Determination of Navigability
Missouri River above Fort Benton, Montana

1. The Omaha District, with the concurrence of the Missouri River Division, has submitted a report pursuant to ER 1165-2-302 (33 CFR 209.260) in which it recommends that the Missouri River above Fort Benton, Montana to Three Forks, Montana be declared a navigable waterway of the United States.

2. The Missouri River is 2,475 miles in length, forming at the confluence of the Gallatin, Jefferson and Madison Rivers at Three Forks. It then flows 30 miles beyond Fort Benton, Montana and then in an easterly and southeasterly direction to its juncture with the Mississippi River, approximately 17 miles above St. Louis, Missouri. Improvements to navigation began in 1876 and continued intermittently until 1912. However, no further improvements were made above Fort Benton after 1899.

3. Historically, the use of the Missouri River as far upstream as Three Forks began in 1810 with the start of the Missouri Fur Company. Later, in the 1860's, logs were rafted down the Missouri River from mills above Great Falls, Montana. Several lumber mills flourished in that area using portions of the Missouri to transport the logs downstream. Other

forms of interstate commerce existed in the Great Falls area of the Missouri River. Several steamboats traversed sections of the river between Great Falls and Fort Benton carrying textiles, produce and passengers. Much of the commercial use of the river ended in the late 1880's due to the increased use of railroads which could carry goods cheaper and faster. Commercial traffic continued to decrease with the development of modern highways and rail and air transportation systems until today when the river is only sporadically used for commerce. The degree of navigation along the Upper Missouri will depend on the continued expansion of recreation in the area.

4. Accordingly, on the basis of its past use for interstate commerce, I hereby determine that the Upper Missouri River between Fort Benton, Montana and Three Forks, Montana is a navigable water of the United States for the purposes of the exercise of regulatory jurisdiction of the Corps of Engineers. This determination is based on the holding in *Economy Light and Power Co. v. United States,* 256 U.S. 113, 123 (1921), which held that a waterbody retains its character as "navigable in law" when it has been used for interstate commerce in the past even though it is not presently used for commerce.

FOR THE CHIEF OF ENGINEERS:

/s/ E. Manning Seltzer
E. MANNING SELTZER
General Counsel

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

PPL MONTANA, LLC, a Delaware limited liability company, Plaintiff, v. STATE OF MONTANA, Defendant.	Cause No.: CDV-2004-846 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This case was tried to the Court, sitting without a jury, in a seven-day trial beginning October 22, 2007, and ending October 30, 2007. Following the hearing, the parties were given the opportunity to file post-trial findings of fact and conclusions of law. Those have been filed, and the case has been submitted for decision. From the testimony and evidence presented, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff PPL Montana, LLC (PPL Montana), is a Delaware limited liability company registered to do business in Montana. It is an unregulated wholesale generator of power. PPL Montana is a wholly owned subsidiary of PPL Corp.

2. Defendant State of Montana (State) is one of the fifty states of the Union and was granted statehood on November 8, 1889.

3. Upon admission to the Union, the State acquired title to the beds and banks of navigable waters within its borders under the Equal Footing Doctrine.

4. By Memorandum and Order entered August 28, 2007, the Court determined that the Missouri, Madison, and Clark Fork Rivers are navigable rivers and that the State acquired title to the riverbeds of those rivers upon statehood.

5. By separate Memorandum and Order entered August 28, 2007, the Court determined that the streambeds of the rivers are part of the public land trust and that the Montana Board of Land Commissioners (Land Board) has the authority to lease the streambeds and use the funds for the support of public education.

6. PPL Montana owns and operates ten federally licensed hydroelectric facilities within Montana that are at issue in this litigation: Thompson Falls (known as the Thompson Falls Project) and Hebgen, Madison, Holter, Hauser, Ryan, Cochrane, Morony, Rainbow, and Black Eagle (collectively known as the Missouri-Madison Project).

7. Prior to 1999, the Thompson Falls and the Missouri-Madison Projects were owned by the Montana Power Company (MPC). In 1999, PP&L Global, LLC, purchased the Thompson Falls Project and the Missouri-Madison Project. It then transferred those assets to PPL Montana. The closing date for the purchase was December 17, 1999. As part of the

purchase, PPL Montana acquired by warranty deed title to certain lands owned by MPC which are associated with the hydropower projects. The deeds did not include the beds of the Missouri, Madison, and Clark Fork Rivers.

8. PPL Montana operates the Thompson Falls and the Missouri-Madison Projects and associated facilities pursuant to licenses issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act, 16 U.S.C. § 791a, *et seq.* The Thompson Falls Project is FERC Project No. 1869 and the Missouri-Madison Project is FERC Project No. 2188.

9. PPL Montana's Thompson Falls dam is located on the Clark Fork River in Sanders County, Montana. The 90-megawatt Thompson Falls Project was built in 1915. The Federal Power Commission (FERC's predecessor) issued a license for the Project in 1949, and FERC issued a new license on December 28, 1979.

10. The Missouri-Madison Project has eight hydropower dams, all of which have power generation capability. The Ryan, Cochrane, Morony, Rainbow, and Black Eagle dams are located on the Missouri River in Cascade County. The Holter and Hauser dams are located on the Missouri River in Lewis and Clark County. The Madison dam is located on the Madison River in Madison County.

11. The 60-megawatt Ryan dam was completed in 1915. The 54-megawatt Cochrane dam was

completed in 1958. The 48-megawatt Morony dam was completed in 1930. The 35-megawatt Rainbow dam was completed in 1910. The 18-megawatt Black Eagle dam was completed in 1891. The 50-megawatt Holter dam was completed in 1918. The 17-megawatt Hauser dam was completed in 1907. The 9-megawatt Madison dam was completed in 1906.

12. The Hebgen dam, part of Project 2188, is located on the Madison River in Gallatin County and provides storage capability for downstream power generation. It was completed in 1915.

13. FERC issued a new license for Project 2188 to PPL Montana on September 27, 2000.

14. PPL Montana sells power at wholesale subject to rate regulation by FERC for use in Montana and elsewhere. A portion of PPL Montana's power is sold pursuant to a contract with NorthWestern Energy. PPL Montana has several generating facilities other than the facilities at issue in this litigation.

15. The State has been aware of the presence of the Thompson Falls Project and the Missouri-Madison Project since the dams were constructed.

16. FERC regulations require that within five years of the issuance of a license, the licensee must acquire title to the land within the project boundaries or the right to use the lands in perpetuity.

17. During the time it owned and operated the Thompson Falls and Missouri-Madison Projects, MPC never applied for a lease under what is commonly

referred to as the Montana Hydroelectric Resources Act, Section 77-4-201, *et seq.*, MCA, nor did it otherwise compensate the State for the full market value of its use of the riverbeds.

18. Likewise, PPL Montana has not applied for a lease nor has it compensated the State for its use of the riverbeds.

19. The Montana Department of Natural Resources and Conservation (DNRC) manages the state trust lands. Until this action was initiated, neither DNRC nor the Land Board had tried to determine the full market value of riverbeds used to generate hydroelectric power.

20. The Thompson Falls Project occupies 1,992 acres. There are a total of 1,089 state owned riverbed acres within the Project. Of that amount, 1,047 acres are above the dam and 42 acres are below the dam.

21. The Hebgen dam storage project occupies 12,613 acres. The state owned riverbed above the dam is 701 acres, and the state owned riverbed below the dam is 12 acres.

22. The Madison dam project area covers 4,002 acres. The state owned riverbed above the dam is 277 acres, and the state owned riverbed below the dam is 7 acres.

23. The Hauser dam project area covers 6,007 acres. There are 1,048 acres of state owned riverbed above the dam and 9 acres below the dam.

24. The Holter dam project area covers 5,578 acres. There are 1,437 acres of state owned riverbed above the dam and 27 acres below the dam.

25. The Black Eagle dam project area covers 478 acres. There are 423 acres of state owned riverbed above the dam and 37 acres below the dam.

26. The Rainbow dam project area covers 360 acres. There are 154 acres of state owned riverbed above the dam and 75 acres below the dam.

27. The Cochrane dam project area covers 203 acres. There are 154 acres of state owned riverbed above the dam and 7 acres below the dam.

28. The Ryan dam project area covers 401 acres. There are 116 acres of state owned riverbed above the dam and 43 acres below the dam.

29. The Morony dam project area covers 418 acres. There are 232 acres of state owned riverbed above the dam and 31 acres below the dam.

30. The riverbeds at issue, including the riverbeds below the dams, are necessary and appropriate for the operation of the projects, and they are contributing factors to the value of the power sites.

31. The State retained John Duffield, Ph.D., an economist, to determine the full market value of the riverbeds. In his analysis, Duffield utilized what is known as the "shared net benefits method."

32. The shared net benefits method has been used primarily in proceedings before FERC involving

tribal lands. The Supreme Judicial Court of Maine has approved the methodology in a case which did not involve tribal lands, but only state lands. ***State v. Cent. Me. Power Co.***, 640 A.2d 1067 (Me. 1994).

33. Under the shared net benefits analysis, the net benefits are determined by calculating the difference between the value of the power produced and the cost of producing that power. The net benefits are then shared between the project owner and the land owners. The standard share is fifty percent to the project owner and fifty percent to the land owners.

34. In his analysis, Duffield utilized documents either produced or publicly filed by PPL Montana.

35. Because the most recent financial information available was for the first half of 2007, Duffield extrapolated that data for the full 2007 year.

36. A number of the documents relating to the net benefits of the projects which were admitted into evidence are subject to the protective order entered June 20, 2007.

37. Duffield's calculations are based on the state owned riverbeds both above and below the dams.

38. The net benefits for the Thompson Falls Project for the years 2000 through 2007 are:

Year of Operation	Project Net Benefits
2000	$9,327,893
2001	$6,028,107
2002	$2,318,463
2003	$2,745,201
2004	$3,372,527
2005	$4,843,824
2006	$4,247,297
2007	$7,136,051

39. Including the riverbed below the dam, the State owns 54.6 percent of the Thompson Falls Project area.

40. The State's share of the Thompson Falls Project is 27.3 percent.

41. The total net benefits of the Thompson Falls Project for the years 2000 through 2006 is $38,521,558. Based on its 27.3 percent ownership, the total rents due to the State for that period without interest is $8,988,436.

42. Duffield calculated past rentals with interest at $10,529,613. Duffield used an interest rate of 4.48 percent for the past rentals, which is the actual real rate of return used by the Board of Investments from 1971 through 2006.

43. For 2007, the rent for the Thompson Falls Project is $1,950,592.

44. The total net benefits for the Missouri-Madison Project for the years 2000 through 2007 are:

Year of Operation	Project Net Benefits
2000	$28,603,397
2001	$22,711,100
2002	$4,735,174
2003	$9,166,791
2004	$7,911,153
2005	$17,278,764
2006	$14,144,245
2007	$17,630,706

45. The percentage of state land associated with each facility in the Missouri-Madison Project is:

Name of Project	Percent
Hebgen	5.7
Madison	6.8
Hauser	17.6
Holter	26.2
Black Eagle	96.2
Rainbow	63.6
Cochrane	79.3
Ryan	39.7
Morony	62.9

46. Because the Hebgen dam storage facility does not generate power, Duffield allocated its benefits and costs to the downstream generating facilities.

47. With Hebgen allocated, the State's share of the net benefits for each facility is:

Name of Project	Percent
Madison	3.3
Hauser	8.6
Holter	12.8
Black Eagle	46.9
Rainbow	31.0
Cochrane	38.8
Ryan	19.4
Morony	30.8

48. The State's share of the total net benefits for the Missouri-Madison Project for the years 2000 through 2006 without interest is $25,759,825. With interest, the total rents are $30,133,985.

49. For 2007, the rent for the Missouri-Madison Project is $4,257,327.

50. PPL Montana retained Gary S. Saleba to determine what a fair and reasonable per acre annual lease payment would be if the State is entitled to compensation for use and occupation of the riverbeds. He opined that the most appropriate methodology for determining a fair market value annual lease payment is the methodology used by FERC to determine the amounts PPL Montana pays for using federal lands at its Montana facilities under 18 C.F.R. § 11.2.

51. FERC sets the annual per acre charges for federal land flooded by a private dam based on the schedule of fees for the use of linear rights-of-way prepared by the United States Forest Service. Because Forest Service fees are based on linear

rights-of-way, FERC multiplies the Forest Service fee by two to set its per acre charges.

52. FERC updates its schedule of fees annually.

53. Because the Forest Service fees vary from county to county, the annual fees PPL Montana pays for the use of federal lands in connection with its facilities also vary. In 2006, the fee was $42.16 per acre in Sanders, Gallatin, Madison, and Lewis and Clark Counties, but was only $14.02 per acre in Cascade County.

54. Saleba did not include the below dam acreage in his calculations.

55. Based on the FERC fee schedule, Saleba determined that the total annual lease payments to the State for 2006 would be $205,230.

56. Because Saleba did not have the 2007 FERC fee schedule, he increased the 2006 fees by 2.6 percent to estimate that the total lease payments for 2007 would be $210,476.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and this matter.

2. The riverbeds at issue are state school trust lands.

3. The State has a constitutional duty to obtain full market value for the use of school trust lands.

MONT. CONST. art. X, §11. In administering the trust, the Land Board must "secure the largest measure of legitimate and reasonable advantage to the state." Section 77-1-202(1)(a), MCA.

4. Under Section 77-4-208, MCA, the rental for state land used for a power site "shall not be less than the full market value of the estate or interest disposed of through the granting the lease or license, such value to be carefully ascertained from all available sources."

5. The Federal Power Act does not preclude the State from seeking compensation for state trust land used in conjunction with the power sites.

6. The shared net benefits methodology relied on by the State is the most appropriate means of determining the full market value of the riverbeds.

7. The State is entitled to compensation for the acreage of the riverbeds both below and above the dams that is within the Thompson Falls and Missouri-Madison Projects' boundaries.

8. The State is not entitled to prejudgment interest.

9. The State is entitled to compensation from PPL Montana for the years 2000 through 2006 in the amount of $34,748,261.

10. The State is entitled to compensation from PPL Montana for 2007 in the amount of $6,207,919.

11. The terms of any lease must be approved by the Land Board. This includes provisions for calculating future rents.

12. The reasons for the Court's conclusions are set out in the Memorandum of Decision entered this same date.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 13th day of June 2008.

/s/ Thomas C. Honzel
THOMAS C. HONZEL
District Court Judge

pcs: Robert L. Sterup/Kyle Ann Gray
Mike McGrath/Anthony Johnstone/
Jon Ellingson

REPLY BRIEF

No. 10-218

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

REPLY BRIEF OF PETITIONER

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St, Ste. 1500
Billings, MT 59101
(406) 252-2166

PAUL J. LAWRENCE
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for Petitioner

October 13, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The State's Record Distortions Confirm The Need For This Court's Review 1

II. The Court Should Clarify The Proper Test For Determining Navigability For Title Purposes. 8

III. The Court Should Clarify The Preemptive Reach Of The Federal Power Act 11

CONCLUSION 13

SUPPLEMENTAL APPENDIX

TABLE OF SUPPLEMENTAL APPENDICES

Appendix A

Steele v. Donlan,
Findings of the Court,
(D. Mont. July 19, 1910) App-1

Appendix B

Steele v. Donlan, Decree,
(D. Mont. July 19, 1910) App-11

TABLE OF AUTHORITIES

Cases

Brown v. Huger,
62 U.S. 305 (1858) 2

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 4

Missoula v. Bakke,
121 Mont. 535 (1948) 2

Montana Power v. FPC,
185 F.2d 491 (D.C. Cir. 1950) 5

The Montello,
87 U.S. 430 (1874) 5

United States v. Oregon,
295 U.S. 1 (1935) 2

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 7

United States v. Utah,
283 U.S. 64 (1931) 1, 8

Utah v. United States,
403 U.S. 9 (1971) 10

Statutes

Mont. Code Ann. § 70-16-201 2

Other Authorities

U.S. Dep't of Interior,
Letter to Montana Dep't of State Lands
(Aug. 26, 1988) 5

REPLY BRIEF

Montana's opposition brief attempts to revive a number of fact-bound arguments that the courts below rejected on their way to establishing a sweeping legal proposition that is contrary to this Court's precedents and effectuated an enormous land grab. That legal proposition is that navigability for title—as distinct from navigability for regulatory purposes (a key distinction Montana repeatedly ignores)—is judged on the basis of the river as a whole and can be determined based on evidence of present-day use. That proposition is flatly inconsistent with *United States v. Utah*, 283 U.S. 64 (1931). It also has enormous practical consequences: the decision below provides a roadmap for cash-strapped states to take (and collect back-rent from) riverbed lands heretofore believed to belong to private landowners and the federal government by the simple expedient of declaring them to have belonged to the State all along. This Court's intervention is clearly needed.

I. The State's Record Distortions Confirm The Need For This Court's Review.

Rather than address the legal issues raised in the petition, Montana attempts to revive a number of factual issues that did not form the basis for the Montana Supreme Court's legal ruling below. Montana repeatedly states, for example, (i) that testimony from a PPL witness confirmed that PPL's title "end[s] at the riverbanks"; (ii) that, under state property law "title to" the riverbeds "has remained with the State since statehood"; and (iii) that this "undisputed evidence is dispositive

and presents no federal question." Opp'n 24; *see also id.* at 1, 16, 30–31. Montana misstates the record and is wrong on the law.

1. Read in context, the quoted testimony makes clear that, although PPL's "[Associate] General Counsel" did not *himself* review PPL's deeds to determine title to the riverbeds, the deeds were reviewed by outside counsel, *see* Tr. 619, and PPL had "no reason to" believe that the riverbeds "were not included in the real property." Tr. 620. Under Montana law (as elsewhere), title runs to the river's edge and the status of the river—whether or not it is navigable for title purposes—determines who owns the riverbeds. The relevant Montana statute, enacted in 1895 and still in force, provides that when land "borders upon a navigable ... stream," the owner "takes to the edge of the ... stream at low-water mark," but when land "borders upon any other water, the owner takes to the middle of the ... stream." Mont. Code Ann. § 70-16-201; *see also Missoula v. Bakke*, 121 Mont. 535, 539 (1948) (same) (citing *Brown v. Huger*, 62 U.S. 305, 320 (1858) ("watercourses not navigable must be '*ad medium filum aquae*'")). Accordingly, whether PPL's deeds include title to riverbeds hinges on a threshold question of *federal* law—were the relevant river stretches navigable at statehood? *See United States v. Oregon*, 295 U.S. 1, 14 (1935) (because "the effect upon the title to [waterbed] lands is the result of federal action in admitting a state to the Union, the question whether [waters] are navigable or non-navigable is a federal, not a local one").

2. Montana also repeatedly asserts that PPL has conceded navigability. Opp'n 3, 25. That assertion is baseless. Indeed, the Montana Supreme Court expressly rejected it, holding that the trial court "improperly relied" on PPL's supposed admissions; and made clear that it did not rely "upon any ostensible admissions made by PPL" in its "analysis regarding" title navigability. App. 62.

Moreover, Montana's imagined concession is a product of Montana's own conflation of the well-settled distinction between navigability for commerce and navigability for title. *See* App. 94–101 (Rice, J., dissenting). PPL has acknowledged that some of the river stretches are navigable for commerce purposes (and, therefore, subject to federal regulation), but it has never conceded that any of the relevant stretches are navigable for title purposes. Montana's appendix omits those portions of PPL's Answer that denied that "[t]itle to the beds and banks ... passed to ... Montana upon its admission to the Union." PPL Fed. Answer ¶ 36 & Fed. Amend. Compl. ¶ 36. In fact, belying its representations to this Court, the State actually sought sanctions below based on PPL's *refusal to admit* that the river stretches were navigable for title purposes. *See* Mont. Summ. J. 13 ("utilities know the rivers at issue are navigable, yet they have refused to admit it").

3. Montana also contends that certain earlier decisions are "preclus[ive]." Opp'n 24–25. But no court in this case has ever found *any* previous decision to be preclusive. Montana cites cases (at pages 5–10) that it asserts determined that the

relevant river stretches were navigable. In fact, in those cases no party disputed title navigability and, therefore, the issue was never decided. *See* App. 116 (Rice, J., dissenting) ("this issue had never previously been decided by this Court").

Montana likewise contends (at pages 24–26) that certain federal cases discussing *regulatory* navigability are binding because they involved PPL's predecessor-in-title. That is doubly wrong. First, no court has ever concluded that PPL is in privity with The Montana Power Company, and the trial court found the opposite for liability purposes. Second, this is just another example of Montana's conflation of title navigability with regulatory navigability. The cases all addressed regulatory navigability under the Federal Power Act, which requires courts to consider river improvements and ignore interceding falls. None involved title navigability, which requires examining the river in its ordinary, natural condition, including the stand-alone non-navigability of sections with extended rapids and falls. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) ("any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case"); *see also* Pet. 26–29. Indeed, even the federal government does not consider these cases binding. In a 1988 letter, the Bureau of Land Management rejected Montana's claims of title to these riverbeds, emphasizing that the United States recognizes only certain portions of the Missouri, Yellowstone, and Big Horn rivers within Montana "as being navigable for title related purposes." U.S.

Dep't of Interior, Letter to Montana Dep't of State Lands (Aug. 26, 1988).

To the extent the federal cases cited by Montana are relevant, they support reversal. Contrary to the conclusion reached below, the D.C. Circuit's *Montana Power* decision recognized that the Madison River was "concededly" *not* a "navigable water," but found that dams on the river were subject to federal regulation because they occupy federal lands, 185 F.2d 491, 496 (D.C. Cir. 1950), thus belying Montana's assertion that federal interests are a "fiction" and no one else "has disputed the navigability of these rivers for most of a century." Opp'n 31. With respect to the upper Missouri River, the D.C. Circuit found *regulatory* navigability, but its decision depends on evidence of navigation *after* post-statehood river improvements. *Montana Power*, 185 F.2d at 494, 496; App. 251–52, 256–57. The only relevant evidence of navigability before the river improvements—a report by Hubert Bancroft that gold-miners traveled downstream to Fort Benton with a portage around the Falls—has since been proven false. *See* App. 115 (Rice, J., dissenting); App. 196 ("utterly impossible"); App. 277–278 (Bancroft's source "is a puff piece" that is "entirely unbelievable"). The State quibbles that Dr. Emmons misspelled Bancroft's middle name, and proclaims that this Court has "relied on Hubert *Howe* Bancroft for nearly as long as it has considered navigability cases." Opp'n 12 (citing *The Montello*, 87 U.S. 430, 440 (1874)). But that is also false. In *Montello*, the Court cited to *Bancroft's History of the United States*, a treatise authored by

the historian *George* Bancroft. 87 U.S. at 440 n.12. To PPL's knowledge, the Court has never relied on anything by Hubert Bancroft. *See* Historians' Br. 11 (no "reputable historian" would ever rely solely on Hubert Bancroft).

4. Montana offers no meaningful response to the only federal court decision addressing navigability for title—the 1910 federal court decree. Montana asserts that this decision was a "minor water rights case" that did "not analyze navigability." Opp'n 6. In fact, the case specifically addressed navigability for title in determining whether a PPL predecessor held title to the Clark Fork riverbeds so it could build its hydropower dam. The decree states that the Clark Fork "is a non-navigable" river "incapable of carrying the products of the country in the usual manner of water transportation," Supp.App. 11–12, and decrees that PPL's predecessor "owns the bed thereof and both banks thereof" in the section of the river at issue then (and now). Supp.App. 8. As the "Findings of the Court" explain, the court took evidence and found that "Clark's Fork of the Columbia River at all points in Sanders County, Montana, always was and is a non-navigable, torrential, mountain stream, full of rapids and falls." Supp.App. 3.

5. Finally, Montana's opposition is riddled with other distortions. For example, Montana continues to cite to supposed "Army Corps" studies that were *not* conducted by the Corps. Opp'n 9–10; *cf.* App. 269–71. It asserts that PPL's expert, Dr. Schumm, "never set foot near any of the rivers at issue," Opp'n 8, when, in fact, the renowned fluvial

geomorphologist drove the Clark Fork, and viewed the entire Madison River and all relevant stretches of the Missouri River by low-level helicopter flight, providing further support for his conclusions that the rivers had changed and were not "conducive to navigation" at statehood. App. 212–13. And it contends that Dr. Emmons's affidavit "disputed just one of the dozens of [supposed] specific recorded instances of navigability on the rivers at issue," Opp'n 11, even though, as Justice Rice recognized, the affidavit critiques all of the State's purported evidence. App. 190–204. Similarly, Montana complains that Dr. Emmons's report (unlike his affidavit) is not part of the summary judgment record. In fact, PPL made a valid offer of proof urging the court to consider the expert navigability report. Tr. 1055–57 (entry of offer of proof regarding expert reports). Dr. Emmons's report thus provides further confirmation that the lower court could not properly resolve the important, federal navigability issue without a full evidentiary trial. *Cf. United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (title navigability is a matter "requiring evidence, and to be determined by proof").

II. The Court Should Clarify The Proper Test For Determining Navigability For Title Purposes.

When the smoke clears, Montana's opposition brief offers no rejoinder to the petition's key points: the Montana Supreme Court departed from precedent by (i) failing to apply a section-by-section approach to determining navigability, and (ii) deeming present-day usage "sufficient" to

establish navigability at statehood. Pet. 19–24, 26–29.

1. Despite Montana's effort to inject irrelevant factual issues, the Montana Supreme Court could not have been clearer that its *legal* conclusions were outcome-determinative. In the Court's view, the "key inquiry" was whether the trial court had correctly applied the navigability-for-title test because that test "sets forth the *legal standard* the State must meet for summary judgment and also indicates the quantum of evidence PPL must present in order to raise a genuine issue of material fact." App. 53 (emphasis added). Moreover, as the petition explains, the Montana Supreme Court erroneously rejected a section-by-section analysis of navigability for title purposes. *See* Pet. 19–23. Although it acknowledged that *Utah* considered "navigability with regard to certain sections of the rivers, as opposed to the rivers themselves as a whole," it deemed *Utah* to have "limited applicability." App. 59; *see also* App. 96 (Rice, J., dissenting) (criticizing majority for assuming "an *entire river* is navigable").

Montana does not defend the lower court's reading of *Utah*. Nor does it grapple with Justice Rice's dissent, App. 96–101, or address the deep conflicts among the lower courts. *See* Pet. 24–25. Instead, it tries to deny the reality that the Montana Supreme Court rejected *Utah*'s section-by-section approach. Opp'n 18 ("river-as-a-whole" approach "does not appear in the opinions below"). That assertion cannot withstand scrutiny. The district court expressly rejected the view "that the

appropriate analysis" requires looking "at the relevant reaches of the river." App. 138. In turn, the Montana Supreme Court deemed the district court's approach "unequivocally correct," expressly rejecting PPL's argument that "particular stretches of a river" that are non-navigable "require a piecemeal classification of navigability—with some stretches declared navigable and others declared non-navigable." App. 54, 58.

2. Shifting gears, Montana contends that the relevant river sections are too "short," Opp'n 18, and that "PPL has cited no case in which a court has held that such a short interruption ... rendered the longer reach of river non-navigable." Opp'n 20. But PPL is not the one arguing for a whole river approach, with stretches of non-navigability controlling the classification of other portions. As Justice Rice recognized, PPL has never argued that "particular stretches of a river which are non-navigable ... can defeat a finding of navigability with respect to the *whole river*"; it "argues only for certain reaches to be declared non-navigable under *Utah*'s approach." App. 99.

Montana also provides no answer to PPL's contention that a "short interruptions" exception would swallow *Utah*'s rule. Pet. 23. In fact, the opposition highlights the absurdity of Montana's position. In contrasting PPL's "short" river sections with the "long" river sections in other cases, including the 19.21 mile section in a Fourth Circuit case, *see* Opp'n 20, Montana neglects to mention that *Utah* focused on a *4.35 mile* river section, while the Montana Supreme Court determined the "Great Falls Reach, even though a roughly *17-mile*

stretch of the Missouri River, is merely a short interruption." App. 57, 59, 61 (emphasis added).

3. Finally, Montana argues that the lower court did not improperly rely on evidence of present-day usage. But it does not dispute that the lower courts have taken widely different positions on the relevance of post-statehood evidence when determining title navigability. *See* Pet. 26–29. Nor can it reasonably dispute that the Montana Supreme Court deepened this conflict in holding that present-day recreational use is "sufficient" to establish title navigability. App. 58. Indeed, in declaring that this Court's precedents "embrace[] the notion that emerging and newly discovered forms of commerce can be retroactively applied to considerations of navigability," App. 55, the lower court made no caveats explaining that such reliance must be contingent on the waterway's hydrology remaining in its ordinary condition unchanged since statehood (and ignored extensive evidence that the rivers *had* changed). App. 58, 102–104, 251–57, *cf. Utah v. United States*, 403 U.S. 9, 11–12 (1971) (emphasizing that facts from the 1870s had not changed by 1896).

Montana cryptically asserts that "PPL fails to cite a single instance of such misuse of post-statehood evidence." Opp'n 22. In fact, PPL's petition explains precisely why the decision below misuses post-statehood evidence. Pet. 19, 26–29. Where, as here, historical usage is neither "well-documented" nor "well-established," App. 54, 56, and the rivers' hydrology has substantially changed, considering present-day recreational

usage as "sufficient" to determine navigability is flatly at odds with this Court's precedent.

III. The Court Should Clarify The Preemptive Reach Of The Federal Power Act.

Montana also offers no meaningful response to the petition's legal argument that the State's belated attempts to impose retroactive rental obligations are preempted under federal law.

1. Montana contends that, because the lower court held that the Hydroelectric Resource Act's rental provisions are severable from its "more explicit regulatory provisions," there is no conflict with federal law. Opp'n 27. But that ignores that the massive rental obligations were imposed under the Act, and that the massive, retroactive rent payments are preempted wholly apart from the more obviously preempted regulatory provisions the rental provisions complement. Those massive, retroactive state-law rental obligations fundamentally undermine the judgment struck in the federal license as to the economics and financial viability of the project.

Montana attempts to shift the blame to PPL, asserting that a licensee must "obtain all rights necessary" to operate a hydropower project, and that PPL's failure to determine that the riverbeds were state-owned and proffer unasked-for rent, reflected PPL's "failure of diligence." Opp'n 28–29. That blinks reality. The Federal Power Act does not require that licensees anticipate every conceivable legal argument that might be conjured up decades in the future by enterprising state lawyers seeking new sources of revenue. Unlike

the cases cited by Montana, this is not a situation where a claimed right to payment based on a claimed right to title has been delayed due to prolonged litigation. Instead, the riverbeds have always been thought to belong not to Montana but to the federal government and private parties and, on that basis, PPL has made extensive payments to the federal government. If anyone hid the ball here, it was Montana. Montana actively participated in the licensing proceedings and *never* claimed title to any of the riverbeds. Indeed, its own "lack of diligence" was recognized by the Montana Supreme Court. App. 68–69.

2. Of course, there is an explanation for the State's otherwise inexplicable lack of vigilance in asserting its property rights to the riverbeds back in the federal licensing process—*viz.*, that everyone involved understood that title lay elsewhere. Montana's opposition brief suggests that the decision below only confirmed what had been obvious since statehood. But the State's own actions in the licensing proceedings, and its failure to seek compensation for the use of the riverbeds for the previous 100 years, speaks much louder than anything in its brief. The reality, as reflected in the extensive evidence disregarded by the lower courts, is that the State had no title to these lands until it was conveyed by the decision below. That decision conflicts with this Court's precedents, renders important aspects of the federal licensing process a nullity, and, as the amicus briefs filed by concerned landowners, irrigators, industry participants, and distinguished historians attest,

effectuates a massive land grab that should not be allowed to stand.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St, Ste. 1500
Billings, MT 59101
(406) 252-2166

PAUL J. LAWRENCE
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

October 13, 2010 *Counsel for Petitioner*

SUPPLEMENTAL APPENDIX

TABLE OF SUPPLEMENTAL APPENDICES

Appendix A

Steele v. Donlan,
Findings of the Court,
(D. Mont. July 19, 1910) App-1

Appendix B

Steele v. Donlan, Decree,
(D. Mont. July 19, 1910) App-11

Appendix A

IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA

Fred M. Steele, Edward Maher and Zaidah E. Wenham,

Complainants.

vs **IN EQUITY No. 950**

Edward Donlan and Northwestern Development Company, a Corporation, Defendants,

and

Charles F. Wenham, Defendant added by Court order.

FINDINGS OF THE COURT.

BE IT REMEMBERED: In this cause the plaintiffs Fred H. Steele, Edward Maher and Zaldah E. Wenham filed their bill of complaint against defendants in December, 1909, the defendant Donlan filed a disclaimer thereto and the defendant Northwestern Development Company, a corporation, filed an answer to said bill of complaint likewise in December, 1909, and then and there obtained of the Court an order granting it leave to file a bill of cross-complaint seeking affirmative relief against the plaintiffs and one Charles F. Wenham, who the court then duly ordered to be made a party defendant and who was accordingly made such party defendant, and that

subpoena was issued on the said cross bill, which was theretofore filed, and was duly served on said plaintiffs and said Charles F. Wenham, and each and all of said plaintiffs and the said Charles F. Wenham thereafter duly appears to and jointly answered the said cross bill to which answer the said Northwestern Development Company filed its reply, and thereafter the whole cause was, by consent of all the parties, set down for trial and hearing before the Court, without reference to a master, for July 5th, 1910, and at the request of said plaintiffs and said Charles F. Wenham the said hearing was later postponed and reset for Monday, July 18th, 1910, at 10 o'clock a.m.

At the last named time, and in open court, the cause was by the Court duly called for hearing and trial, counsel for said plaintiffs and said Charles F. Wenham was present but produced no evidence in support of their answer to the said bill of cross complaint, or any in support of plaintiffs' bill of complaint, but consented that the hearing proceed. The defendant Northwestern Development Company appeared by counsel and introduced upon the trial and hearing evidence to support all the allegations of the answer to the bill of complaint and of its bill of cross complaint, and thereupon the Court, after deliberation, finds:

(1) That the allegations of the plaintiffs' bill of complaint which are controverted by the answer of the defendant Northwestern Development Company and are all untrue in fact.

(2) That each allegation of the bill of cross complaint of the Northwestern Development

Company, — are in all respects true, and the contrary averments in said answer to said bill of cross complaint are false.

(3) That Clark's Fork of the Columbia River at all points in Sanders County, Montana, always was and is a non-navigable, torrential, mountain stream, full of rapids and falls and incapable of being used to transport the products of the country in the usual manner of water transportation; and that its waters always were, until appropriated by said Northwestern Development Company or its predecessor, subject to appropriation; and that the flow of the waters of said stream ranges from a minimum of six thousand cubic-second feet, to a maximum of two hundred thousand cubic-second feet.

(4) That on and after February 16th, 1905, and until he sold to said Northwestern Development Company, the defendant Donlan owned in fee simple absolute lots numbered four (4) and five (5) in section eight (8) of township twenty-one (21) north of range twenty-nine (29) west of the Montana Principal Meridian, and likewise owned all the shore line and for a considerable distance back therefrom of lots six (6) and seven (7) in said section and all the flooding rights upon the whole of said last named lots and likewise the entire bed of said River at all points between and opposite said lots four (4) and five (5) on the one side and lots six (6) and seven (7) on the other side of said River; and that all of said four lots, according to the public survey under which they were patented, runs to the said River, and that the patents included the bed of the River on which were and are the falls known as

Thompson Falls and for over a quarter of a mile above said Falls; and also that there was at all of said times a natural channel or gorge lying upon said lots four (4) and five (5), and then entirely owned by said Donlan, which afforded the only practical means of diverting water for practical power development purposes in that vicinity, and that but one power development project is possible in that vicinity.

(5) That said Donlan acquired by purchase a very old water right of six hundred and twenty-five (625) cubic-second feet of the waters of said River and by virtue of his ownership of the banks and bed of said stream as aforesaid likewise owned the right to have the waters thereof flow down to and past said lots four (4), five (5), six (6) and seven (7) undiminished in quantity and unimpaired in quality with also, as an incident thereto, the right to reasonably use said waters in their passage in and over his lands; and that a water power development use was and is such a reasonable use of said waters, this right being what is commonly known as a riparian right.

(6) That on each occasion intending to and believing he was appropriating all the waters in said stream and for the purpose of securing the same, if necessary, by appropriation, in addition to his said riparian rights and without in any manner relinquishing or impairing them, said Donlan in March, 1905, in January, 1906, and in December, 1906, respectively, duly appropriated, for water power development and other industrial purposes, respectively twelve hundred and fifty (1250) cubic-second feet, two thousand (2,000) additional cubic-

second fee and five thousand (5,000) additional cubic-second feet of the waters of said stream, and thereafter and in June, 1909, said Northwestern Development Company, with like purpose, intention and belief, duly appropriated an additional seven thousand five hundred (7,500) cubic-second feet of the waters of said stream; and that this belief on the part of said Donlan and said Northwestern Development Company was reasonably induced from time to time by different reports of hydraulic engineers and each appropriation was additional to and independent of the preceding ones and each was regularly made by duly posting a notice at the point of intended diversion and thereafter duly recording a properly verified notice likewise in due form, with the County Recorder of Sanders County, Montana, and on December, 1909, a single amended notice covering all of said preceding appropriations, and likewise in due form and properly verified, was also properly recorded in said Sanders County, the same covering fifteen thousand two hundred and fifty (15,250) cubic-second feet of the waters of said stream.

(7) That the said power development enterprise was a large and costly one involving protracted exploration of the River bed for a suitable dam foundation, and prolonged expert examination to determine a suitable point for the development of said power, and the location of the primary and secondary dams, forebays and powerhouse essential therefore, also involving extensive survey operations to determine the probable flood line to result from the construction

of the proposed dam when its nature was determined upon and thereby the areas of land above on the River to be flooded, and involving the acquisition of titles or flooding rights for the lands so determined to be flooded for not less than six miles up the stream, as well as the clearing of ground and the performance of much other preliminary work; that said Donlan honestly intended to appropriate said waters so appropriated by him for the purposes named, and forthwith after the posting of said first named and each one of said succeeding notices of appropriation began to carry on with reasonable diligence the vigorous prosecution of work directed to subject said waters to said uses, and he continued so to do until he sold to said Northwestern Development Company, which after its purchase likewise continued in the same manner the prosecution of said work at all times, and is still so continuing the same; and that there has been actually and reasonably expanded either by said Donlan or by said Northwestern Development Company an average of over sixty-six dollars per day, over nineteen hundred dollars per month, and over twenty-three thousand hundred dollars per year on said work since March 1st, 1905, or a total to this date of upwards of one hundred and seventeen thousand dollars; and that the work for which said sums were so expended was of the nature in this finding first outlined.

(8) That in the year 1907 said Donlan, for a valuable consideration, sold and conveyed all his rights of every nature as above outlined, to the defendant Northwestern Development Company,

which has since actually, necessarily and reasonably expended upwards of sixty-five thousand dollars in the diligent prosecution of said work, and has just completed the acquisition of the last of the needed flooding rights at points above its proposed dam, and is, therefore, now first prepared to enter upon the prosecution of the work of building and mechanical structures incident to the lifting of said waters for the development of said power.

(9) That said rights and claims of defendants stood unchallenged until the year 1909, when in the month of July defendant Charles F. Wenham entered upon said lot five (5) without the consent and against the will of defendant Northwestern Development Company and posted a notice whereby he pretended to appropriate the waters of said stream in defiance of said appropriations by said Donlan and said Northwestern Development Company, and thereafter, but all prior to October 15, 1909, he expended about six hundred dollars in a crib and boom built likewise on the lands of said Northwestern Development Company against its will and without its consent; and that said work as not calculated in any manner to aid in the development of any proposed water power at said point; and that neither said Charles F. Wenham nor any of the plaintiffs ever got any right to enter on any of said lands for the purpose of attempting to appropriate water or for working, by either grant or eminent domain or otherwise; that the recorded and posted notice of appropriation so made by said Charles F. Wenham in July, 1909, in Sanders County, Montana, does not state the dimensions of

the ditch, canal or means or diversion, or refer to any monument or any natural object to identify the point of diversion; and that none of the plaintiffs or the same Charles F. Wenham ever had any genuine claim in or to the waters of said stream, and the claims urged by each of them are and were false and made and intended to embarrass the operations of said Northwestern Development Company and cast a cloud upon its said lands and said water rights and its said power development enterprise, as are also the deeds purported to be executed between said Charles F. Wenham and one or more of plaintiffs, in October, 1909; and that the claims of each of the plaintiffs and the defendant Charles F. Wenham in and to the said water and in and to the right of entry upon said land are not and were not made in good faith; and that they have been insisting upon such claims for the purpose of clouding the title of defendant Northwestern Development Company and would continue to insist thereon unless enjoined by order of this court.

And as conclusions of law the Court finds:

(1) That the defendant Northwestern Development Company is the owner of the first and prior right to use, for the purposes herein, named, fifteen thousand two hundred and fifty (15250) cubic feet of water per second of time of the water of said stream; that said stream is a non-navigable stream, and that said defendant Northwestern Development Company owns the bed thereof and both banks thereof at all points up stream from the north and west lines of section seven (7) in township twenty-one (21) north of range twenty-

nine (29) west, Montana Principal Meridian, eastward continuously to the Thompson Falls and for one-quarter of a mile above on said stream, and also owns either the fee or flooding rights to all the land on both banks for a distance of six (7) miles above Thompson Falls in said stream, and is, therefore, the owner of all riparian rights so herein above set forth found to belong thereto, and the whole thereof was and is honestly intended by said defendant Northwestern Development Company, and was by its predecessor Donlan honestly intended to be devoted to the public power development use set forth in said cross-bill.

(2) That said pretended appropriation by defendant Charles F. Wenham and the said record thereof are each and both null and void and a cloud upon the title of said defendant Northwestern Development Company in said waters, as are likewise the deeds each of July 22, 1909, from said Charles F. Wenham to plaintiffs Steele and Maher, and of October 23, 1909, from said Charles F. Wenham to one Ida M. Rock, and from said Ida M. Rock to Zaidah E. Wenham, wife of said Charles F. Wenham; and each and all constitute clouds upon the title of said Northwestern Development Company in said waters; and that the said defendant Northwestern Development Company is entitled to have its title to said waters and its said lands quieted against the claims of said plaintiffs and said defendant Charles F. Wenham, and to have a decree perpetually enjoining said plaintiffs and said Charles F. Wenham and all persons acting or claiming to act by, through or under them from in any manner trespassing upon any of said lands

or the shore of said River, on either side, for six (6) miles above the falls known as Thompson Falls in said River, or at any point between said Falls and the north and west lines of section seven (7) aforesaid, or from in any manner interfering with said Northwestern Development Company in the prosecution of its said water power development enterprise, or its use or enjoyment of said river bed, or banks, or the waters of said stream as aforesaid.

Dated, Helena, Montana, July 19th, 1910.

Carl Rasch
District Judge

Reproduced at the National Archives and Records Administration — Pacific Alaska Region (Seattle)

Appendix B

IN THE CIRCUIT COURT OF
THE UNITED STATES, NINTH CIRCUIT,
DISTRICT OF MONTANA

Fred M. Steele, Edward Maher
and Zaidah E. Wenham,

Complainants.

vs IN EQUITY No. 950

Edward Donlan and Northwestern
Development Company, a corporation,
Defendants,

and

Charles F. Wenham,
Defendant added by Court crder.

DECREE.

This entire cause came on to be heard at this term, by consent, before the Court instead of by reference to a master, and upon the bill, answer and reply and the cross bill, answer thereto and reply to said answer, on July 18th, 1910, at ten o'clock a.m., and the Court then heard the evidence, and after consideration made its findings of fact and conclusions of law, which were duly filed in said cause on July 19th, 1910, and thereupon it was ordered, adjudged and decreed as follows, viz:

(1) That the Clark's Fork of the Columbia River in Sanders County, Montana, was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of

water transportation, and its waters were at all times subject to appropriation for useful purposes under the laws of the State of Montana; and that the defendant Northwestern Development Company and its predecessors, since February 16th, 1905, have owned lots four (4) and five (5) in section eight (8) of township twenty-one (21) north of range twenty-nine (29) west of Montana Principal Meridian, carrying the north bank of said Stream and the shore lines for a considerable depth along, and carrying the south bank of said stream in lots six (6) and seven (7) in said section immediately opposite said first named lots, and has owned and now owns all of both the banks of said stream from the north and west lines of section seven (7) in said township and range, eastward to the east lines of the two easternmost of the four first named lots in section eight (8), and the whole bed of said stream at all points opposite the said bank lands from the north and west lines of said sections six (6) and seven (7) to the east line of said last named lots including that portion of the bed carrying that portion of said River known as Thompson Falls, and also owns the bed of said River and either the fee or flooding rights to all of the land carrying both banks of said River for a distance of six (6) miles above said Thompson Falls in said stream as hereinafter described, and owns all riparian rights incident thereto, among others, the right to have the waters of said stream flow to and across its said lands unimpaired in quality and undiminished in quantity with the privilege of using the same while passing for power development purposes; and that the whole of said property was and is honestly intended by said

Northwestern Development Company, and was so intended by its predecessor Donlan, to be devoted to the public power development use setforth in said cross bill.

(2) That said Northwestern Development Company was and is the owner of the first and prior right to the use for power development and other industrial purposes of fifteen thousand two hundred and fifty (15,250) cubic feet of water per second of time of the waters of said River for use in sections seven (7) and eight (8) of township twenty-one (21) north of range twenty-nine (29) west of Montana Principal Meridian.

(3) That said Northwestern Development Company acquired said rights, not only as riparian owner, but by virtue of four certain appropriations and one amended appropriation of said waters, each made in compliance with the laws of the State of Montana, and respectively for twelve hundred and fifty (1250) cubic-second feet in March, 1905, for two thousand (2,000) cubic-second feet additional in January, 1906, for five thousand (5,000) cubic-second feet additional in December, 1906, and for seventy-five hundred (7500) cubic-second feet additional in June, 1909; and that each of said appropriations was made in good faith by the appropriator named therein for the purpose therein stated; and that by mesne conveyance the right in the case of each was duly transferred to the defendant Northwestern Development Company, save as to the last appropriation which was made by said Company; and that the work calculated to subject said waters to the proposed use named in said appropriation was begun in each instance by

the appropriator forthwith after the posting of notice, and prosecuted with reasonable diligence by the appropriator, of his successor Northwestern Development Company, since and until the present time.

(4) That the attempted appropriation by defendant Charles F. Wenham by a notice posted in July, 1909, on said lot five (5) was invalid and void and conferred no rights in the waters of said stream; and that the record of the notice of said attempted appropriation made by said Wenham in the Recorder's office of Sanders County, Montana, which is recorded in Volume I. of Water Rights Records, on page 311, because it fails to state the dimension of the intended means of diversion, or to refer to the point of intended diversion by sufficient reference to any natural or permanent monument and because it was based on a trespass on said lot five (5), is likewise null and void, and therefore the deeds or agreements or transfer pretending to transfer said alleged water right under date of July 22nd, 1909, from Charles F. Wenham and Zadiah E. Wenham, his wife, to plaintiffs Frederick M. Steele and Edward Maher, which deed is dated July 22nd, 1909, and is recorded in Volume 18 of Deed Records of the Recorder's office of Sanders County, Montana, on page 57, and that certain other deed or agreement, bearing, date October 20th, 1909, between Charles F. Wenham and Zadiah E. Wenham, his wife, and Ida G. Rock, which is recorded in Volume 18 of said Deed Records, on page 64, and that certain other deed or agreement bearing date October 21st, 1909, between Ida G. Rock and the plaintiff Zadiah E.

Wenham and recorded in said Volume 18 of Deed Records, on page 67, are each and all likewise null and void, and the said water right record and the said three named deeds and agreements each constitute and are clouds upon the title of said Northwestern Development Company to said fifteen thousand two hundred and fifty (15,250) cubic-second feet of water so owned by it in said stream; that under the said record notice and the said deeds the said plaintiffs and the said Charles F. Wenham were, and, unless restrained by order of this Court, would be claiming rights in the waters aforesaid to the detriment and irreparable injury of the defendant Northwestern Development Company and rights to enter upon the banks or bed of said stream at points aforesaid, owned by said Northwestern Development Company.

It is, therefore, further ordered, adjudged and decreed, that the said recorded notices of attempted appropriation of water found recorded on page 311 and following of volume 1. of the Water Rights Records of Sanders County, Montana, and the said deeds recorded respectively on pages fifty-seven, sixty-four and sixty-seven of said Book 18 of Deed Records of Sanders County, Montana, be and they are each hereby annulled as being clouds upon the title of said Northwestern Development Company to said water.

And it is further ordered, adjudged and decreed that the plaintiffs Fred M. Steele, Edward Maher and Zadiah E. Wenham and the defendant Charles F. Wenham and each and all of them and the agents, servants and employees of each and every of them and all persons claiming to act by, through

or under them be and they are each hereby forever and perpetually enjoined from in any manner claiming any part of the waters of said stream so hereby decreed in use to the defendant Northwestern Development Company, or from in any manner interfering with the use and enjoyment thereof by said defendant Northwestern Development Company, its successors or assigns, and from in any manner trespassing upon or entering upon or in any manner interfering with the use and enjoyment by said defendant Northwestern Development Company or its successors or assigns, of the lands so owned by it or in which it so owns said flooding rights, or of the bed of said stream along the banks so owned or held by said defendant Northwestern Development Company, or any part thereof.

The said lands so carrying the banks of said stream being the lands between the west and north side lines of section seven (7) in said township and range along the River upward continuously to the east side line of said township, and they are more particularly described as follows, to-wit:

All of lots one (1), two (2), three (3), four (4), five (5), six (6), seven(7), eight (8), nine (9) and twelve (12) of section seven (7), township twenty-one (21) north of range twenty-nine (29) west; the south half of lot four (4), and all of lots five (5), six (6), seven (7) and eight (8), in section eight (8); together with the flowage rights on the south half of the southwest quarter of said section eight (8); and also all those portions of the following described tracts lying on the right or north bank of the Clark's Fork of the Columbia River, and all

lying between or below a contour line twenty-four hundred and twenty (2420) feet above sea level, according to the data of the United States Geological Survey on said Clark's Fork of the Columbia River, to-wit: Lots one (1), two (2) and three (3) of section eight (8); lots one (1) and three (3), and the northeast quarter (NE ¼) of the southwest quarter (SW ¼) of section nine (9); lots one (1), two (2), five (5), six (6) and nine (9), and the northeast quarter (NE ¼) of the southeast quarter (SE ¼) of section sixteen (16); lot two (2) of section fifteen (15); lots five (5), six (6) and seven (7) of section twenty-two (22); lots one (1), two (2), three (3) and four (4) of section twenty-three (23); lot four (4) of section twenty-four (24); and lots one (1), two (2) and three (3) of section thirteen (13); also all those portions of the following described tracts lying on the south or left bank of the Clark's Fork of the Columbia River, all lying between or below a contour line twenty-four hundred and twenty (2420) feet above sea level, according to the data of the United States Geological Survey of the said Clark's Fork of the Columbia River; all in township twenty-one (21) north of range twenty-nine (29) west, in Sanders County, Montana, to-wit: lot nine (9), and the southeast quarter (SE ¼) of the southeast quarter (SE ¼) of section eight (8); lot two (2) of section nine (9); lots three (3), four (4), seven (7) and eight (8), and the southeast quarter (SE ¼) of the southeast quarter (SE ¼) of section sixteen (16), lot one (1) of section fifteen (15), and the northeast quarter (NE ¼) of northeast quarter (NE ¼) of section seventeen (17); lots one (1), two (2), three (3), and four (4), of section twenty-two (22); lots five (5), six (6), seven (7) and eight (8), of

section twenty-three (23); and lots three (3) and five (5) of section twenty-four (24); and lots four (4) and five (5) of section thirteen (13).

All of the above described property and flowage rights embrace and include both banks of the said Clark's Fork of the Columbia River, as it flows through said township twenty-one (21) north of range twenty-nine (29) west of Montana Principal Meridian, in Sanders County, Montana.

And it is further ordered, adjudged and decreed that defendant Northwestern Development Company have and recover of the plaintiffs Fred M. Steele, Edward Maher, Zadiah E. Wenham, and the defendant Charles F. Wenham, its legally taxable costs and expenses incurred in this action, to be taxed as provided by law and rule of Court; and that it have execution against said plaintiffs and said Charles F. Wenham and each of them therefore. Costs taxed of $174.80.

This decree is final and upon the merits.

Ordered entered this 19th day of July, 1910.

Carl Rasch
District Judge

Reproduced at the National Archives and Records Administration — Pacific Alaska Region (Seattle)

AMICUS CURIAE BRIEF

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC, PETITIONER

v.

STATE OF MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

WILLIAM M. JAY
Assistant to the Solicitor General

KATHRYN E. KOVACS
KATHERINE J. BARTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MICHAEL A. BARDEE
General Counsel

ROBERT H. SOLOMON
Solicitor

HOLLY E. CAFER
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTIONS PRESENTED

Petitioner owns federally licensed hydroelectric facilities on three rivers in Montana. The Montana Supreme Court held that the State owns the submerged lands underlying the facilities and that petitioner owes rent for the use of these lands. The questions presented by the petition are:

1. Whether the Montana Supreme Court erred in concluding that riverbeds occupied by petitioner's hydroelectric facilities are the property of the State of Montana because they were navigable for title purposes at the time Montana became a State.

2. Whether the Montana law requiring rent for past and ongoing use of State-owned riverbeds is preempted in relevant part by the Federal Power Act, 16 U.S.C. 791a *et seq.*

TABLE OF CONTENTS

Page

Statement 1
Discussion 9
I. The question whether the State holds title to the riverbeds on which petitioner's hydropower facilities are located does not warrant this Court's review 10
II. The question whether the compensation provisions of Montana's Hydropower Resources Act are pre-empted by the Federal Power Act does not warrant this Court's review 17
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Alaska v. *Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), cert. denied, 495 U.S. 919 (1990) 16
Albany Eng'g Corp. v. *FERC*, 548 F.3d 1071 (D.C. Cir. 2008) 18
Bauman v. *Woodlake Partners, LLC*, 681 S.E.2d 819 (N.C. Ct. App. 2009) 14
Brewer-Elliott Oil & Gas Co. v. *United States*, 260 U.S. 77 (1922) 12, 13
California v. *FERC*, 495 U.S. 490 (1990) 18
City of Centralia v. *FERC*, 851 F.2d 278 (9th Cir. 1988) 14
City of Seattle v. *FERC*, 883 F.2d 1084 (D.C. Cir. 1989) 20
Economy Light & Power Co. v. *United States*, 256 U.S. 113 (1921) 3, 4

Cases—Continued: Page

Federal Power Comm'n v. *Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954) 19
First Iowa Hydro-Elec. Coop. v. *Federal Power Comm'n*, 328 U.S. 152 (1946) 4, 18
Georgia Power Co. v. *138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 936 (1981) 19
Jordan v. *Randolph Mills, Inc.*, 716 F.2d 1053 (4th Cir. 1983) 19
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 4
Leavitt v. *Jane L.*, 518 U.S. 137 (1996) 17
Loving v. *Alexander*, 745 F.2d 861 (4th Cir. 1984) 14
Muckleshoot Indian Tribe v. *FERC*, 993 F.2d 1428 (9th Cir. 1993) 14
North Dakota v. *United States*, 972 F.2d 235 (8th Cir. 1992) 16
Northwest Louisiana Fish & Game Preserve Comm'n v. *United States*, 574 F.3d 1386 (Fed. Cir. 2009), cert. denied, 130 S. Ct. 1072 (2010) 14
Northwest Steelheaders Ass'n, Inc. v. *Simantel*, 112 P.3d 383 (Or. Ct. App.), review denied, 122 P.3d 65 (Or. 2005), cert. denied, 547 U.S. 1003 (2006) 16
Philadelphia Co. v. *Stimson*, 223 U.S. 605 (1912) 4
Ryals v. *Pigott*, 580 So. 2d 1140 (Miss.), cert. denied, 502 U.S. 940 (1991) 14
Shively v. *Bowlby*, 152 U.S. 1 (1894) 2
The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871) 2
The Montello, 87 U.S. (20 Wall.) 430 (1874) 3

Cases—Continued: Page

United States v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) 3, 4, 13, 14
United States v. *Holt State Bank*, 270 U.S. 49 (1926) 3
United States v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) 13
United States v. *Utah*, 283 U.S. 64 (1931) ..... *passim*
Utah v. *United States*:
283 U.S. 801 (1931) 12
403 U.S. 9 (1971) 2
Wisconsin Pub. Serv. Corp. v. *FERC*, 32 F.3d 1165 (7th Cir. 1994) 19

Constitution, statutes and regulations:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 3, 15
Federal Power Act, 16 U.S.C. 791a *et seq.* ..... *passim*
16 U.S.C. 797(b) 19
16 U.S.C. 797(e) 5
16 U.S.C. 814 19
Montana Hydroelectric Resources Act, Mont. Code Ann. § 77-4-201 *et seq.* (2009) 1, 5, 6, 8, 17, 20
§ 77-4-201 5
§ 77-4-205 5
§ 77-4-207 5
§ 77-4-208 5
§ 77-4-209 5
Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C. 403 15

Regulations—Continued: Page

18 C.F.R.:

Section 2.9 19

Section 4.41(e) 19

Section 4.41(h)(4) 19

Section 4.51(h) 19

Miscellaneous:

U.S. Army Corps of Engineers, Omaha Dist., *Navigable Waters of the United States*, http://www.nwo.usace.army.mil/html/od-r/navwat.pdf (last visited May 19, 2011) 15

In the Supreme Court of the United States

No. 10-218

PPL MONTANA, LLC, PETITIONER

v.

STATE OF MONTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

This case involves the question whether petitioner, a utility registered to do business in Montana, must pay rent to the State of Montana for the use of the riverbeds on which its hydropower facilities are located. The Montana district court held that petitioner must pay rent pursuant to the Montana Hydroelectric Resources Act (HRA), Mont. Code Ann. § 77-4-201 *et seq.* (2009), because the State of Montana owns the beds of the rivers on which petitioner's facilities are located, and the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, does not preempt the requirement to pay compensation. The Montana Supreme Court affirmed.

1. This Court has long held that when a State is admitted to the Union, it takes title to the lands beneath waters that are navigable at that time. That is because the Crown held those lands in a public trust at the time of American independence, and the original 13 States assumed that trust responsibility. *Shively* v. *Bowlby*, 152 U.S. 1 (1894). Under the "equal footing" doctrine, subsequently admitted States enter the Union on an equal footing with the original States, so they, too, take title at statehood to the lands under waters that are navigable at that time. See *Utah* v. *United States*, 403 U.S. 9, 10 (1971). Title to lands beneath waters that are *not* navigable at the time of statehood, however, is not affected by a State's entry into the Union. *United States* v. *Utah*, 283 U.S. 64, 75 (1931). Thus, to determine whether the State or the adjacent landowner owns the submerged lands underlying certain waters, a court must determine whether those waters were navigable at statehood. *Ibid.*

In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), this Court set forth the general standard for determining whether waters are navigable as a matter of federal law. The Court stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563. Navigability "does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels, or flatboats—nor on an

absence of occasional difficulties in navigation." *United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926). Navigability is not destroyed because a watercourse is interrupted by occasional natural obstructions, or short interruptions such as rapids and sandbars, nor need navigation be open at all seasons of the year, or at all stages of the water. *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921); *United States* v. *Utah*, 283 U.S. at 77. It is not sufficient, however, that a river be navigable only under exceptional conditions or during short periods of temporary high water. *Id.* at 87. The condition of the watercourse should be such as to ordinarily assure regularity and predictability of usage. *Ibid.*

The precise legal standard and its application vary depending on the purpose for which a specific determination is being made. Navigability determinations are made not only to identify whether a State gained title to submerged lands at statehood, but also to delineate admiralty jurisdiction, see, *e.g.*, *The Montello*, 87 U.S. (20 Wall.) 430 (1874), and to aid in determining the extent of federal regulatory jurisdiction under the Commerce Clause and legislation enacted pursuant to that Clause, see, *e.g.*, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (construing navigability under the FPA). The differing standards reflect these different purposes. For example, while navigability for title must be determined as of the time a State entered the Union, admiralty jurisdiction may exist over waters currently navigable even if they were non-navigable in the past. See *id.* at 409. And the standard for identifying navigable waters for purposes of federal regulatory jurisdiction even more broadly recognizes waters to be navigable if they were once navigable but are no longer, see,

e.g., *Economy Light & Power*, 256 U.S. at 123-124, or only recently have become passable, see, *e.g.*, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 634-635 (1912), or are not now and never have been navigable but may become so, by improvements, in the future, see, *e.g.*, *Appalachian Elec. Power*, 311 U.S. at 409. Thus, "any reliance upon judicial precedent" on the subject of navigability "must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 171 (1979) (citation omitted).

2. This case concerns whether particular stretches of three rivers—the Clark Fork, the Madison, and the Missouri—were navigable at the time Montana became a State in 1889. The Clark Fork originates east of Missoula, Montana, and flows generally northwest to its terminus in Lake Pend Oreille in Idaho. The Madison River originates in Yellowstone National Park in Wyoming and flows north after it enters Montana until it joins two other rivers to form the Missouri River at the town of Three Forks. The Missouri continues flowing north through Helena and northeast through Great Falls to Fort Benton, and it ultimately joins the Mississippi River on the Missouri-Illinois border.

Petitioner operates two hydropower projects on those three rivers. Petitioner acquired the projects from the Montana Power Company in 1999. Pet. App. 3. Pursuant to the FPA, which imposes "a complete scheme of national regulation" to promote hydropower development, *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U.S. 152, 180 (1946), the Federal Energy Regulatory Commission (FERC), formerly the Federal Power Commission (FPC), licenses hydroelectric power projects on waterways within federal jurisdic-

tion. 16 U.S.C. 797(e). Both of petitioner's projects are licensed by FERC.

The Thompson Falls Project consists of a single dam constructed at Thompson Falls, Montana, on the Clark Fork River. The project was relicensed by FERC in 1979. Pet. App. 2.

The Missouri-Madison Project consists of nine dams on the Madison and Missouri Rivers. Pet. App. 2-3. Two of the project's dams are located on the Montana portion of the Madison: the Hebgen dam near the Wyoming-Montana border and the Madison dam north of Ennis, Montana. The other seven dams are located on the Missouri: five dams (Black Eagle, Rainbow, Ryan, Morony, and Cochrane) are located on a 17-mile stretch of rapids that is part of the so-called Great Falls Reach, just downstream from the city of Great Falls, and the other two dams (Holter and Hauser) are on the Stubbs Ferry stretch north of Helena.[1] The Missouri-Madison dams were constructed between 1891 and 1958, and were relicensed by FERC in 2000. *Ibid.*

3. In 1931, the Montana Legislature enacted the HRA. That statute contains both regulatory provisions, which include a competitive bidding process for the award of power site leases, a 50-year lease-term limitation, and a preference for lease bids submitted by municipalities, Mont. Code Ann. §§ 77-4-205, 77-4-207, 77-4-209 (2009), and compensatory provisions, which require the State to charge rent for the use of state-owned lands for hydropower projects. *Id.* §§ 77-4-201, 77-4-208 (2009).

---

[1] The dams on the Missouri are all upstream from Fort Benton, where the parties agree the river was navigable in 1889.

4. In November 2004, petitioner filed this action in Montana state court against the State of Montana. Petitioner sought a declaration that it owed the State no compensation for the use of the riverbeds underlying its hydroelectric facilities.[2] Petitioner contended, as relevant here, that the Montana HRA is preempted by the FPA. Pet. App. 5.

The State counterclaimed. It sought a declaration that it owned submerged lands beneath petitioner's projects and that petitioner owes it compensation for use of those lands. The State also sought damages for petitioner's past uncompensated use. Pet. App. 147; Br. in Opp. App. 1-13.

5. a. The state district court rejected petitioner's claim that the FPA preempts the Montana HRA on its face. The court held that the FPA does not occupy the field and that the compensatory provisions of the state HRA do not conflict with federal law. Pet. App. 152-156. The court acknowledged that at least one regulatory provision of the HRA is conflict-preempted, but held that the compensatory provisions are independent and do not seek to regulate petitioner's hydropower operation—only to seek payment for use of state lands. *Id.* at 155-156. The court deferred action on petitioner's as-applied preemption claim as presenting a question of fact. *Id.* at 156-157.

b. The state district court then granted the State partial summary judgment on the question whether the

---

[2] Petitioner's suit was prompted by another lawsuit, brought in federal court by parents of Montana schoolchildren, that contended that the Montana school trust owned the riverbeds where petitioner's facilities are located and that petitioner owed rent to the trust. After petitioner filed this action in state court, the federal action was dismissed for lack of standing. Pet. App. 3-5.

three rivers were navigable at statehood, allowing the State to claim compensation for their use. Pet. App. 130-143. The court relied principally on admissions by petitioner and on decisions of the FPC applying the different test for navigability under the federal commerce power. See *id.* at 137-143. The court also cited one historical study of navigation on the Madison River. *Id.* at 143.

c. After trial, the state district court rejected petitioner's as-applied preemption claim. Pet. App. 119-124. The court then entered judgment for the State and held that petitioner owed back rent in the amount of $40,956,180. *Id.* at 45.

6. The Montana Supreme Court affirmed by a vote of 5 to 2. Pet. App. 1-117.

a. The state supreme court concluded that petitioner had failed to create a material factual dispute on the question whether the three rivers were navigable in 1889. Pet. App. 57. The State's evidence, the court held, "was clearly sufficient to demonstrate navigability in fact," or that the rivers "were susceptible of such use," at the time of statehood. *Id.* at 56. Although some of the State's evidence was of post-statehood use, including present-day use, the state court agreed with the trial court that such evidence may "be probative as to navigability of a river at the time of statehood." *Id.* at 53; see *id.* at 54, 58. Petitioner had submitted expert evidence that conditions on the Madison had changed so much since 1889 that evidence of present-day usage could not show navigability at the time of statehood. *Id.* at 20-21. The state court held that petitioner's expert evidence "fails to demonstrate that the Madison was not susceptible for use as a channel of commerce at the time of statehood." *Id.* at 58.

The state supreme court dismissed much of petitioner's evidence of non-navigability, such as a 1910 federal district court decree, as "conclusory." Pet. App. 57-58. As for petitioner's contention that the Great Falls Reach and other segments of the three rivers were not navigable at statehood, the court concluded that "'carrying places,' portages, or other obstructions which require a resort to 'artificial means' of navigation, are not sufficient to defeat a finding of navigability." *Id.* at 54. The court observed that the Great Falls Reach had been portaged by the Lewis and Clark expedition. *Id.* at 56, 57. In any event, the court held, the segments that petitioner addressed were "insufficient as a matter of law" to establish non-navigability, because they were only "relatively short interruptions" in navigation that "do not affect the actual use or susceptibility of use of these rivers as channels for commerce in Montana at the time of statehood." *Id.* at 61.

b. The court also rejected petitioner's preemption challenge to the Montana HRA. The court acknowledged that the regulatory provisions of the state law may conflict with the FPA, but held that the compensatory provisions are severable. See Pet. App. 70-72.[3] The latter provisions are not preempted, the court concluded, because "[t]he FPA permits private landowners, including states, to seek and receive compensation for the use of their land." *Id.* at 71.

c. Justice Rice dissented, joined by Judge Salvagni. Pet. App. 93-117. The dissent concluded that the majority "erred in its analysis of the law governing title navigability and also failed to properly apply the tenets of

[3] The court noted that the regulatory provisions had not been applied to petitioner, so "no [preemptive] conflict exists at the present" even as to those provisions. Pet. App. 72.

summary judgment by disregarding genuine material factual conflicts." *Id.* at 93. Addressing the court's legal analysis, the dissent reasoned that "in applying the navigability for title test, courts are not to assume an *entire river* is navigable merely because certain reaches of the river are navigable," and that the majority erred in concluding "that all of the challenged reaches of all the rivers are 'relatively short' and thus unable, as a matter of law, to be declared non-navigable for title purposes." *Id.* at 96, 100.

Turning to the question whether summary judgment was appropriate, the dissent undertook a river-by-river analysis of the record evidence, and concluded that, "with respect to all the relevant reaches of the Madison, Clark Fork, and Missouri Rivers, the State met its initial burden to prove navigability under the title test." Pet. App. 116. But the dissent further concluded that petitioner's evidence, if accepted, "would lead inevitably to the conclusion that the State did not hold title to the streambeds at issue." *Id.* at 100-101. The dissent thus concluded that petitioner "ha[d] satisfied its burden to produce substantial evidence that the disputed reaches of the rivers were, at the time of statehood, non-navigable," and that the case should have gone to trial. *Id.* at 117.

DISCUSSION

The decision of the Montana Supreme Court does not warrant this Court's review. The court's rulings are largely fact-specific and do not conflict with any decision of this Court, another state court of last resort, or a federal court of appeals. Therefore, although the court erred in certain respects in applying the principles for determining navigability for title purposes, those errors

in this case do not warrant plenary review by this Court. The state supreme court's decision on the preemption question largely rests on a state-law severability analysis; to the extent that the court rejected the preemption challenge to the HRA's compensation provisions, that decision is correct and does not warrant further review.

I. THE QUESTION WHETHER THE STATE HOLDS TITLE TO THE RIVERBEDS ON WHICH PETITIONER'S HYDROPOWER FACILITIES ARE LOCATED DOES NOT WARRANT THIS COURT'S REVIEW

The Montana Supreme Court's navigability-for-title holding is not squarely at odds with any holding of this Court. Although the state supreme court appears to have incorrectly applied some aspects of this Court's principles to the summary-judgment record here, that case-specific decision does not warrant further review.

1. Petitioner contends (Pet. 21-22) that the Montana Supreme Court erred in its analysis of the effect of the rapids and obstructions on the Missouri and Clark Fork rivers by assessing the status of the rivers "as a whole," without undertaking the "section-by-section analysis" that, petitioner submits, is required by this Court's decision in *United States* v. *Utah*, 283 U.S. 64 (1931). That overstates the Montana Supreme Court's rationale. The state court did address the river segments that interrupted navigation, but held that they should be regarded as navigable on the theory that they are "relatively short" sections that before statehood were portaged by travelers on the river. Pet. App. 60-61. And contrary to petitioner's contentions, characterizing those segments as "relatively short" does not directly conflict with *United States* v. *Utah* or any other decision of this Court.

a. As petitioner emphasizes, one of the issues in *United States* v. *Utah* was the proper characterization of a stretch of river approximately 4.35 miles in length. Petitioner argues (Pet. 22-23; Cert. Reply 9-10) that *United States* v. *Utah* and other decisions of this Court require a "section-by-section analysis" that looks at segments as small as 4.35 miles.

United States v. *Utah* does not stand for the legal proposition that any 4.35-mile interruption in navigability must be treated as a distinct segment over which a State did not acquire title at statehood. Indeed, the Court and parties did not focus on the 4.35-mile segment because of distinct features that required it to be analyzed separately from both the upstream and the downstream stretches. Rather, the dispute over the 4.35-mile stretch was over whether it properly belonged with the segment upstream (which was navigable) or the segment downstream (which was not navigable).

The Special Master found that the relevant portions of the Green River and the Grand River (as it was then known) had been navigable in 1896, and that title to the lands beneath those portions therefore had passed to Utah at statehood.[4] The Green and the Grand join to form the Colorado River; the Master further found that the first 40 miles of the Colorado (most of which flow through Cataract Canyon) had been entirely non-navigable at the time of statehood, and that the United States therefore retained title to that stretch. 283 U.S. at 73-74. Utah made no objection to most of that finding, except for a 4.35-mile stretch of the Colorado from the confluence of the Green and Grand Rivers down to the

---

[4] The United States excepted unsuccessfully to that conclusion. *United States* v. *Utah*, 283 U.S. at 74-75, 89.

beginning of Cataract Canyon. *Id.* at 75. The Court sustained that exception, because it found that the 4.35-mile segment "d[id] not differ in its characteristics, with respect to navigability, from [the Green and Grand] as they reach the point of confluence" immediately above that segment. *Id.* at 89. Thus, although the Court differed with the Special Master as to the treatment of the 4.35-mile segment, it did so not because the segment was so long as to require separate treatment, but because the Court could not "substantially differentiate" that segment "from those parts of [the adjacent Green and Grand Rivers] found by the Master to be navigable." *Ibid.* Navigability ended where the river entered Cataract Canyon; the Court left it to the parties to work out the exact endpoint and to submit their agreement in a proposed decree. See *id.* at 90; see also *United States* v. *Utah*, 283 U.S. 801 (1931) (decree).

Separately, the Special Master concluded that the portion actually flowing through Cataract Canyon was non-navigable, although it was situated in between navigable segments. The Master emphasized that the Cataract Canyon stretch could not be portaged. See Report of the Special Master at 126-127, *United States* v. *Utah*, *supra* (No. 14, Original). This Court did not consider that issue, because neither party excepted to the Master's ruling. See 283 U.S. at 74, 80. Here, by contrast, the state supreme court concluded that the relevant segments *had* been portaged to allow commerce to continue uninterrupted. Pet. App. 60-61 (distinguishing *United States* v. *Utah*); see *id.* at 54, 56.

b. The other decisions of this Court that petitioner cites (Pet. 19-20) did not address how to treat non-navigable "middle section[s] of an otherwise-navigable river," Pet. 20. In *Brewer-Elliott Oil & Gas Co.* v.

United States, 260 U.S. 77 (1922), the Court held that Oklahoma did not acquire title at statehood to a segment of the bed of the Arkansas River that was "a number of miles" above the "head of navigation," *id.* at 86, and there is no indication that the Arkansas was navigable anywhere above that point. Accord *United States* v. *Utah*, 283 U.S. at 88 n.12 (discussing the lower courts' findings in *Brewer-Elliott*). And in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), the Court considered whether the Rio Grande was navigable "within the limits of the Territory of New Mexico," *id.* at 698, 699, because the case had come from the territorial supreme court and did not present the question of navigability outside the Territory; this Court did not suggest that the Rio Grande was navigable *upstream* of the point where it enters New Mexico. In both *Brewer-Elliott* and *Rio Grande*, the reason the relevant stretch was not navigable was because so little water flowed through it during most of the year, see *id.* at 698; *United States* v. *Utah*, 283 U.S. at 88 n.12, and the Court never suggested that conditions were different upstream. Moreover, *Rio Grande* concerned the distinct question (see Cert. Reply 4) of navigability for commerce, not for title. See 174 U.S. at 701, 707.

Finally, in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Court dealt with a stretch of the New River that the United States argued was navigable for commerce; navigability for title purposes was not at issue. To "conserve discussion," the Court divided the stretch into three sections and focused its analysis on the "crucial" middle one, because that section had the least evidence of navigability. *Id.* at 411-412. Once the Court concluded that the middle section was (through improvement) navigable for commerce,

"[i]t follow[ed]" that the other two sections were navigable as well, and thus that the whole stretch at issue was navigable. *Id.* at 418-419.

c. Nor is there a conflict in the lower courts on this question. Each of the three cases that petitioner describes as requiring a section-by-section analysis addressed only a single segment because that was the extent of the dispute between the parties, and two of those cases were not applying this Court's standards de novo but deferentially reviewing FERC's application of the FPA's statutory definition of navigability. See *Muckleshoot Indian Tribe* v. *FERC*, 993 F.2d 1428, 1430, 1432-1433 (9th Cir. 1993); *City of Centralia* v. *FERC*, 851 F.2d 278, 279-280 (9th Cir. 1988); *Loving* v. *Alexander*, 745 F.2d 861, 867 & n.7 (4th Cir. 1984).

Similarly, the few cases that petitioner cites (Pet. 25) as joining the court below in applying an improper "river as a whole" analysis are either misconstrued, irrelevant, or both. *Northwest Louisiana Fish & Game Preserve Comm'n* v. *United States*, 574 F.3d 1386 (Fed. Cir. 2009), cert. denied, 130 S. Ct. 1072 (2010), addressed the federal navigational servitude, not navigability for title; because all that mattered was whether the Red River was navigable, and the Saline Bayou was not part of the Red River but a tributary to it, the Saline Bayou's status was irrelevant. *Id.* at 1388, 1391-1392. In the two state cases, which applied state public-trust doctrine, the courts naturally focused on particular segments (surrounding an artificial lake, or flowing through a particular county), and not on the river as a whole. See *Bauman* v. *Woodlake Partners, LLC*, 681 S.E.2d 819, 827 (N.C. Ct. App. 2009); *Ryals* v. *Pigott*, 580 So. 2d 1140, 1152 (Miss.), cert. denied, 502 U.S. 940 (1991).

d. The Montana Supreme Court concluded that petitioner's evidence of non-navigability at statehood could establish only "relatively short interruptions of navigability" in otherwise navigable rivers. Pet. App. 61. As petitioner and the dissent both note, summary judgment for the State on that basis was incorrect, particularly given the length of the segments as to which petitioner submitted evidence of non-navigability. See Pet. 23 (citing the dissent).[5] But the state supreme court's application of the summary-judgment standard to particular evidence does not warrant review by this Court absent some more significant consequence, such as an attempt to apply the decision below more broadly to claim not only back rent from a private utility, but title from others, including the federal government. See, *e.g.*, Br. in Opp. 31 (affirming that no one except petitioner is bound by the judgment below).

2. Petitioner also contends (Pet. 26-29) that the state supreme court erred in its use of post-statehood evidence of navigability on the Madison River. But as petitioner recognizes (Pet. 26-27), evidence of current-day boating may be probative of navigability at statehood, *United States* v. *Utah*, 283 U.S. at 82, *if* the evidence also shows that the river was in a condition at statehood that would support comparable boating. The cases that petitioner cites do not establish a conflict on

---

[5] Even if those segments are not navigable for title, however, they have been determined to be subject to federal regulation under the Commerce Clause. See, *e.g.*, U.S. Army Corps of Engineers, Omaha Dist., *Navigable Waters of the United States*, http://www.nwo.usace.army.mil/html/od-r/navwat.pdf (last visited May 19, 2011) (listing the Missouri River "[f]rom its Headwaters near Three Forks, Montana downstream" as navigable within the meaning of Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403).

this point; they merely reach different outcomes after applying the relevant principles to different facts. Compare, *e.g.*, *North Dakota* v. *United States*, 972 F.2d 235, 240 (8th Cir. 1992) (modern-day canoe use not probative because district court found that river's physical condition had materially changed since statehood), with *Alaska* v. *Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (modern commercial use probative because parties stipulated that river's "physical characteristics have remained unchanged since statehood"), cert. denied, 495 U.S. 919 (1990), and *Northwest Steelheaders Ass'n, Inc.* v. *Simantel*, 112 P.3d 383, 391-393 (Or. Ct. App.) (post-statehood use, by comparable vessels, probative because post-statehood conditions were *less* favorable to navigation than conditions at statehood), review denied, 122 P.3d 65 (Or. 2005), cert. denied, 547 U.S. 1003 (2006).[6]

The Montana Supreme Court correctly recognized that navigability for title purposes is determined by navigability in 1889, not today. See, *e.g.*, Pet. App. 15, 54, 55-56, 58, 62. The court recognized that petitioner could establish the irrelevance of inquiry into present-day use by showing that the river had changed, *id.* at 20-21, but it rejected petitioner's expert evidence as insufficient to survive summary judgment on that question, *id.* at 58. Although the state supreme court did not adequately explain *why* it was rejecting that evidence, see *ibid.*, and it ignored petitioner's evidence that the river was too braided and interrupted by sandbars at statehood to support navigation, see Pet. 11,[7] the court's deficient

---

[6] Petitioner's other cases (Pet. 27, 28) do not concern navigability for title and thus do not examine the question of navigability *at statehood*.

[7] The state supreme court also failed to consider whether the modern-day craft using the Madison River were comparable to vessels used in the customary modes of trade and travel at statehood. See, *e.g.*,

application of the relevant legal principles to the facts of this case does not warrant further review.

II. THE QUESTION WHETHER THE COMPENSATION PROVISIONS OF MONTANA'S HYDROPOWER RESOURCES ACT ARE PREEMPTED BY THE FEDERAL POWER ACT DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner also contends that the FPA preempts the state law under which the State recovered compensation. Petitioner does not allege that the Montana Supreme Court's rejection of that contention creates any conflict; indeed, the state court only briefly discussed the points petitioner presses. Rather, petitioner contends that the state court's decision is so erroneous as to warrant review. That contention lacks merit. Further review on this question is not warranted.[8]

1. Petitioner first contends (Pet. 32-33) that Montana's HRA conflicts "on its face" with federal law, because its regulatory provisions are "irreconcilabl[e]" with the FPA. But as petitioner acknowledges (Cert. Reply 11), the state supreme court held that those provisions—which have never been applied to petitioner—are severable from the compensatory provisions at issue in this case. Pet. App. 71. Severability is a question of state law, and the state supreme court's answer is authoritative. *Leavitt* v. *Jane L.*, 518 U.S. 137, 139 (1996).

Ahtna, 891 F.2d at 1405; see also *United States* v. *Utah*, 283 U.S. at 82 (approving admission of evidence of post-statehood use of the rivers, but noting that such use included boats of particular types in use when Utah became a State). Petitioner does not separately contend that the state supreme court erred in this respect, however.

[8] Even if this Court were to grant review on the first question presented, this question would not warrant review; indeed, the preemption issue would be mooted if this Court were to reverse on the title issue.

Whether those regulatory provisions are preempted[9] therefore has no bearing on whether the compensatory provisions are preempted.

2. Petitioner also contends (Pet. 33-35) that the compensatory provisions are preempted in their own right because petitioner obtained its licenses from FERC "on the unquestioned assumption that the riverbeds were not State lands." A FERC license, however, does not turn every "assumption" underlying the license application into preemptive federal law. "A state measure is pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *California* v. *FERC*, 495 U.S. 490, 506 (1990) (citations omitted); accord *Albany Eng'g Corp.* v. *FERC*, 548 F.3d 1071, 1076 (D.C. Cir. 2008) ("this does not mean that the FPA precludes every state exercise of power marginally related to federal hydropower licensees"). The state supreme court did not err in finding no conflict.

PPL is correct that the FPA imposes a "complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U.S. 152, 180 (1946). Under that scheme, FERC's authority to license jurisdictional hydroelectric projects is exclusive. *Id.* at 167-168. But questions of title and compensation for property rights

---

[9] The state supreme court acknowledged that if Montana applied the regulatory provisions in a way that conflicted with FERC requirements, that application "would arguably be preempted." Pet. App. 72. The court did not decide that question, however, as this case does not present it.

fall outside the scope of the FPA and within the realm of state law. See *id.* at 178; *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1954); see also, *e.g.*, *Georgia Power Co.* v. *138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980) (state law governs measure of compensation for land condemned under FPA), cert. denied, 450 U.S. 936 (1981). Although FERC conducts an economic analysis of a proposed project at the time of licensing, see 16 U.S.C. 797(b), FERC's economic analysis does not incorporate the *actual* costs of land acquisition. See 18 C.F.R. 4.41(e) (license application must include *estimated* cost of necessary land rights); 18 C.F.R. 2.9 (adopting Form L-1, which allows licensees five years to obtain necessary property rights).

Moreover, although an application for a FERC license must identify (*inter alia*) the lands within the project boundary that the applicant owns, 18 C.F.R. 4.41(h)(4); see 18 C.F.R. 4.51(h), that does not mean that FERC's approval of the license adjudicates the licensee's ownership of the lands, or preempts state property law giving someone else title to those lands. See *Jordan* v. *Randolph Mills, Inc.*, 716 F.2d 1053, 1055 (4th Cir. 1983) (holding that a FERC license "neither transfers nor diminishes any right of possession or enjoyment possessed by" any landowner). A licensee, like any commercial venturer, assumes on a prospective basis the risk of increased costs (whether for land acquisition, dam safety remediation, or environmental abatement) over the 30-to-50-year term of the FERC license. See *Wisconsin Pub. Serv. Corp.* v. *FERC*, 32 F.3d 1165, 1170 (7th Cir. 1994) ("The FPA cannot be read to require the Commission to protect the economic viability of all hydroelectric projects."). The licensee can condemn necessary lands that it does not own. 16 U.S.C. 814. But it is

not protected against having to pay more for those lands than it initially projected. Petitioner points to no contrary authority from any court.

The FPA's "policy favoring the protection of licensees' expectations" precludes FERC itself from imposing certain retroactive charges, see *City of Seattle* v. *FERC*, 883 F.2d 1084, 1088-1089 (D.C. Cir. 1989), but it does not follow that the FPA impliedly ousts state property law allowing a landowner to charge rent simply because a FERC licensee's bill for past rent is both substantial and unforeseen. Accordingly, compliance with the HRA neither precludes petitioner from complying with its FERC licenses nor upsets licensees' expectations in a manner preempted by the FPA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

WILLIAM M. JAY
Assistant to the Solicitor General

KATHRYN E. KOVACS
KATHERINE J. BARTON
Attorneys

MICHAEL A. BARDEE
General Counsel

ROBERT H. SOLOMON
Solicitor

HOLLY E. CAFER
Attorney
Federal Energy Regulatory Commission

MAY 2011

AMICUS CURIAE BRIEF

SEP 15 2010

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, NATIONAL HYDROPOWER ASSOCIATION, AND PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON IN SUPPORT OF PETITIONER

MICHAEL A. SWIGER
Counsel of Record
VAN NESS FELDMAN, P.C.
1050 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D.C. 20007
(202) 298-1800
mas@vnf.com

Counsel for Amici Curiae

(Of Counsel Listing On Inside Cover)

September 15, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of
Law

EDWARD H. COMER
HENRI D. BARTHOLOMOT
EDISON ELECTRIC INSTITUTE
701 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
Counsel for Edison Electric Institute

JAMES H. HANCOCK JR.
BALCH & BINGHAM LLP
1710 SIXTH AVENUE NORTH
BIRMINGHAM, AL 35203
Counsel for National Hydropower Association

JEFFREY A. LEAHEY
NATIONAL HYDROPOWER ASSOCIATION
1 MASSACHUSETTS AVENUE, N.W.
SUITE 850
WASHINGTON, D.C. 20001

ANNE SPANGLER
General Counsel
PUBLIC UTILITY DISTRICT NO. 1 OF
SNOHOMISH COUNTY
2320 CALIFORNIA STREET
EVERETT, WA 98201

QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?*

---

* This *amici* brief is limited to the first question presented in the Petition.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF HYDROPOWER AND UTILITY AMICI CURIAE 1

REASONS FOR GRANTING THE PETITION ... 9

I. THE COURT SHOULD GRANT REVIEW TO REAFFIRM THE PROPER TEST UNDER FEDERAL LAW FOR DETERMINING NAVIGABILITY FOR TITLE 9

II. THE SUPREME COURT OF MONTANA'S RETROACTIVE NAVIGABILITY DETERMINATION AND ASSESSMENT OF RENTS THREATENS SETTLED EXPECTATIONS OF HYDROPOWER PROJECT AND OTHER RIPARIAN FACILITY OWNERS. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Arkansas River Rights Comm. v. Echubby Lake Hunting Club,
126 S.W.3d 738 (Ark. App. 2003) 12

Brewer-Elliott Oil & Gas Co. v. United States,
260 U. S. 77 (1922) 10

City of Seattle v. FERC,
883 F.2d 1084 (D.C. Cir. 1989) 13

First Iowa Hydro-Elec. Coop. v. F.P.C.,
328 U.S. 152 (1946) 5

North Dakota v. United States,
972 F.2d 235 (8th Cir. 1992) 12

Pacific Gas & Elec. Co. v. F.E.R.C.,
720 F.2d 78 (D.C. Cir. 1983) 6

Pollard v. Hagan,
44 U.S. (3 How.) 212 (1845) 10

PPL Montana, LLC v. Montana,
119 P.3d 421 (Mont. 2009) 11

Shively v. Bowlby,
152 U.S. 1 (1894) 10

The Daniel Ball v. United States,
77 U.S. (10 Wall.) 557 (1870) 10

United States v. Appalachian Electric Power Co.,
311 U.S. 377 (1940) 11, 12

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 10

United States v. Utah,
283 U.S. 64 (1931) 10, 11

Statutes

American Recovery and Reinvestment Tax Act,
§ 1603, Pub. L. No. 111-5, 123 Stat. 115, 364
(2009) 4

Federal Power Act, 16 U.S.C. §§ 791-823 (2000)
§ 4(e), 16 U.S.C. § 797(e) 5, 7
§ 6, 16 U.S.C. § 799 6
§ 10(a)(1), 16 U.S.C. § 803(a)(1) 5
§ 10(e)(1), 16 U.S.C. § 803(e)(1) 13, 14
§ 15, 16 U.S.C. § 808 5
§ 15(a)(1), 16 U.S.C. § 808(a)(1) 5
§ 17(a), 16 U.S.C. § 810(a) 14
§ 23(b), 16 U.S.C. § 817 5
§ 28, 16 U.S.C. § 822 6

Miscellaneous

Electric Power Research Institute, *Assessment of Waterpower Potential and Development Needs* at vii (2006) 4

Federal Energy Regulatory Commission, *Annual Report 2008* at 18, *available at* http://www.ferc.gov/about/strat-docs/annual_rep.asp. 3

Federal Energy Regulatory Commission, *Complete list of Issued Licenses* available at http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls 7

Navigant Consulting, *Job Creation Opportunities in Hydropower,* Executive Summary at 17 (2010), *available at* http://www.hydro.org/Jobs%20Study/NHA_JobsStudy_Final%20Report_Final_Sept%2020.pdf 4

Press Release, Montana Attorney General Steve Bullock, *Bullock Calls Supreme Court's PPL Decision "A Victory for Generations of Montanans"* (Mar. 30, 2010), available at http://www.doj.mt.gov/news/releases2010/20100330.asp 15

U.S. Department of Energy, *Feasibility Assessment of the Water Energy Resources of the United States for New Low Power and Small Hydro Classes of Hydroelectric Plants* at 21-24, 35, DOE-ID-11263 (2006) 4

U.S. Department of Energy, *Obama Administration Announces up to $32 Million Initiative to Expand Hydropower* (June 30, 2009 press release), *available at* http://www.energy.gov/news/7555.htm (statement of Secretary of Energy Steven Chu) 4

U.S. Energy Information Administration, *Renewable Energy Consumption and Electricity Preliminary Statistics 2009* at 4 & Table 3 (Aug. 2010), *available at* http://www.eia.gov/fuelrenewable.html 3

INTERESTS OF HYDROPOWER AND UTILITY AMICI CURIAE

The Edison Electric Institute ("EEI"), National Hydropower Association ("NHA"), and Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") (together "Hydropower and Utility *Amici*") represent electric utilities and hydropower project owners and operators from across the nation, as well as others who rely on such projects.[1] In particular:

EEI is the trade association of U.S. shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Its U.S. members represent approximately 70 percent of the U.S. electric power industry and generate 60 percent of the electricity produced by U.S. generators. In providing these services, many EEI members rely on hydropower, and many own and operate hydropower projects licensed by the Federal Energy Regulatory Commission ("FERC"). In fact, EEI members comprise the largest group of FERC hydropower project license holders. EEI members also own and operate other electric generation and transmission facilities, located on or near rivers, that could be affected by the outcome of this case.

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici curiae*'s intention to file this brief, and the parties have consented to its filing. Letters of consent are submitted with this brief. Pursuant to Rule 37.6, EEI, NHA, and Snohomish state that no counsel for either party to this case authored this brief in whole or in part, and no person other than *amici* and their members made monetary contributions to preparation and submission of this brief.

NHA is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage and new hydrokinetic technologies. NHA seeks to secure hydropower's place as a clean, renewable and reliable energy source that serves national environmental and energy policy objectives. NHA's membership consists of more than 170 organizations including public power utilities, investor owned utilities, independent power producers, project developers, equipment manufacturers, and environmental and engineering consultants and attorneys.

Snohomish is a municipal corporation of the State of Washington, formed by a majority vote of the people in 1936 for the purpose of providing electric and/or water utility service. Snohomish is the second largest consumer-owned electric utility in Washington State and has experienced rapid growth within its service territory in recent years. Snohomish is the licensee of the 112 megawatt (MW) Jackson Hydroelectric Project, and is in the process of developing and assessing several additional small hydropower sites in the next five to ten years. If fully developed, the collective energy output could serve tens of thousands of Snohomish customers. Snohomish is also a member of NHA.

Hydropower projects are an important source of electric power, accounting for seven percent of national electric production and more than 66 percent of the

country's renewable electric energy in 2009.[2] Hydroelectric dams impound water in a reservoir or divert water for release through the project's turbines for the production of electricity. Yet hydropower projects do more than simply generate electricity. The projects help maintain the national electric system's stability, speed recovery when the electric grid is disrupted, and provide valuable base load and peaking power – thereby avoiding the need for additional power plants that rely on coal, natural gas, oil, nuclear, and other fuels. Hydropower projects also provide energy to manufacturing facilities that own and operate such projects, helping to keep our country's manufacturing base competitive in world markets. In addition to electricity production and associated ancillary benefits, the nation's hydropower projects "provide public benefits such as managed water supply, recreation, economic development and flood control while minimizing adverse impacts on environmental resources."[3]

Moreover, the U.S. Department of Energy recognizes continued hydropower development as "clearly part of the solution [to the energy crisis] which represents a major opportunity to create more clean energy jobs," and that "[i]nvesting in our existing hydropower infrastructure will strengthen our

---

[2] U.S. Energy Information Administration, Renewable Energy Consumption and Electricity Preliminary Statistics 2009 at 4 & Table 3 (Aug. 2010), available at http://www.eia.gov/fuelrenewable.html.

[3] Federal Energy Regulatory Commission, *Annual Report 2008* at 18, *available at* http://www.ferc.gov/about/strat-docs/annual_rep.asp.

economy, reduce pollution and help us toward energy independence."[4] Recent studies have concluded that by 2025, the nation's hydropower capacity has the potential to nearly double from current levels of approximately 80,000 MW, with a substantial associated increase in jobs.[5] Congress is actively promoting the development of hydropower projects through economic incentives.[6] Such future development of hydropower, which is vital to the interests of this country, depends on the cost of project development remaining competitive with other energy sources, and on investor confidence in predictability of future costs.

Almost all non-federally-owned hydropower projects are subject to the Federal Power Act's ("FPA's") comprehensive regulatory and licensing framework. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of

---

[4] U.S. Department of Energy, *Obama Administration Announces up to $32 Million Initiative to Expand Hydropower* (June 30, 2009 press release), *available at* http://www.energy.gov/news/7555.htm (statement of Secretary of Energy Steven Chu).

[5] U.S. Department of Energy, *Feasibility Assessment of the Water Energy Resources of the United States for New Low Power and Small Hydro Classes of Hydroelectric Plants* at 21-24, 35, DOE-ID-11263 (2006); Electric Power Research Institute, *Assessment of Waterpower Potential and Development Needs* at vii (2006); Navigant Consulting, *Job Creation Opportunities in Hydropower*, Executive Summary at 17 (2010), *available at* http://www.hydro.org/Jobs%20Study/NHA_JobsStudy_Final%20Report_Final_Sept%2020.pdf.

[6] *See, e.g.*, American Recovery and Reinvestment Tax Act, § 1603, Pub. L. No. 111-5, 123 Stat. 115, 364 (2009).

1920) in order "to secure a comprehensive development of national resources," *First Iowa Hydro-Elec. Coop. v. F.P.C.*, 328 U.S. 152, 180-81 (1946). Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric projects.[7] *See* §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, and 817 (2000). In carrying out its statutory responsibilities, FERC is required to consider all the factors affecting the public interest in the comprehensive development of a waterway, including power development, navigation, water supply, recreation, and appropriate conditions to protect the environment. §§ 10(a)(1), 4(e), 16 U.S.C. §§ 803(a)(1), 797(e).

In the early 20th Century, Congress recognized that the federal government lacked the resources to construct hydroelectric dams on all of the nation's rivers. The Federal Water Power Act of 1920 was the result of years of legislative effort to find a licensing regime that would encourage non-federal investment by permitting investors to reap the fruits of their investments subject to federal oversight. To attract the enormous amount of capital required to develop the nation's hydropower potential, Congress included safeguards in the FPA to help ensure positive returns on investments. For example, FPA § 15 requires that licenses be issued on reasonable terms. 16 U.S.C. § 808(a)(1). Under FPA § 6, FERC is authorized to issue licenses with terms of up to 50 years and is

---

[7] Federally operated projects, such as those operated by the Tennessee Valley Authority, Army Corps of Engineers, and the Bureau of Reclamation are not licensed by FERC.

prohibited from amending licenses, once they are accepted, without the consent of the licensee. 16 U.S.C. § 799; *Pacific Gas & Elec. Co. v. F.E.R.C.*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). FPA § 28 restricts the authority of Congress to alter the terms of a license, or otherwise impair the rights of the licensee, once a license has been issued. 16 U.S.C. § 822.

As Petitioner explains, this case involves Montana state court litigation resulting from claims made by the State of Montana seeking to require Petitioner to pay a portion of its revenues as "rent" and "back rent" for use of the streambeds under certain of PPL Montana's dams and reservoirs. The case focuses on two hydropower projects – Thompson Falls (P-1869) and Missouri-Madison (P-2188) – with facilities on the Missouri, Madison, and Clark Fork Rivers. The two projects include one storage dam and nine dams with generating facilities that have a combined capacity of approximately 350 MW. Nine of the ten dams were built before 1931. The tenth was built in 1958. The projects were initially licensed in 1949 (P-1869) and 1956 (P-2188), and later issued renewed, long-term licenses by FERC. The total acreage upon which PPL Montana has been ordered to pay rent to the State is approximately 5,600 acres. This acreage includes all areas within the FERC-established project boundaries that formed the streambed prior to construction of the dams.

The State of Montana has laid claim to the ownership of the original beds and banks of the entire Madison, Missouri and Clark Fork Rivers, asserting that it owns those lands in trust for the people of Montana, even though the relevant portions of those rivers have historically been understood to have been

non-navigable for title purposes at the time of Montana's statehood in 1889. The State's claim of ownership was confirmed by a divided decision of the Montana Supreme Court interpreting federal title navigability law and asserting ownership (and the concomitant right to charge rent for past and future occupation) of the riverbeds.

Hydropower and Utility *Amici* agree with PPL Montana that the Montana Supreme Court's decision conflicts with the decisions of this Court and other courts. The Hydropower and Utility *Amici* also fear that if the State court's decision is not corrected, the decision has the potential of being adopted by other States, thereby imposing even more substantial and disruptive burdens on the nation's hydropower and other infrastructure.

There are over 1,000 FERC-licensed projects in 32 States,[8] many of which are located on rivers that might now be deemed navigable at the time of statehood under the Montana Supreme Court approach. Hydropower and Utility *Amici* are concerned that a State requirement that hydropower project owners pay back rents and future rents for occupying beds and banks to which they thought they had acquired title or easements years or even decades earlier, or which they believed were federal lands and thus lawfully occupied pursuant to Section 4(e) of the FPA, 16 U.S.C. § 797(e), throws a dark cloud over licensees' certainty of investment – to say nothing of the unfairness of such

---

[8] Federal Energy Regulatory Commission, *Complete list of Issued Licenses* available at http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls.

licensees being "double-billed" for the right to occupy the streambeds. To encourage investment in and maintenance of these important infrastructure projects, licensees and license applicants must be able to make reasonable and accurate calculations of the economic and financial soundness of hydropower facilities at the time they are built, licensed and relicensed. Hydropower and Utility *Amici* are concerned about the disruption and harm to both the electric utility and hydropower industries and their customers that will likely occur if states can impose multi-million dollar assessments on long-standing hydropower facilities that, for decades, have not been subject to such assessments. We are further concerned that the specter of such assessments will create a disincentive to invest in needed refurbishments of aging hydro infrastructure or in new hydropower facilities.

Furthermore, other riparian land uses, including electric generation and transmission facilities that rely on rivers, are potentially at risk as a result of Montana's new assertion – more than 120 years after statehood – that it owns the riverbeds at issue in this case. The threat of riverbed fees being assessed against owners of other riparian facilities would similarly upset settled land and facility ownership rights, undercut investments already made in reliance on those settled rights, and inhibit future investment.

The tens of millions of dollars in fees that Montana proposes to collect from PPL Montana alone, as well as the flood of other such fees on electric facilities that the State court's decision may unleash in other States, will ultimately be borne by electric utility customers. Such unexpected increased fees are especially

unwelcome now because electric ratepayers already face substantial burdens to pay for increased use of renewable energy, increasingly tight environmental standards, and replacement and upgrades of existing electric generation and delivery infrastructure. Unexpected new fees are also particularly difficult now given the tenuous condition of our economy, with many customers struggling to pay their bills.

Finally, Hydropower and Utility *Amici* believe it is important that the standards for adjudication of the status of rivers as to navigability for title purposes at the time of statehood remain settled, clear, and consistent, so that possible future state claims of land ownership under dams and reservoirs and other riparian facilities will not cloud ownership rights and the prospects for existing or future hydropower and other infrastructure investments.

Hydropower and Utility *Amici*, therefore, request that the Court grant PPL Montana's Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO REAFFIRM THE PROPER TEST UNDER FEDERAL LAW FOR DETERMINING NAVIGABILITY FOR TITLE.

The Montana Supreme Court's decision on navigability is inconsistent with this Court's precedents and fails to apply the proper test for who holds title to submerged lands. Under the "equal footing" doctrine, title to the beds of rivers vested in a State when it was admitted to the Union if the rivers

were "then navigable." *United States v. Utah*, 283 U.S. 64, 75 (1931); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223, 229 (1845); and *Shively v. Bowlby*, 152 U.S. 1, 27-28 (1894). If the rivers were not "then navigable," "title to the river beds remained in the United States." *Utah* at 75. This Court's precedents establish that the proper test for navigability is whether the relevant stretches of the rivers were "navigable in fact" when Montana joined the Union in 1889 – that is, whether the river stretches were used, or susceptible to use, "as highways for commerce, over which trade and travel" could "be conducted in the customary modes of trade and travel on water." *Id.* at 76 (citing *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1870)).

The Montana Supreme Court's navigability analysis contravenes this Court's precedents in important ways. First, it failed to consider evidence demonstrating navigability on a section-by-section basis. Instead it concluded that the rivers at issue are generally navigable even though significant stretches where PPL Montana's hydropower projects are located were not navigable when Montana joined the Union. Yet over a century ago in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899), this Court indicated that the navigability of a waterway for title purposes must be determined on a section-by-section basis. The Court has since reaffirmed that, when determining navigability for title, a fact-intensive, section-by-section analysis is required. *Utah*, 283 U.S. 64, 77 & n. 9 (1931); *see also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86 (1922). The Court also has applied a section-by-section approach when determining navigability for purposes of establishing the Federal Power Commission's (FERC's predecessor agency's) regulatory jurisdiction.

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). In contrast, the Montana Supreme Court concluded that "so long as *the river* itself was used, or susceptible of being used, as a channel of commerce at the time of statehood," no further inquiry was required. *PPL Montana, LLC v. Montana*, 119 P.3d 421, 446 (Mont. 2009) (emphasis added), Pet. App. 53.[9] As Justice Rice's dissenting opinion (joined by Judge Salvagni) pointed out, the river-as-a-whole approach adopted by the Montana Supreme Court majority cannot be reconciled with this Court's decisions. *Id.* at. 96.

Second, the Montana Supreme Court's reliance on *present-day* navigability conflicts with this Court's decisions and those of other courts. The Court's decisions have applied a rigorous approach to navigability that ties evidence of navigability to the State's precise date of admission to the Union, while noting that some post-admission evidence of actual navigation can be "relevant" to the river's "susceptibility" to use as a highway of commerce at the time of admission. *Utah*, 283 U.S. at 82. As Justice Rice framed it in his dissenting opinion: "Consequently, because Montana entered the Union on November 8, 1889, the courts must apply the navigability for title test at that time, a factual question about which PPL submitted substantial evidence and attacked the State's case for its failure to do so." Pet. App. at 96. Several lower courts have concluded that post-statehood evidence of navigability is generally an unreliable indicator of a waterway's

---

[9] Citations for *PPL Montana* hereinafter made to Petitioner's Appendix.

condition at statehood. *See North Dakota v. United States*, 972 F.2d 235, 240 (8th Cir. 1992) (rejecting evidence of modern-day recreational canoe use); and *Arkansas River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 (Ark. App. 2003)) ("present-day navigability" may be relevant to navigability for Commerce Clause purposes but not for title purposes). This Court has recognized that, for Commerce Clause purposes, non-navigable status may change, in contrast to the determination of navigability to fix ownership of riverbeds, which is determined at the time of admission to statehood. *Appalachian Electric* at 408. Yet the Montana Supreme Court's decision turns this jurisprudence on its head by concluding: (1) that evidence of present-day recreational use "is sufficient for purposes of 'commerce'" to establish navigability for title (Pet. App. at 58); (2) that this Court in *Utah* "embraced the notion that emerging and newly-discovered forms of commerce can be retroactively applied to considerations of navigability" for title (*Id.* at 55); and (3) that the concept of navigability for title is to be "very liberally construed." *Id.* at 54.

As a result of its iconoclastic approach to the question of navigability for title, the Montana Supreme Court determined that the historical evidence amassed by PPL Montana showing non-navigability at time of statehood – including a 1910 federal court decree, and 1891 and 1898 reports from the Army Corps of Engineers to Congress – was simply irrelevant, and granted summary judgment for the State.[10] This

---

[10] Hydropower and Utility *Amici* are particularly troubled that the state district court reached its conclusion on summary judgment,

radical departure from the traditional, fact-intensive, section-by-section historical inquiry into navigability employed by this Court and other courts is reason enough to grant certiorari in this case.

II. THE SUPREME COURT OF MONTANA'S RETROACTIVE NAVIGABILITY DETERMINATION AND ASSESSMENT OF RENTS THREATENS SETTLED EXPECTATIONS OF HYDROPOWER PROJECT AND OTHER RIPARIAN FACILITY OWNERS.

The Montana Supreme Court's decision undercuts a foundation policy of the FPA "favoring the protection of licensees' expectations." *City of Seattle v. FERC*, 883 F.2d 1084, 1088 (D.C. Cir. 1989). The FPA does contemplate that landowners (including States) will be compensated for use of their lands by licensees – generally through a one-time, up-front fee to pay for fee title or a permanent easement as to non-federal lands. Here, however, more than 120 years after statehood, the State has asserted ownership over lands PPL's predecessor believed it had lawfully acquired from private riparian landowners at the time the projects were built, and additionally over lands PPL believed were owned by the United States. As to the latter, because the United States has not disclaimed its interest, PPL must continue to pay annual charges to FERC under Section 10(e) of the FPA, 16 U.S.C.

---

despite voluminous evidence provided by PPL Montana demonstrating that the issue of navigability of the river sections involved in the case were in profound dispute. Such use of summary judgment, upheld by the state supreme court, strikes us as highly inappropriate.

§ 803(e)(1), for occupying lands the U.S. believes are federal lands – as well as rent to the State for the same land – although if the Montana Supreme Court is correct, the U.S. has no right to such payments. And 37.5 percent of the FERC annual charges are even returned to Montana under the FPA's formula! *See* 16 U.S.C. § 810(a).

The rent that Montana seeks to assess is not inconsiderable. Indeed, under the State's valuation methodology, PPL Montana must pay the State 50 percent of the net revenues from hydroelectric generation multiplied by the State's percentage ownership of overall project lands.[11] Pet. App. at 42. The back rent charge for the projects alone was almost $41 million, plus nearly $8 million in interest, and the State will continue to take a substantial portion of the project revenues going forward. *Id.* at 1, 45, 81.

Hydropower and Utility *Amici* are concerned that the Montana Supreme Court's precedent may encourage other States to follow suit in assessing substantial rents and back rents on hydroelectric dam and other riparian facility owners.[12] Not only would

---

[11] Hydropower and Utility *Amici* are very troubled by the use of a "50 percent" of revenues test for land rent. Such a radical departure from traditional measures of fair market value of land, based on sales and rent of comparable land, and the nature of the burden imposed by a rental use, elevates land as one factor in the production of hydropower to a disproportionate importance. Charging a percent of a project's net revenue also will impede investment in and retention of hydropower facilities and again will unduly burden electric customers.

[12] Hydropower and Utility *Amici* also are concerned that the State here is seeking rent for use of riverbeds just by "out of state"

this unsettle licensee and facility owner investment expectations and be a burden on electric customers, but it would also be a substantial disincentive to investment in new and existing hydropower projects and other infrastructure, contrary to national policies encouraging hydroelectric development as a clean, reliable, renewable, and emissions-free source of domestic energy and investment to repair and replace the nation's aging infrastructure.

---

hydropower project owners, while assuring in-state ranching and farming interests that they will not be similarly burdened. Press Release, Montana Attorney General Steve Bullock, *Bullock Calls Supreme Court's PPL Decision "A Victory for Generations of Montanans"* (Mar. 30, 2010), available at http://www.doj.mt.gov/news/releases2010/20100330.asp. This certainly raises concerns about fairness and equity, if not constitutional concerns about uneven application of state assessments to in-state and out-of-state interests.

CONCLUSION

For the reasons set forth above, Hydropower and Utility *Amici* respectfully request the Court to grant certiorari of the judgment below.

Respectfully submitted,

MICHAEL A. SWIGER
Counsel of Record
VAN NESS FELDMAN, P.C.
1050 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D.C. 20007
(202) 298-1800
mas@vnf.com
Counsel for Amici Curiae

(Of Counsel Listing On Inside Cover)

September 15, 2010

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF PROFESSORS DAVID M. EMMONS, THOMAS NOEL, CHARLES E. RANKIN, CARLOS A. SCHWANTES, AND DAVID M. WROBEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Robert R. Gasaway
Counsel of Record
Stephen S. Schwartz*
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
robert.gasaway@kirkland.com
(202) 879-5000

Counsel for Amicus Curiae

September 15, 2010 * Admitted only in Virginia

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER AND STATEMENT OF INTEREST[1]

Pursuant to Supreme Court Rule 37, Professors David M. Emmons, Thomas Noel, Charles E. Rankin, Carlos A. Schwantes, and David M. Wrobel respectfully request leave to file the following *amicus curiae* brief in support of petitioner, PPL Montana, LLC ("PPL"). PPL has consented to the filing of this brief. Respondent, the State of Montana, has withheld its consent.

Amici are professors of history with particular emphasis on the history—and historiography—of the American West. All have published extensively on the West. All are concerned with the public's familiarity with and regard for history as an intellectual discipline. David M. Emmons is professor emeritus on the history faculty of the University of Montana in Missoula, Montana, where he has taught since 1967. Professor Emmons has developed and taught an historical methods course

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored any part of this brief, and that no counsel or any other party or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. Professor David M. Emmons served as petitioner PPL Montana, LLC's retained and compensated expert on the history of the Missouri, Madison, and Clark Fork Rivers in the litigation below. In this Court, he is donating his time. The remaining *amici* have no prior involvement with this case and also are receiving no compensation for the preparation of this brief.

entitled "The Historians' Craft." Professor Emmons has not been compensated for the time he has spent discussing this case with other concerned historians, analyzing the historical flaws in the Montana Supreme Court's decision, and helping to prepare this brief.

Nonetheless, Professor Emmons wants to be clear that he was retained and compensated as an expert witness by PPL in the trial court proceedings below. Professor Emmons wants to further disclose that he has been informed by counsel for PPL that, in the event the Court grants its petition, reverses the decision below, and remands for trial, he may well be asked by PPL to participate in those remand proceedings (with appropriate compensation). But Professor Emmons wants to be equally clear that his motivation for joining this brief, and promoting it to fellow historians, is his deep concern about the consequences of the Montana courts' historically inaccurate conclusions and unprofessional historical methods.

If PPL were able to find another expert on Montana history that would, to PPL's satisfaction, address relevant historical issues in any remand proceedings, Professor Emmons would readily forgo any future expert participation in this case. But in light of PPL's clearly articulated preference in favor of Professor Emmons's potential participation in future stages of the case, if any, Professor Emmons carefully weighed whether it would be appropriate for him to support PPL's petition for certiorari as *amicus curiae*. Professor Emmons ultimately decided it would be appropriate, in light of his career-long commitment to sound historical analysis, so long as his past involvement in earlier

proceedings and potential involvement in future proceedings were fully disclosed.

The other professional historians who join this brief have not had any prior involvement with this case. Nor do they expect to become involved for compensation in any future case proceedings. They are all preeminent experts in Western history and are deeply concerned about the Montana courts' approach to the important issues of historical method the case presents.

Thomas Noel is professor of history and Director of Public History, Preservation and Colorado Studies at the University of Colorado, Denver, where he has taught since 1991. Charles E. Rankin teaches history at the University of Oklahoma, where he also has served as Editor-in-Chief of the University of Oklahoma Press since 2000. Carlos A. Schwantes is professor of history at the University of Missouri–St. Louis, and has taught there and elsewhere for over twenty years. Professor Schwantes is a recognized expert on transportation in the American West, including steamboating on the Missouri River. David M. Wrobel is Chair of the History Department at the University of Nevada, Las Vegas. He, too, has taught courses in historiography.

The interest of the historians in this case is on behalf of history as a profession and a method, as well as on behalf of the historical record itself. Ensuring that courts are proficient in historical reasoning and in evaluating historical sources is a matter of great public concern. Much as familiarity with law is often critically important for historians, so too lawyers and judges should be able to employ historical analysis in their professional work. For

these reasons, *amici* take a professional interest in the judicial use of historical methodology, particularly in cases pertaining to the American West. That unique interest, combined with the decades of professional knowledge and expertise underlying it, brings an important perspective to the issues before the Court that cannot be appreciated or conveyed adequately by any other party.

In this case involving the history of the West, the State courts misapplied historical methodology. As explained in this submission, the Montana Supreme Court failed to evaluate its sources with an historian's critical eye, and failed to read those sources as they were meant to be read. The result was an unwarranted historical conclusion that threatens serious consequences for the law and future litigation. For these reasons, *amici* seek leave to file the attached *amicus curiae* brief in support of petitioner.

Respectfully submitted,

Robert R. Gasaway
Counsel of Record
Stephen S. Schwartz*
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
robert.gasaway@kirkland.com
(202) 879-5000

Counsel for Amicus Curiae

September 15, 2010 * Admitted only in Virginia

QUESTION PRESENTED

1. Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

2. When a hydropower project is licensed under the Federal Power Act, a process that includes an economic analysis of the project and solicits state input, and the hydropower producer has obtained easements from private parties and paid substantial rents to the federal government on the understanding that the riverbeds under the hydropower facilities are owned by those private parties or the federal government, is a State's attempt retroactively to claim title and impose tens of millions of back and future rent obligations for use of the riverbeds preempted?

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER AND STATEMENT OF INTEREST i

QUESTION PRESENTED v

TABLE OF AUTHORITIES viii

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The Montana Supreme Court Disregarded Historical Evidence And Misapplied Basic Methods Of Historical Analysis 5

A. The Montana Supreme Court Failed To Critically Evaluate The Origins Of, And Basis For, The State's Secondary Historical Sources. 5

B. The Montana Supreme Court Failed To Interpret Primary Source Language In Context. 13

II. This Case Presents A Recurring Issue Of Property Law Rooted In The Constitution And Dependent On History. 15

CONCLUSION 20

APPENDIX

February 14, 1986
HRA Letter to Roy Henderson 1a

TABLE OF CONTENTS (Cont.)

Page

1986 Report (Excerpts) 3a

1974 Report (Excerpt) 13a

TABLE OF AUTHORITIES

Page(s)

Cases

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005) 5

In re Montana Power Co.,
7 F.P.C. 163 (1948),
aff'd, Montana Power Co. v. FPC,
185 F.2d 491 (D.C. Cir. 1950) 11

Martin v. Waddell's Lessee,
41 U.S. (16 Pet.) 367 (1842) 16

Massachusetts v. New York,
271 U.S. 65 (1926) 16

Pollard's Lessee v. Hagan,
44 U.S. 212 (1845) 15, 16

United States v. Appalachian Elec. Power Co.,
311 U.S. 377 (1940) 11

United States v. Utah,
283 U.S. 64 (1931) ..... v, 12, 16, 17

Statutes

16 U.S.C. § 799 18

TABLE OF AUTHORITIES (Cont.)

Page(s)

Other Authorities

Bailyn, Bernard,
On the Teaching & Writing of History,
(Edward Connery Lathem ed.,
1994) 2, 9

Bebbington, David,
Patterns in History: A Christian Perspective on Historical Thought
(1990) 2

Emmons, David M.,
Garden in the Grasslands: Boomer Literature of the Central Great Plains
(1971) 9, 10

Johnson, Kirk,
Part of Denver's Past, The Rocky Says Goodbye, N.Y. TIMES,
Feb. 27, 2009 10

Starr, Kevin,
Americans and the California Dream, 1850-1915 (1973) 11

Tuchman, Barbara W.,
Practicing History (1981) 8

TABLE OF AUTHORITIES (Cont.)

Page(s)

Wrobel, David M.,
Promised Lands: Promotion, Memory, and the Creation of the American West (2002)..... 9

INTRODUCTION AND SUMMARY OF ARGUMENT

The Montana Supreme Court confronted a quintessentially historical question: Were the upper Missouri, Madison, and Clark Fork Rivers "navigable" for title purposes in 1889 when Montana became a State? As the Montana Court recognized, that historical question could be answered only by an historical analysis. Unfortunately, in affirming the trial court's summary judgment decision that the rivers had in fact been navigated at the time of statehood, the Montana Supreme Court failed strikingly in the historian's task.

This brief offers a professional historian's assessment of the Montana Supreme Court's handling of the question of navigability of the Missouri River in 1889. Because the Missouri River's historical record is more extensive than that of the Madison or Clark Fork Rivers, the Montana Supreme Court's errors are most evident in its analysis of that river, although similar errors may be found in its treatment of the other rivers.

It is undisputed that the Missouri River is navigable as far upstream as Fort Benton, Montana, which is situated at the lower end of the tailing off of the large series of waterfalls known as the Great Falls. Farther upstream from Fort Benton, on the upstream side of the Great Falls, lies the city of Great Falls, Montana. Between the city of Fort Benton and the upper Missouri River's headwaters at Three Forks, Montana, lie many miles of rapids and other obstacles to navigation, including the Great Falls themselves. The critical historical question this case presents is whether those

obstacles prevented navigation at the time of Montana's 1889 statehood. That historical question was both outcome-determinative and hotly disputed in the trial and appellate courts below.

The trial court's summary judgment determination of what the historical evidence *meant* necessarily demanded historical reasoning. All historical documents come accompanied by their own limitations. As one historian reminds us, properly using any form of historical documentation means that "one has to be aware of the limitations and problems that are involved in using it." Bernard Bailyn, *On the Teaching & Writing of History* 47 (Edward Connery Lathem ed., 1994); *see also* David Bebbington, *Patterns in History: A Christian Perspective on Historical Thought* 4 (1990) ("The 'textbook mentality', that an assertion is true because it is written down, is utterly alien to any historical outlook.").

As Justice Rice noted in dissenting from the Montana Supreme Court's decision and historical analysis, PPL submitted a "mountain" of evidence that the Missouri River was not navigable upstream of Fort Benton. This evidentiary showing included Professor Emmons's affidavit, his expert report, and the report's accompanying exhibits. Pet. App. 100. The majority, however, deemed that evidentiary mountain a molehill, denying that it even raised a question of fact as to the issue of historical navigability. In reaching this erroneous conclusion, the Montana Supreme Court majority overlooked much of the evidence adduced by PPL, erroneously concluding that it rested on three, and only three, sources. Pet. App. 56-57. In fact, however, PPL

relied on other sources in addition to those cited below, including the Lewis and Clark journals, Pet. App. 230-39; records compiled by the Federal Power Commission licensing proceedings in the 1940s, Pet. App. 219-222, 273; and the circumstantial inferences to be gleaned from the historical pattern of roadways linking the Missouri River to other Montana sites and waterways. Pet. App. 239-44.

Compounding its error of underestimating PPL's evidentiary showing, the Montana Court overestimated the strength of the State's showing, and in so doing it failed to adhere to fundamental tenets of historical analysis. At the core of historical analysis is the critical evaluation of historical documents and other sources of information. And at the core of the Montana Supreme Court's error was its failure to critically evaluate the principal historical sources relied on by the State of Montana. *First*, the Montana Supreme Court failed to apply an historian's scrutiny to the State's proffer of secondhand accounts that in turn relied on primary and other secondary sources that no historian would rely on without corroboration. If the Montana Supreme Court had evaluated the State's sources as professional historians do, it would have found them insufficiently reliable to form an historical judgment in favor of navigability. *Second*, the Montana Supreme Court failed to follow the cardinal rule that language in primary sources must be evaluated in context, and in light of its author's intentions. As one critical example, the court seized on isolated words in the journals of the Lewis and Clark expedition without the necessary historical awareness of how those words were being used. As a

result, the Montana Supreme Court drew lessons from the journals opposite to their actual meaning.

By affirming the trial court's judgment, the Montana Supreme Court treated disputed historical evidence as proven fact, rather than submitting it to the test of trial.

ARGUMENT

Academic historians live by professional standards. These standards, while perhaps incapable of once-for-all-times delineation, nonetheless provide signposts for proper conduct that are fiercely defended by the best of the profession. Like the canons for any profession, the standards dividing competent from incompetent historical research may be (and often are) disputed in particular settings and applications. But what is not disputable is that there are such principles. To the competent historian, these include reading primary sources in their proper authorial and temporal context; judging secondary sources according to their skill in handling primary sources; and maintaining a proper critical distance and healthy skepticism when confronting characterizations of historical fact, regardless of whether found in primary or secondary source materials.

The professionalism these principles embody and enforce can perhaps be most easily discerned by judges through their inevitable familiarity with Judge Leventhal's own canonical description of its antithesis—the practice of tendentiously reviewing historical materials as part of "an exercise in looking over a crowd and picking out your friends." *See, e.g.*,

Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (quotation marks omitted). This brief is respectfully offered because we believe the Montana Supreme Court incorrectly employed a pick-out-your-friends approach, as opposed to the professional historian's approach, to adducing historical evidence and adjudicating historical fact. Its misguided approach, we believe, caused the Montana Court to lapse into the serious error of incorrectly resolving the historical and constitutional question of the navigability of Montana's rivers in 1889.

I. The Montana Supreme Court Disregarded Historical Evidence And Misapplied Basic Methods Of Historical Analysis.

The historical questions presented here required the Montana Supreme Court to adjudicate historical facts by evaluating the relevant primary and secondary sources as competent historians would. Close historical analysis of the court's opinion demonstrates that it failed in this task and reached false historical conclusions as a result.

A. The Montana Supreme Court Failed To Critically Evaluate The Origins Of, And Basis For, The State's Secondary Historical Sources.

The Montana Supreme Court concluded that the State showed that the Missouri River is navigable along its entire length—including upstream of the Great Falls and not just downstream of Fort Benton. The Court further concluded that "Lewis and Clark . . . and many others" had actually navigated the upper river after portaging the Great Falls. Pet.

App. 56-57. Aside from the journals of the Lewis and Clark expedition (discussed below), it reached this historical navigability conclusion largely on the strength of questionable secondary sources prepared long after the fact: two unpublished reports prepared in 1974 and 1986, respectively (the "1974 Report" and "1986 Report"—collectively, the "Reports"). Pet. App. 16-17; Amicus App. 3a-19a.

Nor was the reason for this scanty evidentiary showing difficult to discern. The State presented hardly any evidence in support of navigability on the upper Missouri River, beyond what the Montana Supreme Court cited. Pet. App. 203. A competent historian would have treated the 1974 Report and the 1986 Report according to the professional standards that apply to an historian's interpretation of secondary sources. A competent historian would have considered, for example, the purpose for which the Reports were produced, at what time, under what circumstances, and by whom. A competent historian also would have judged those secondary sources according to their choice of, and proper use of, primary sources. The Montana Supreme Court did none of the above.

To begin with, the Montana Supreme Court misunderstood the nature of the Reports in ways that exaggerated their credibility. The 1986 Report, prepared by the Heritage Research Center in Missoula on commission for the Montana Department of State Lands, did not even purport to be a complete record of the Missouri River's navigability. Because of funding constraints, the 1986 Report's authors "focused upon generating the most information for the least possible cost," not on

producing the most accurate or authoritative account of Montana's navigable waterways. Pet. App. 193; Amicus App. 5a-6a. Indeed, those constraints had prevented at least one other firm from bidding for the work of preparing the report. As the would-be bidders explained, "we do not think that we could provide the necessary document given the stated project ceiling and the stipulation that no additional costs incurred would be reimbursed." Pet. App. 194; Amicus App. 1a.

Ultimately, little primary source research is evident in the 1986 Report. The Report instead cribbed its research almost entirely from the earlier 1974 Report. Indeed, the 1986 Report drew nearly all its citations from the earlier work, dutifully recording its dependence by describing its sources as "as cited in" or "as quoted in" the 1974 Report. Amicus App. 9a-12a. Insofar as the 1986 Report's authors did perform primary source research, they committed errors of their own. For example, when they turned their attention to the Clark Fork River, they cited the February 24, 1882 article from the frontier newspaper, the MISSOULIAN, for the proposition that logs *were* floated down the river in that year. Amicus App. 8a. Whatever the dubious merits of the newspaper itself (discussed further below), in fact the article only said that logs "*can be*" floated. Pet. App. 111, 197 (emphasis added). Because the underfunded 1986 Report relied almost exclusively on the 1974 Report for its treatment of the Missouri River, Amicus App. 4a-12a, the State's historical case for the navigability of the Missouri River in 1889 rested, in effect, on the sole authority of the 1974 Report.

As for the 1974 Report, the Montana Supreme Court operated under a mistaken impression that the 1974 Report was prepared *by* the United States Army Corps of Engineers (the "Corps"), Pet. App. 17, when in fact it was prepared *for* the Corps, through the work of Alan Newell and Gary Williams. Any special authority that historians might attach to the Corps's own reports which are researched in the field and prepared by the Corps's own experts therefore does *not* attach to the 1974 Report.

More importantly, the Montana Supreme Court failed to perform the all-important evaluation of the Reports' use of primary sources. Secondary sources like the Reports are "helpful but pernicious," because the facts they bring to light "have already been pre-selected." Barbara W. Tuchman, *Practicing History* 19 (1981). Because a secondary source based on unreliable primary sources cannot itself be credible, care in selection and evaluation of primary sources should have been the guidepost not only for the Reports' authors, but for the Montana Supreme Court's decision as to whether or not to rely on the Reports.

The 1974 Report, however, simply cannot bear the weight the Montana Court has now placed on it. Most of the 1974 Report describes the undisputed fact of historical navigation on the Missouri River downstream of Fort Benton. Although it also purports to describe actual use of the Missouri River upstream of Fort Benton for trade and passenger travel at the time of Montana's statehood, it overwhelmingly relies on two sources of information for that showing. *First*, the 1974 Report relies extensively on frontier-era newspapers such as the

HELENA WEEKLY HERALD and the GREAT FALLS TRIBUNE for its conclusion that companies used the Missouri River for commercial boats and to float logs downstream to Great Falls. Amicus App. 15a-18a. *Second*, it relies on footnotes in Hubert Howe Bancroft's 19th century history of Montana for the proposition that miners and settlers travelled the upper Missouri River with only a short portage around the Great Falls upstream of Fort Benton. Amicus App. 14a. No professional historian would treat those sources standing alone as adequate proof of an occurrence.

The place of frontier-era newspapers in historical scholarship has been much discussed, and is a particular scholarly interest of *amici* Professor Emmons and Professor Wrobel. *See, e.g.*, David M. Emmons, *Garden in the Grasslands: Boomer Literature of the Central Great Plains* (1971). It is fair to say that professional historians almost universally concur that frontier newspapers were frequently written to promote travel and settlement, and, as a result, subordinated considerations of factual accuracy to the seemingly more important goal of presenting glowing pictures of life on the frontier. The result was persuasive hyperbole and often outright fabrication. Accordingly, "[i]f you think of [these newspapers] as small versions of today's NEW YORK TIMES, you're in trouble—because they weren't." Bailyn, *supra* p.2, at 46; *see also* David M. Wrobel, *Promised Lands: Promotion, Memory, and the Creation of the American West* 5-6 (2002) ("Some boosters were great anticipators, trying to convince themselves as much as others of the promise of western places; others were bold-faced

liars selling promises for financial profit and nothing more."). Because frontier newspapers should always be read with a grain of salt and in light of their important role as promotional brochures, they should seldom be relied on as sole sources on questions of historical fact. Pet. App. 194-95, 222.

Examples from representative non-Montana frontier newspapers illustrate this point. Some newspapers claimed that rainfall on the Great Plains would increase if the ground were plowed, or if "'American' culture" were "substitute[ed] . . . for Indian[.]" *See* Emmons, *supra* p.9, at 153; *see generally id.* at 153-60 (discussing newspapers in Kansas and Colorado). One reported that its State's soil produced 28-pound radishes. *See id.* at 65. Another concluded "that Eastern moneyed investors would want Denver to have good steamboat access," and then on this basis "simply invented" news of steamboat traffic between Denver and the Gulf of Mexico. *See* Kirk Johnson, *Part of Denver's Past, The Rocky Says Goodbye*, N.Y. TIMES, Feb. 27, 2009, at A11. The trustworthiness concerns applicable to those newspapers apply equally to Montana's frontier newspapers. The authors of the 1974 Report undoubtedly would have hesitated to count on Montana's or any other frontier newspapers for descriptions of monster radishes. For similar reasons, the 1974 Report's authors and the Montana Supreme Court should have hesitated before crediting questionable accounts of ready commercial uses of Montana's rivers.

As for Bancroft, the 1974 Report's other source, his interpretations of historical fact, standing alone, are not considered reliable by professional

historians. Rather, their principal usefulness is as leads to more credible sources. Bancroft, a wealthy businessman, was primarily a collector and compiler of documents and for that historians no doubt owe him a great debt. The Bancroft Library at the University of California, Berkeley, for example, was founded on his collection. Bancroft's documents concerning California are often useful. But even as to California, as the preeminent California historian Kevin Starr has observed, Bancroft was "often ludicrous and sometimes dishonest." Kevin Starr, *Americans and the California Dream, 1850-1915* 119 (1973). For other States such as Montana, Bancroft merely had his assistants review unreliable newspapers and gazettes for source material. Pet. App. 277. Today, no reputable historian would use Bancroft as a sole source on an important factual point of Montana history. Pet. App. 196, 277.

Bancroft was also the main source for the State's federal authority treating the Missouri River as navigable upstream of Fort Benton for regulatory purposes. *See In re Montana Power Co.*, 7 F.P.C. 163, 172-73 (1948), *aff'd Montana Power Co. v. FPC*, 185 F.2d 491, 493-94 (D.C. Cir. 1950). Those administrative agency proceedings, it should be noted, addressed regulatory navigability, not title navigability. Hence, the proceedings would be no more than persuasive authority in this case, even if their sources were reliable. *Compare United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (title navigability determined "as of the formation of the Union in the original states or the admission to statehood of those formed later," while "navigability, for the purpose of the regulation of

commerce, may later arise"), *with id.* at 410 (navigability determined with reference to the river as a whole), *and United States v. Utah*, 283 U.S. 64, 77 & n.9, 89 (1931) (title navigability determined as to particular river segments, not the river as a whole).

Against this backdrop, the 1974 Report's crucial reliance on Bancroft cannot be defended. Instead of mining Bancroft's work for primary sources, the 1974 Report's authors cited Bancroft alone to show that miners and settlers travelled the Missouri River above Fort Benton by boat, and that a company operated a line of boats for commercial transport with a portage around the Great Falls. Amicus App. 14a. But Bancroft's likely source for this dubious proposition was an 1866 issue of the city of Helena's ROCKY MOUNTAIN GAZETTE, yet another frontier newspaper riddled with factual errors rendering suspect the accuracy of its accounts. For example, this 1866 account dramatically understated the length of the portage required to avoid the Great Falls: The portage it described would have left the passengers stranded in the middle of the Falls, or drowned. Pet. App. 278. Nor were the remarkable facts the article describes—"thousands" of passengers travelling on commercial mackinaw boats—directly corroborated by any other source brought to light in the present litigation, including the voluminous reports of the Corps cataloguing the uses of the Missouri River. Here again, an historian would not have used the GAZETTE'S dubious reports as historical fact without demanding further corroboration.

In summary, in finding that "many" besides Lewis and Clark had portaged the Great Falls and navigated the upper Missouri, the Montana Supreme Court relied on the 1986 and 1974 Reports. But the 1986 Report relied on the 1974 Report, and the 1974 Report relied on primary and secondary sources that no competent historian would treat with anything other than deep skepticism. The 1974 Report did credibly confirm actual navigation of the Missouri River upstream *to* Fort Benton, but not *beyond* Fort Benton. From the perspective of a professional historian, the Montana Supreme Court found historical "proof" where no such proof was evident.

B. The Montana Supreme Court Failed To Interpret Primary Source Language In Context.

The Montana Supreme Court's other basis for finding that the State had proved navigability is what can only be described as a tendentious reading of the journals of the Lewis and Clark expedition. According to the Montana Court, the expedition "portaged" the Great Falls, "allowing the Missouri to provide a useful channel of commerce." Pet. App. 57. In so concluding, the court read the Lewis and Clark journals in an ahistorical fashion.

To be sure, Lewis and Clark travelled the Missouri River upstream by boat (keelboats, pirogues, and canoes), took their canoes around the Great Falls by land, and ultimately put canoes back into the water. And, to be sure, the expedition's journals did refer to this land transport as a portage. And the journals further referred to the expedition's continued progress as navigation. Pet. App. 232-37. Nonetheless, a cardinal rule of interpreting primary

historical sources is that words must be read in context, in light of contemporary facts and circumstances, and according to the meanings their author had in view. Historians must read Lewis's and Clark's words as *they* meant them. Pet. App. 237. Unless the historian does that, the bare words of a journal become meaningless hieroglyphics or, worse, signposts on the road to historical error.

The evidence below established in the Montana courts without contradiction that the Lewis and Clark portage took *thirty-three* days. Pet. App. 233-34. And though Lewis and Clark returned their canoes to the Missouri River after that arduous land passage, they could no longer "navigate" the river in any way relevant here. As an initial matter, the vessels that the expedition "portaged" were mere dugout canoes, built in a matter of hours by hollowing out tree trunks; they were certainly not boats suited for commercial operations. Pet App. 235. More fundamentally, although those rude canoes were put back in the water after the 33-day portage, the expedition members often could only walk alongside the water, towing the canoes as they went. Pet. App. 234, 236-37. Doing so required extreme physical exertion from the men on land. Pet. App. 235-37. Accordingly, when the journals referred to the river as navigable, they meant only that they could follow its course as they explored the then-uncharted territory in this manner. Pet. App. 235. The mere fact that the exploratory expedition's canoes could be floated in parts of the Missouri River on both sides of the Great Falls does not remotely establish that the river was commercially useful upstream of the Great Falls.

Significantly, once the expedition had returned, Lewis and Clark's contemporaries did not consider their reported portage promising for navigation. Those highly-interested contemporaries thus disagreed with the Montana Supreme Court's conclusion that "portages" of the Great Falls "allow[ed] the Missouri to provide a useful channel of commerce" beyond the Falls. Historians are now in agreement, in fact, that the Lewis and Clark reports were the final undoing of the perennial, centuries-old, hopes for easy passage by navigable water to the Pacific Ocean. Pet. App. 57, 238-39. From an historian's perspective, it is thus not only incorrect but extremely ironic to say that Lewis's and Clark's journals prove as a matter of law that the upper Missouri River could "provide a useful channel of commerce." Pet. App. 57. The Montana Supreme Court's conclusion in this regard is diametrically *opposite* to the one drawn by Lewis and Clark's own contemporaries, as well as historians down to the present day.

II. This Case Presents A Recurring Issue Of Property Law Rooted In The Constitution And Dependent On History.

This Court has long held that when new States enter the Union, they enjoy title in the waterways on their territory that are navigable at the time of statehood. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 229 (1845). That rule, commonly called the "equal footing doctrine," is a constitutional rule regulating valuable property rights and the relationship between States and the federal government. If the historical errors committed below are not corrected, this venerable rule risks becoming little more than a

cash cow for State governments wishing to reshuffle settled property rights to their own benefit by twisting the historical record.

The equal footing doctrine is rooted in the Nation's early history. Because the original thirteen States were independent sovereigns when they formed the United States, they held title in the beds and banks of their own navigable waterways that the federal Constitution did not disturb. *Massachusetts v. New York*, 271 U.S. 65, 86-89 (1926); *Martin v. Waddell's Lessee*, (1842), 41 U.S. (16 Pet.) 367, 410-11 (1842). When other States later came into the Union, it was readily acknowledged that they should do so on terms of equality with the original States. Hence, a settled constitutional rule holds that, although the federal government holds title to a new State's navigable waterways pre-statehood, title to the beds of those navigable waterways "passes" to the State when it joins the Union, just as if it too had formerly been an independent sovereign. By contrast, title to the beds and banks of non-navigable waters remains with the federal government upon a territory's accession to statehood. *See Utah*, 283 U.S. at 75; *Pollard's Lessee*, 44 U.S. at 228-29. This equal footing doctrine is grounded in "the equality of states." This Court has emphasized that it ultimately rests on "constitutional principle." *Utah*, 283 U.S. at 75.

By its nature, however, the equal footing doctrine is a constitutional principle that is uniquely dependent in application upon accurate historical analysis. The critical question is always whether a given section of a waterway was navigable *at the time of statehood*. *Id.* The doctrine therefore

requires a point-in-time historical analysis by its very terms. Moreover, the difficulty and professional skill required for this analysis only increases as time passes. When a State is newly admitted, many questions of title navigability will be comparatively uncontroversial, because the contemporary usefulness of waterways for navigation will be a matter of public knowledge. Today, however, no State has been admitted to the Union for more than fifty years. In today's circumstances, the historian's craft is indispensable for accurately determining whether given rivers were navigable in historical times that range from a half-century ago in the case of Alaska and Hawaii, to ninety-eight years ago for New Mexico and Arizona, and to well over a century ago in all other cases. For that same reason, the equal footing doctrine leads in turn to important reliance interests.

Consequently, disturbances to longstanding conclusions reached on equal-footing grounds will inevitably lead to serious disruptions of settled expectations, especially where, as here, those conclusions are rooted in flawed historical analysis. To date, the equal footing doctrine has been likeliest to be contested in cases brought soon after States enter the union, or when development of waterways is underway. For that reason, and because of the reliance interests involved, title to waterways under the equal footing doctrine has been litigated only infrequently in recent decades. Indeed, the Court's most recent major pronouncement on the issue remains *Utah*, a 1931 decision prompted by a quiet title action commenced against Utah by the federal government.

The Montana Supreme Court's decision, however, carries a potential to unleash a new wave of litigation between States, private parties, and the federal government. By persuading the court below to declare—more than 120 years after Montana's statehood—that the upper Missouri, Madison, and Clark Fork Rivers had in fact been navigable in 1889, the State of Montana reaped both lease revenue and property-rights windfalls. Precisely because Montana's reward was so high in this case, the temptation for sister States to engage in similar historical revisionism will be great.

The consequences for property rights, dramatic here, could be equally or even more dramatic in other cases. All but one of the dams at issue in this litigation were built between 1891 and 1930, and the newest was built in 1958. Title to each of these dams had been treated as settled by all parties, including the State, for at least fifty years, and in some cases for more than a century. It just so happens that PPL has only held title to the dams since 1999 and relicensed them in 2000, meaning that the assessed judgment from PPL was for "only" about a decade's worth of back compensation. But PPL's predecessor in title had owned and operated the dams since the 1940's, and in general licenses for hydroelectric dams can last for up to fifty years. 16 U.S.C. § 799. As great as the $41 million award in this case was, it could have been even greater if the relevant defendant had happened to own the relevant dams for even longer before the outbreak of historical revisionism. Even when a State's case for title navigability is poor, the *in terrorem* threat posed by the prospect of many decades' worth of back

compensation may be sufficient to extract large settlements from companies like PPL in other cases.

In addition, and of particular interest to the *amici*, the consequences for the historical record and historical profession also could be great. All determinations of title navigability at a precise moment of accession to statehood require a quintessentially historical analysis. But the decision below illustrates, if nothing else, that these quintessentially academic inquiries into historical fact can entail enormous, present-day, financial consequences. The result is a legal situation that, if left unremedied, will require intensive, detached, evenhanded historical analysis in precisely those cases where the temptations for States and State courts to run roughshod over the historical record will be most difficult to resist—a situation almost equally distressing for legal practice, settled rights, and historical professionalism.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

Robert R. Gasaway
Counsel of Record
Stephen S. Schwartz*
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
robert.gasaway@kirkland.com
(202) 879-5000

Counsel for Amicus Curiae

September 15, 2010

* Admitted only in Virginia

APPENDIX

APPENDIX CONTENTS

February 14, 1986
HRA Letter to Roy Henderson 1a

1986 Report (Excerpts) 3a

1974 Report (Excerpt) 13a

HISTORICAL RESEARCH ASSOCIATES

P.O. Box 7086
Missoula, Montana 59807-7086
(406) 721-1958

P.O. Box 36720, Station D Square
Albuquerque, New Mexico 87176
(505) 296-6187

February 14, 1986

Roy Henderson
Resource Development Bureau
Lands Division
Department of State Lands
1625 Eleventh Avenue
Helena, Montana 59620

Dear Mr. Henderson:

On February 4, 1986, I discussed with you the Department of State Lands (DSL proposed Navigability and Reach contract for 35 streams in Montana. I expressed my concern that given the budget ceiling for the project our firm would be hesitant to submit a bid. As I stated, Historical Research Associates (HRA) has extensive experience in this type of research, both for Montana waterways and for waterways in other western states. Based on this experience, we are familiar with the amount of time required to provide our clients with a solidly researched and defensible product. Unfortunately, we do not think that we could provide the necessary document given the stated project ceiling and the

stipulation that no additional costs incurred would be reimbursed. Therefore, given the Department's budgetary constraints, HRA is not able to offer a proposal on this project.

You stated that if the other firm selected to submit a proposal expressed similar reservations, DSL would probably have to re-evaluate the scope of the project. If this in fact occurs, HRA would like the opportunity to respond.

We appreciate the opportunity to respond to the Department's solicitation and hope that we may be called upon in the future.

Thank you for your time and consideration.

Sincerely,

DANIEL GALLAGHER

DG/pm

MONTANA NAVIGABLE WATER STUDY

Submitted to:
Montana Department of State Lands
Helena, Montana

Submitted by:
Heritage Research Center
P. O. Box 9316
Missoula, Montana 59801

December 1986

* * *

I. * * *

Materials researched for this project were applied to Project #2, whenever they seemed appropriate.

Following the research, we analyzed the information retrieved and prepared reports upon individual waterways. The record of historical navigation was written to include, whenever available, the specific segments of the waterway that were navigated.

Project #2

Determination of highest point of recorded navigation and stream segments historically navigated on 35 streams listed in the Statement of Work.

Included in the research for this project were thirty-five (35) streams identified as navigable by the Department of State Lands. For each of these streams researchers reviewed existing reports and extracted citations of historic navigation. They then consulted the original sources to determine, if possible, the segments of the waterways that were actually floated. Copies of reports in our offices, including those prepared for both districts of the Corps and those prepared by our firm, were used.

In addition to consulting the reports, researchers for Heritage Research Center reviewed the sources cited in "Bibliography of Materials Recommended for Further Research" that we submitted with our previous study on Western Montana waterways. When possible, we supplemented the written record with interviews and available tapes of long-time residents with knowledge of the waterways involved. The Montana State Historic Preservation Office and the various Forest Service archaeologists were consulted to determine whether cultural remains indicated the use of specific waterways. Requested evidence included interviews, splash dams, etc. (See Appendix of Forest Service Returns.)

Research Sources included the extensive holdings of Heritage Research Center, the Mansfield Library and K. Ross Toole Archives, the Montana Historical Society, and the Kalispell Public Library.

The document contains a brief report on each waterway with a description of navigation as it pertains to specific stream segments. When it was not possible to determine the area of use, a statement to that effect would be made. As with the reports for the first project, we included a discussion of vague references to navigation that might provide clues to additional research, should it be required in the future.

Due to funding limitations, several exclusions were made from the research. County Courthouse records were excluded because of travel and per diem costs, combined with the difficulty of determining in advance how extensive that research might be. Certain citations uncovered in the past have made references such as, "They put the logs in at John Doe's place on Smith River." Property ownership records likely would indicate where John Doe owned property at the time of the log drives. Thus, one could establish the segment of the waterway that was navigated. Such information could be researched at a later date as it might become necessary for litigation purposes. Also, our researchers could not conduct thorough paper-by-paper research of local newspapers, because of the costly and time-consuming nature of that type of search. Instead, we read through newspapers when looking for a specific incident at a specific time.

Recommendations for Further Research:

Because the approach to documenting navigable waterways for title purposes has been constrained by lack of funding, efforts have been focused upon generating the most information for the least possible cost. Below are listed additional sources of information that could not be covered in previous investigations. While some were well-known, others were revealed in the course of the present study, notably the water rights records and Montana Fish, Wildlife and Parks classified trapper and outfitter records. The latter may become more useful in view of a recent district court ruling in Alaska pertaining to the Gulkana River. The Big Hole River, for example, lacks historical evidence of commercial navigation associated with logging or similar ventures, yet Fish, Wildlife and Parks officials report that it is subject to heavy commercial outfitter traffic.

Some further avenues of research include:

1. Search of the Department of Natural Resources Computerized water rights files was discussed with Ron Guse, Water Rights Bureau New Appropriations Program Manager, and Jim Kindle, Records Section Supervisor. Both agreed that there is some possibility for finding water reserves for navigation purposes. Since the files contain approximately 200,000 claims, the cost of the computer run could not be covered under the existing contract. Our own research indicated that at least some commercial logging enterprises filed for water rights to preserve in-stream flows for floating logs. An example is

Rattlesnake Creek, tributary of the Clark Fork of the Columbia. The Water Rights Bureau records are classified by nature of use and point of diversion as well as other descriptions.

In contacting the DNRC chief Legal Counsel, Don MacIntyre, we learned that that office does not maintain files on navigable waterways since no such determinations are necessary for them to issue permits. The issue of navigability could arise on Federal . . .

* * *

> This, in connection with the cruise of the Kangaroo last season, and the uninterrupted transportation of hay and lumber between the mouth of Cedar [Creek] about 1 mile west of Superior) and the Missoula Ferry demonstrates the practicability of navigating the Deer Lodge, Hellgate and Missoula rivers from Deer Lodge City to Pend Oreille. [Source: The Missoula Pioneer, March 2, 1871 as cited in Heritage Research Center, "Report on Western Montana Historical Navigation", prepared for the Montana Department of State Lands, 1984, p. 40.]

Other 1871 newspaper items referred to boats and rafts traveling from Missoula to Superior and to boats carrying hay and lumber from St. Regis to the mines. [Source: New Northwest, March 4, 1870, Missoula Pioneer, February 24, 1871.] In 1872, a

surveying party of Northern Pacific Railroad travelled by boat from Missoula to the confluence of the Clark Fork and Flathead Rivers near Paradise, Montana. [Source: Browman, 1974, p. 3.]

In the early 1880's when the Northern Pacific Railroad was constructing its line to the Pacific Coast, it contracted with the Eddy Hammond Company to provide timber for ties between the Little Blackfoot and the Idaho line. Mills were constructed at the confluence of the Blackfoot and Clark Fork Rivers and at several other locations on the Clark Fork. [Source: Missoulian, August 19 and 26, 1881 as cited in Browman, p. 3.] Supplies for the Company were carried down the Flathead River and Clark Fork River by bateaux and up the Clark Fork from Cabinet Landing to Thompson Falls by steamboat. In 1882, lumber was rafted down the Clark Fork, and, during the winter of that year, it was transported on ice between the construction camps. (Missoulian, November 11, 1881, May 19, 1882, June 9 and 30, 1882, July 7, 1882, August 18, 1882, September 8 and 29, 1882 and February 9, 1883 as cited in U. S. Army Corps of Engineers, "Clark Fork River Navigability Report," p. 15.) A February 24, 1882 item in the Missoulian refers to logs being floated down the Missoula and Pend Ore .le Rivers to Weeksville. [Source: the Missoulian, February 24, 1882.]

From 1900 to 1925, drives occurred on the Clark Fork River, originating on Nine Mile Creek, White Pine Creek, Trout Creek, Vermilion River and Bull River. According to the U. S. Army Corps of Engineers Clark Fork Navigability Study, most of

the logs that were driven down these tributaries were floated down the Clarks Fork River to the town of Clark Fork in Idaho. From there they were towed on Pend Oreille Lake to Dover or to the Hope Lumber Company plant at Hope, Idaho. A 1907 item in the Sander County Ledger, (Thompson Falls) stated that:

> the Hope Lumber Company's men arrived here last week to . . .

* * *

Missouri River

The Missouri River is generally considered a navigable stream from the Montana/North Dakota border to its headwaters at Three Forks. There is considerable historical documentation of commercial navigation on the river in Montana. Lewis and Clark navigated this river in pirogues and bateaux to the Great Falls in 1805. (See the numerous editions of "The Journals of Lewis and Clark".) At least one party descended the Missouri from Three Forks to the existing state line in 1806. Manuel Lisa traveled up the Missouri to the mouth of the Big Horn River in 1807 and returned from it to St. Louis in 1808. His St. Louis Missouri River Fur Company sent an expedition up the Upper Missouri River in 1810. There is a record of one party of the expedition floating an indeterminate distance from Three Forks toward the Great Falls that year. [Source: Thomas James, Three Years Among the Indians and Mexicans (St. Louis:1966) p. 66, as cited in Alan

Newell and Gary Williams, Missouri River Navigation Study Loman, Montana, to Three Forks, Montana, prepared for U.S. Army Corps of Engineers, Omaha District, 1974, pp. 8-9.] The fur trading companies made extensive use of the Missouri River from the time of Manuel Lisa's first trip up the Missouri until the 1860's.

Light-draft steamboat, the "Chippewa", was the first steamboat to travel to Fort Benton, arriving there in 1860. [Source: Hiram Martin Chittenden, History of Early Steamboat Navigation on the Missouri River; Life and Adventures of Joseph La Barge, Vol. 1 (Minneapolis,MN:1962), pp. 219-221, as cited in Alan Newell and Gary Williams "Missouri River Navigation Study, Loma, Montana to Three Forks, Montana," prepared for the U. S. Army Corps of Engineers, Omaha District, 1974, p. 11.] Between 1860 and 1880, about 400 steamboats arrived at Fort Benton. [Source: Federal Power Commission, Opinion and Decisions of the Federal Power Commission, Vol. VIII, January 1, 1948, December 31, 1948, (Washington D.C.:1950), p. 171, as cited in Newell and Williams, pp. 11-12.]

Commercial navigation of the Missouri above the Great Falls developed about the same time steamboat traffic to Fort Benton was coming to an end. A. M. Holter's Lumber Company rafted sawed timber from its lumber mill on Stickney Creek, which was 70 miles upstream from Great Falls. [Source: Great Falls Tribune, February 18, 1888; A. M. Holter, "Pioneering Lumbering in Montana; Contributions to the Historical Society of Montana (Vol. VIII, Helena:1917), pp. 270, 271; .the Fort

Benton River Press, April 13, 1881, as cited in Newell and Williams, p. 14.] The Holter Company rafted about 300,000 feet of lumber from its mills on Stickney and Megher Creek to Great Falls in 1885 and floated logs to Great Falls from those creeks until 1891. [Source: Holter, "Pioneer Lumbering in Montana", p. 272; the, Great Falls Tribune, August 9, 1890, as cited in Newell and Williams.]

William F. Wheeler and a crew of five used a rowboat to float the Missouri from Stubbs Ferry (near Helena) to the Great Falls in 1878 in an effort to determine if its upper reaches were navigable. [Source: Stanley K. Davison, "White Hopes of the Big Muddy," Montana, The Magazine of Western History (Spring 1959), p. 2; Helena Weekly Herald, September 26, 1878, as cited in Newell and Williams, p. 18.] A large steamboat, the Fern, floated from Twin Bridges on the Beaverhead, down the Beaverhead, Jefferson, and Missouri to Townsend in June 1887. Three Forks, which the Fern passed by on its descent, constitutes the highest point of navigation. [Source: Davison, White, Hopes on the Big Muddy, pp. 5 & 6, as cited in Newell and Williams, p. 19.] Between September 28 and November 7, 1887, the Fern floated from Townsend to Great Falls. [Source: Ibid., and the Great Falls Tribune, November 9, 1887, as quoted in Newell and Williams, p. 19.]

The U. S. Army Corps of Engineers has declared the Missouri River navigable from the Montana/North Dakota State line to Three Forks, Montana. The United States Coast Guard exercises jurisdiction over the Missouri River to a point 263

miles above Fort Benton, Montana (33 CFR 238 – 1, 1967). The Federal Power Commission, which licenses dams, considers the Missouri River as a navigable river to Three Forks, Montana. [Source: Federal Power Commission Reports, Vol. VII, January 1948-December 1948, Washington:1950.] The case of Montana Power Company vs. Sutherland 74 (Mont. 587) established the Missouri as navigable in Lewis and Clark County and the state case of Gibson vs. Kelley (15 Mont. 417) established that the Missouri River is navigable in Choteau County at T23North, R7East. (Newell and Williams, pp. 21-22.) The Montana Department of Fish, Wildlife and Parks considers the Missouri River as a Class I navigable stream from Three Forks to the Montana/North Dakota border.

Summary: The Missouri River has been navigated in connection with a variety of activities and by a variety of river crafts from its headwaters at Three Forks to the Montana/North Dakota border. It also has been declared a navigable waterway between these points by the federal government.

MISSOURI RIVER NAVIGATION STUDY

(LOMA, MONTANA, to THREE FORKS, MONTANA)

Manuscript Prepared by:

Alan Newell
&
Gary Williams

Presented to:

U.S. Army Corps of Engineers
Omaha District

Contract No. DACW45-74-C-0138

August 12, 1974

* * *

Montana in the 1860's appeared to be the "cutting edge for commercial expansion on the frontier. The discovery of gold at Gold Creek, Grasshopper Creek, Confederate and Alder Gulches in the early sixties, the construction of the Mullan Military Road from Fort Benton to Fort Walla-Walla, and the extension of steamboat travel to Fort Benton combined to insure rapid development of this promising territory. Fort Benton reaped the harvest of this rapid expansion.

A number of transportation lines organized during this period with interests in the trade at Fort Benton. The Montana and Idaho Transportation Line, the St. Louis and Omaha Packet Line, and the ever present American Fur Company, were the major companies competing in the 1860's for the opportunity to carry Montana's gold to the East. In 1863, approximately eight million dollars in gold floated down the Missouri in steamers bound for St. Louis and New York.[22] Five-sixths of Montana's wealth reportedly left the region via the Missouri River in 1860's.[23]

A primary means of travel to the East during the early mining period in Montana was by horse or wagon to Fort Benton and then by steamer or mackinaw downriver. However, some miners and settlers, anxious to reach the States, did hazard the swifter Upper Missouri above Great Falls. Kennedy and Co. operated a line of mackinaws that carried passengers to Fort Benton with a portage around the Great Falls. As many as eighteen mackinaws left French Bar (15 miles north of Helena) bound for Fort Benton in 1867.[24]

---

[22] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 32-33, 42-44.

[23] IBID., p. 39.

[24] Hubert Howe Bancroft, THE WORKS OF HUBERT HOWE BANCROFT: HISTORY OF WASHINGTON, IDAHO, AND MONTANA 1845-1889 (San Francisco: 1890), ftn. p. 732.

The completion of the transcontinental railroad in 1869, and the change from rather simple placer mining to more sophisticated quartz mining altered the patterns of trade at Fort Benton. Mine operators continued to ship equipment via steamboats to Montana. However, the short season, compared to that of overland travel from the Union Pacific railhead at Corrine, Utah, convinced Montana's entrepreneurs that expensive machinery and supplies should be transported by railroad and wagon. Thus, most of the freight carried on the Missouri River during the 1870's consisted of military supplies and Indian annuities.[25] This activity continued and expanded between 1873 and 1888, the last steamboating era on the Upper Missouri. Freight shipments originated from the Northern Pacific railhead at Bismarck, North Dakota, traveling via steamboat up river to Fort Benton. This commerce was international in character, supplies being shipped over the Whoop-up Trail to Fort Macleod in Canada.[26]

---

[25] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 113-136.

[26] For an extensive treatment of this Canadian-American trade see Sharp, WHOOP-UP COUNTRY, passim. Also, Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 87 and 130, and U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, Appendix V, 48th Cong., 1st sess., 1883, vol. II, part 2, p. 1361.

The continued growth of commerce on the north-central Montana plains created a demand for building supplies and fuels. The supply of lumber and cement for Fort Benton and, after 1884, the city of Great Falls, constantly fell short of demand. To fill this increasing need, a number of lumber companies began operations along the Missouri River above Fort Benton in the 1870's and 1880's. The pioneer logging companies of A.M. Holter and Brothers and Ira Myers and Company rafted sawed lumber of floated uncut logs down the Missouri from mills above Great Falls, Montana.

A.M. Holter of Helena established a lumber company in 1863 which served the Helena area.[27] The enterprising Montanan expanded his operations in 1881 by constructing a lumber yard at the mouth of the Sun River, opposite the future city of Great Falls.[28] The company rafted sawed lumber from their mill on Stickney Creek (70 miles upriver from Great Falls) to the Sun River yard and then transported it by wagon to Fort Benton.[29] The firm moved to Great Falls in 1884 and established a yard and planning mill in that infant city. The Company rafted more than 300,000 feet of lumber down the

---

[27] Helena WEEKLY HERALD, May 12, 1887.

[28] Great Falls TRIBUNE, February 18, 1888.

[29] IBID., also see A. M. Holter, "Pioneer Lumbering in Montana," CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA (vol. VIII, Helena: 1917), pp. 270 and 271, and the Fort Benton RIVER PRESS, April 13, 1881.

Missouri during 1885 from its mill on Stickney and Wegner creeks.[30] The Holter Lumber Co. floated logs to Great Falls until about 1891 when most of the timber along Stickney and Wegner creeks was cut. Logs were then shipped by rail to the yards at Great Falls.[31]

A staunch competitor of the Holter Lumber Co. was Ira Myers and Co. Myers located in Great Falls in 1884, constructing a mill and lumber yard. The firm began operations in the Belt Mountains southeast of Great Falls, cutting timber and floating the logs down the Smith and Missouri rivers to the boom at Great Falls.[32] The extensive operations of the Myers and Holter companies often created problems for the two firms. The Holter boom at the mouth of the Sun River broke in August, 1890, sending logs downriver to be caught in the boom of Ira Myers.[33] A log jam in May, 1893 almost destroyed a bridge across the Missouri at Great Falls, creating problems for the citizenry.[34]

Lumber was an important commodity on the northern plains. However, the flourishing

---

[30] Great Falls TRIBUNE, April 3, 1886 and May 14, 1887.

[31] Holter, "Pioneer Lumbering in Montana," p. 272; and Great Falls TRIBUNE, August 9, 1880.

[32] Great Falls TRIBUNE, February 18, 1888 and June 5, 1886.

[33] Great Falls TRIBUNE, August 9, 1890 and August 16, 1890.

[34] Great Falls TRIBUNE, May 17, 1893.

communities along the Missouri required additional supplies. Two barges run by the firm of Davis and Co. left the Townsend shipyards on September 28, 1887, bound for Great Falls with cement.[35] W.L. Martin and Co. experimented in the 1890's with shipping hay in a steamboat on the Missouri above Great Falls.[36] Transport of this nature on the Missouri raised the hopes of leading residents of Great Falls, Helena, and Townsend that the river from Three Forks to Great Falls could be improved for continuous navigation.

The first congressional appropriations specifically for the improvement of navigation on the Upper Missouri to Fort Benton occurred in 1876. One million, three hundred and eighty-three thousand dollars ($1,383,000) was spent by Congress between 1876 and 1900.[37] The construction of wing dams, the removal of boulders, and dredging consumed most of this budget.[38] Budget allocations for the newly created Missouri River Commission in 1885, contained $15,000 for a survey of the Missouri River from Great Falls to Three Forks. However, the

---

[35] Townsend TRANCHANT, May 17, 1893.

[36] Great Falls TRIBUNE, May 4, 1893.

[37] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 176 and 178.

[38] U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, vol. II, part 1, 52d Cong., 2d sess., 1892-1893, p. 263.

Commission recommended that since Fort Benton was the practical head of navigation, this money should be re-allocated for improvements below . . . .

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
SEP 15 2010
OFFICE OF THE CLERK

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF FOR THE MONTANA FARM BUREAU FEDERATION AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae The Cato Institute

MARK F. "THOR" HEARNE II
Counsel of Record
ARENT FOX LLP
1050 Connecticut Ave. NW
Washington, DC 20036
thor@arentfox.com
(202) 857-6000

ROBERT C. O'BRIEN
STEVEN A. HAKSINS
ARENT FOX LLP
555 West Fifth St., Fl. 48
Los Angeles, CA 90013-1065
obrien.robert@arentfox.com
(213) 629-7400

Counsel for Amicus Curiae Montana Farm Bureau Federation

September 15, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

2. When a hydropower project is licensed under the Federal Power Act, a process that includes an economic analysis of the project and solicits state input, and the hydropower producer has obtained easements from private parties and paid substantial rents to the federal government on the understanding that the riverbeds under the hydropower facilities are owned by those private parties or the federal government, is a State's attempt retroactively to claim title and impose tens of millions of back and future rent obligations for use of the riverbeds preempted?

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Decision Below Contravenes This Court's Carefully-Drawn Analytical Framework For Assessing Navigability 5

A. Navigability Determines Ownership of Private Property Rights and Thus a Limited Section-By-Section Inquiry Is Appropriate 7

B. The Montana Supreme Court's "Relatively Short" Test Was Judicial Error, Subjecting Private Property Owners to an Unlawful, Arbitrary Standard of Navigability 9

C. The Majority Improperly Shifted the Burden of Proof Away From the State of Montana and to the Petitioner 14

II. The Majority's Arbitrary Decision Violated Property Rights And Is Nothing More Than A Thinly-Disguised Judicial Taking 15

III. This Court Must Intervene To Defend Federal Prerogatives Against State Encroachments 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Armstrong v. Manzo,
380 U.S. 545 (1965) 19

Brewer-Elliott Oil & Gas Co. v. U.S.,
260 U.S. 77 (1922) 8, 20

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U.S. 673 (1930) 19

City of Centralia, Wash. v. FERC,
851 F.2d 278 (9th Cir. 1988) 9

Great N. Ry. Sunburst Oil & Ref. Co.,
287 U.S. 358 (1932) 19

Kaiser Aetna v. U.S.,
444 U.S. 164 (1979) 16

Leo Sheep Co. v. U.S.,
440 U.S. 668 (1979) 7, 22

Loving v. Alexander,
745 F.2d 861 (4th Cir. 1984) 9

Maritrans, Inc. v. U.S.,
342 F.3d 1344 (Fed. Cir. 2003) 15

Monongahela Nav. Co. v. U.S.,
148 U.S. 312 (1893) 16

Muckleshoot Indian Tribe v. FERC,
993 F.2d 1428 (9th Cir. 1993) 9

North Dakota v. U.S.,
972 F.2d 235 (8th Cir. 1992) 8

Preseault v. I.C.C.,
494 U.S. 1 (1990) 15

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 15

Steele v. Donlan,
In Equity No. 950 (D. Mont. July 14, 1910) 18

Stop the Beach Renourishment v. Florida Dept. of Environmental Protection,
560 U.S. ---, 130 S. Ct. 2592 (2010) 17

U.S. v. Utah,
283 U.S. 64 (1933) ..... passim

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 14

United States v. Willow River Co.,
324 U.S. 499 (1945) 16

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 15, 16

STATE STATUTES

Mont. Code Ann. § 70-16-201 16

INTEREST OF AMICUS CURIAE[1]

The Montana Farm Bureau Foundation (Farm Bureau) represents the interests of over 16,000 member families operating farms, ranches, and other agricultural concerns in every county across the State of Montana. Agriculture and related industries have been a critical part of Montana's economy since its founding. Since 1919, the Farm Bureau has provided its members with a forum representing their interests at every level of government. The Farm Bureau unites the individual voices of its members in speaking out on government policy regarding property rights, water quality, water rights, taxes, government regulations, use of public lands, and the environment.

The Farm Bureau believes that it can best fulfill its mission through its support of the free enterprise system and policies that protect individual freedom and opportunity. In support of those goals, and its desire to contribute positively to the community-at-large, the Farm Bureau promotes, protects, and represents all business, economic, social, and educational interests of members and their communities.

The Farm Bureau's interests are particularly intertwined with the property rights, land use, and

---

[1] In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel has made a monetary contribution to the preparation or submission of this brief. In accordance with Rule 37.2(a), *amici* state that 10-day notice was given and all parties consented to the filing of this brief.

water issues germane to this case. The ruling below will have a profound impact on the farming and ranching operations undertaken by the Farm Bureau's members. The Farm Bureau thus brings a unique and important perspective to the issues presented by Petitioner.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

Amici seek to ensure that the Montana Supreme Court's attempt to alter long-held property rights is reviewed, and as appropriate, reversed.

SUMMARY OF ARGUMENT

This dispute over the navigability of certain Montana rivers threatens to redefine property rights held—without controversy—by Montanans for over a century. The Montana Supreme Court's decision below effectively converts title in hundreds of miles of riverbeds to the State, having profound effect not only on the Petitioner, but on all who own land neighboring the affected rivers and who depend on their existing water rights for their livelihood. *Amici* thus respectfully urge the Court to grant Petitioner's writ—and overturn the Montana Supreme Court's ruling—for the following three reasons:

1. The Montana Supreme Court's ruling contravenes this Court's settled law defining when a river is navigable. To claim title to land under the "equal footing" doctrine, a State must necessarily challenge rights of the existing owners. This Court had previously crafted a rigorous test for use in this context, balancing existing property rights against state claims. But in its enthusiasm to uphold the State's claim, the Montana Supreme Court failed to follow this Court's evenhanded standard, introducing and applying a different and formless standard designed to render navigability a *fait accompli*. This Court must grant Petitioner's writ to correct the Montana Supreme Court's error, and reestablish its own, proper, standard.

2. When the majority of the Montana Supreme Court granted the state of Montana original title to the riverbeds by using its new and different "navigability" standard, it triggered a judicial taking. Had the Montana Supreme Court followed this Court's settled precedents, there would have been no

taking and no violation of the Petitioner's property rights and right of due process. This is further reason why this Court should grant *certiorari* and reaffirm both its established standard for determining navigability and the broader point that a state, whether by judicial fiat or otherwise, cannot redefine settled property rights without violating the Fifth Amendment.

3. The Montana Supreme Court's actions below raise grave federalism concerns and, in particular, erode existing checks and balances between federal and state interests. By purporting to use federal law to take property rights from private parties and the federal government, the Montana Supreme Court is in the tenuous position of turning federal law against its maker. Without this Court's intervention, state courts across the country will be free to employ similar *pro forma* navigability analyses to support similar property grabs. This would delegitimize federal law, converting it into a sword used by the States against existing property owners, including the United States Government, without regard for the settled rights now being upended. This Court need not—and should not—allow the States to take such liberties.

ARGUMENT

Dissenting from the majority's opinion below, Justice Rice found that the majority ignored this Court's established approach to assessing navigability for title purposes. (Pet. App. 98.) The majority's fundamental departure from this Court's teachings led directly to its "categorical pronouncements" that the entirety of the Missouri, Clark Fork, and Madison rivers were navigable at

the time of Montana's statehood. (Pet. App. 98.) Its broad holding eradicates settled property rights Montanans have enjoyed for over a century. In contrast to the majority's approach, this Court's particularized approach is the appropriate method for determining navigability because significant property rights are at stake. (*See* Pet. App. 98.) As *amici* will demonstrate below, law and policy confirm that the Montana Supreme Court's application of this Court's precedent was in error, and should be reversed with directions to follow this Court's established standard.

I. The Decision Below Contravenes This Court's Carefully-Drawn Analytical Framework For Assessing Navigability

In *United States v. Utah*, 283 U.S. 64 (1933), this Court set forth the proper method for determining the navigability of rivers. As Justice Rice noted below, this Court did not endorse the approach, taken by the majority below, that entire rivers were navigable simply because certain reaches of the river were navigable. (Pet. App. 96.) Instead, this Court adopted an approach meticulously analyzing the evidence of navigability of the river at issue section-by-section. *Utah*, 283 U.S. at 77 ("Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends."). Navigable sections of the river should be considered navigable for title purposes and, conversely, nonnavigable sections should be considered nonnavigable.

In *Utah*, the State of Utah challenged a special master's conclusion that a four-mile stretch of the Colorado River was non-navigable. The Court upheld the State's challenge, explaining that while it was not concerned with the non-navigability of a "short interruption" or "negligible part" of a stream, it would separately consider "long reaches with particular characteristics of navigability or nonnavigability." *Id.* at 77. On that basis, this Court concluded that the disputed four-mile stretch had particular characteristics of navigability, and overruled the special master. *See id.* at 90.

In finding that the entirety of the Madison, Clark Fork, and Missouri rivers was navigable, the Montana Supreme Court ignored clear evidence that various stretches of each river were non-navigable, on the legal basis that the sections in question were "relatively short." (Pet. App. 60-61.) While this was not true even in fact, since Petitioner put at issue three stretches of river each over 100 miles long, (see Pet. App. 101, 104, 109-10, 114)[2], it is clear that when the Montana Supreme Court issued its decision granting Montana title to thousands of acres of riverbeds, it ignored not only this Court's teachings, but the policies—intended to protect rights—underlying those teachings.

---

[2] The majority misstates the nature of Petitioner's claims. Petitioner put long stretches of each river at issue below, including 125 miles of the Missouri River, the entire 133-mile-long Madison River, and over 200 miles of the Clark Fork River. (*See* Pet. App. 101, 104, 109-10, 114.)

A. Navigability Determines Ownership of Private Property Rights and Thus a Limited Section-By-Section Inquiry Is Appropriate.

Under the "equal footing" doctrine, title to submerged lands under Montana rivers was vested in the State if the rivers were "navigable" at the time of Statehood. *See Utah*, 283 U.S. at 77. And because many sections of the Madison, Clark Fork, and Missouri Rivers have been considered nonnavigable since statehood, the State of Montana has not held title to these submerged lands. As a result, for over a century Petitioner and thousands of private parties have held and enjoyed their real property rights in riverbed lands, deriving title from their ownership of the riparian lands abutting the rivers. This Court has long protected such settled property interests. *See Leo Sheep Co. v. U.S.*, 440 U.S. 668, 687-88 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.").

In contrast with the majority's erroneous analysis below, this Court previously achieved a delicate balance between the property rights of private owners and those of the states by adopting a thorough navigability analysis. While this Court disclaimed its interest in nautical quirks of navigability—essentially an extension of the judicial maxim *de minimis non curiat lex*[3]—it held that

---

[3] "The law does not concern itself with trifles."

stretches of river that are navigable should be considered as such for title purposes, and that nonnavigable stretches of river should be likewise considered. *Utah*, 283 U.S. at 81 ("The question thus comes to the use, and the susceptibility to use, for commerce of the sections of these rivers which the master has found to be navigable."). This approach ensures minimal disruption to existing rights, while protecting states with legitimate claim to submerged lands under truly navigable waters.

The inherent protections afforded to existing property holders do not end there. To that end, courts have developed a navigability test requiring a State seeking title to submergible lands to demonstrate that a river was "(1) [] used or [] susceptible of being used, (2) as a highway of useful commerce, (3) in its natural and ordinary condition, and (4) by the customary modes of trade and travel at the time of statehood." *North Dakota v. U.S.*, 972 F.2d 235, 237-38 (8th Cir. 1992). States—not current property holders—have the burden of demonstrating that waters were navigable at the time of their statehood, and not the other way around.

These rules did not develop randomly. Instead, they were designed to protect current property holders from States, like Montana, with incentive to abuse the navigability standard for their own gain. *Brewer-Elliott Oil & Gas Co. v. U.S.*, 260 U.S. 77, 89 (1922) ("Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control.").

Putting the burden of proof on the states, requiring them to meet a rigorous multi-element test,

and performing the comprehensive navigability analysis set forth in *Utah* ensures that courts do not override settled property rights without exacting analysis and appropriate safeguards. *See Utah*, 283 U.S. at 77 ("In the present instance, the controversy relates only to the ***sections of the rivers*** which are described in the complaint, and the master has limited his findings and conclusions as to navigability accordingly.") (emphasis added).[4] These safeguards are even more important here because, as Petitioner notes, the majority's navigability ruling gives the State original title to the submerged lands under them—potentially forestalling any takings claim under the Fifth Amendment if Montana takes title to the land. (Pet. 36.) In other words, Montana wants to avoid its Fifth Amendment obligation to pay compensation for taking the Petitioner's property by applying this new "navigability" standard to redefine ownership of the riverbeds. Doing so violates this Court's precedent and merits this Court's review and reversal.

B. The Montana Supreme Court's "Relatively Short" Test Was Judicial Error, Subjecting Private Property Owners to an Unlawful, Arbitrary Standard of Navigability

Despite the understanding of property owners based upon more than a century of settled law, the Montana Supreme Court turned existing property law upside down by (a) shifting the burden of proof

---

[4] *See also Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1432-33 (9th Cir. 1993); *City of Centralia, Wash. v. FERC*, 851 F.2d 278, 280 (9th Cir. 1988); *Loving v. Alexander*, 745 F.2d 861, 867 (4th Cir. 1984).

from Montana to the Petitioner and, (b) more significantly, redefining navigability using a broad, "blanket" approach instead of the specific, evidence-based approach required by this Court. Nowhere was the majority's decision more egregious than in its misapplication of this Court's *Utah* precedent.

This Court has previously held that lower courts should analyze navigability in sections, giving particular concern to "long reaches with particular characteristics of navigability or nonnavigability." *Utah*, 283 U.S. at 77. Taking a simplified view of that test, the majority below focused only on length, concluding that nonnavigable portions of the river were "relatively short interruptions" that could be safely ignored in finding every portion of every river at issue navigable. (Pet. App. 61.) But this finding was in error because whether a nonnavigable stretch of river is "relatively short"—whatever that means—is contrary to the fact-based analysis the *Utah* standard requires. Lower courts must analyze all the relevant facts to determine whether sections of the river have "particular characteristics of navigability or nonnavigability." *Utah*, 283 U.S. at 77. The length of each section is simply one "characteristic of navigability" among many that must be considered.

One example of how the majority's "relatively short" standard skewed its analysis is in its treatment of the 17-mile-long Great Falls Reach. This is an impassable stretch of the Missouri River, mainly due to large waterfalls. (Hence the name, "Great Falls.") But to the majority this was "merely a short interruption in the use of the Missouri as a channel for useful commerce." (Pet. App. 60-61.) Without further explanation, the majority characterized this section of the Missouri River as

"relatively short," ignoring evidence that "there has never been any navigation on the Missouri River in the Great Falls reach because the physical characteristics of the falls prevent it" and overlooking "fifteen different rapids and nine waterfalls" in the area—including the 87-foot descent of the Great Falls themselves. (Pet. App. 198.) The Great Falls Reach is not a "negligible part" of the river. *See Utah*, 283 U.S. at 77. Instead, the 17-mile Great Falls Reach marks a profound transition in the character of the Missouri River. (*See* Pet. App. 228 (explaining that the Great Falls Reach effectively makes the stretch of river above it "a different river" than the stretch of river below it).) These are precisely the "particular characteristics" of nonnavigability that should be determinative—or at least considered—under *Utah*. 283 U.S. at 77. The standard used by the majority below—and the resulting holding—is thus capricious. It never explains why a 17-mile stretch of river including an almost 100-foot waterfall could not be a "long reach[] with particular characteristics of . . . nonnavigability"—even though the majority concedes that the section in question is, in fact, nonnavigable. *Id.*

In *Utah*, this Court deemphasized length as a critical factor, finding that a mere four-mile stretch had the requisite characteristics of navigability and thus overruled the special master's opposite conclusion. *Utah*, 283 U.S. at 80. It is thus clear that navigability cannot be reduced to a mere question of length, as the majority below attempted to do here, but requires a total review of all the relevant "characteristics" of navigability. *See id.* at 77. Indeed, it is this thorough review of all the facts that further limits the possibility of arbitrary

decision-making and the abusive confiscation of long-existing rights.

Even the State of Montana itself has taken a less extreme position than the Montana Supreme Court did. When, in 1986, Montana's Department of State Lands published a list of 37 rivers it claimed were navigable, it claimed only the middle portion of the Madison River from the "confluence of its west fork to Varney, Montana." (Pet. App. 104-05.) That study was hopelessly flawed, but even then, it was only the majority's adoption of an extreme navigability standard that granted the State of Montana title to more of the Madison River than even the State itself once claimed to own.

The majority's approach is wholly unworkable as a standard for adjudicating navigability. Its reductionist approach begs the obvious question: if a stretch of river is too "relatively short" to be, in and of itself, declared nonnavigable, when does it become long enough? Courts—and litigants—can only guess. The touchstone of the *Utah* standard is not length—this Court's adjudication of a mere four-mile stretch of river demonstrates that alone. And Montana's adoption of its own shapeless standard is, quite plainly, an invitation to abuse.

Further, the majority below did not even consistently apply its own misguided standard. For example, the majority ruled that the entire Madison River was navigable based, in large part, on a "log float on its middle portion," (Pet. App. 26, 56), but did not analyze the length of the outer portions of the Madison River at all—even under its "relatively

short" test.[5] It simply concluded that the entire river was navigable based on (disputed) evidence that the middle portion was navigable. Are the portions of the Madison River on either side of the middle portion "relatively short" under the Montana Supreme Court's standard, and thus unable to obtain nonnavigable status in their own right? One has no idea from the majority opinion. The same is true of the "merely short interruptions" on the Clark Fork and Madison Rivers where Petitioner operates its dams. (Pet. App. 60-61.) These are not factual findings; they are bald conclusions. Indeed, one reason why the majority below may have been hesitant to reveal the secret formula behind its "relatively short" navigability standard is that it appears to expand and contract based on the result it seeks to achieve.

The Montana Supreme Court's formulaic decision—even if it refuses to divulge that formula—defeats this Court's clear direction that navigability is to be determined by analysis based upon all relevant facts. In *Utah*, this Court considered "a comprehensive statement of the facts adduced with

---

[5] One reason for the majority's inexactitude below—and the resulting adoption of its all-encompassing navigability standard—is likely the paucity of evidence that actually supported the State's position. One expert for Petitioner below reviewed the State's evidence of navigability and stated that "[h]ad the State been a student of mine at the University of Montana, presenting its brief as a paper . . . it would have received a failing grade for not following the most fundamental tenets of historical analysis." (*See* Pet. App. 203-04.) That same expert explained why the historical record demonstrates, for example, the Madison River's nonnavigability, even if the majority below—willfully or not—chose to ignore that evidence. (*See* Pet. App. 292-95.)

respect to the topography of the rivers, their history, impediments to navigation, and the use, and susceptibility to use, of the rivers as highways of commerce." 283 U.S. at 73-74. In doing so, it divided the rivers at issue into navigable and nonnavigable sections, based on its review of all the features at issue—not just relative length. *See id.* at 77; *see also United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899). Nothing in *Utah*—or anywhere else in this Court's jurisprudence—supports the majority's "relatively short" navigability standard. The property interests at stake demand that navigability be determined using this Court's fact-based and particularized analysis required in *Utah*. The majority below failed to do so and this Court should grant certiorari to correct this error.

C. The Majority Improperly Shifted the Burden of Proof Away From the State of Montana and to the Petitioner.

Not only did the majority below use the wrong standard to analyze navigability, it shifted the burden of proof away from the State of Montana and on to the Petitioner. For example, the Court rejected Petitioner's expert report concluding that the Madison River was nonnavigable because it "fail[ed] to demonstrate" that the Madison was not "susceptible for use as a channel of commerce." (Pet. App. 58.) But as demonstrated above, the Court offered no analysis of the navigability of the outer sections of the Madison River. That, in turn, is because the State offered no evidence of those sections' navigability, except for a single log float on the Madison River's "middle" section. (Pet. App. 101-

108.) The majority did not even analyze the length of the bookending stretches of the river under its "relatively short" standard. (Pet. App. 101-108.)

When a state wishes to change title to property by claiming it is "navigable," the state bears the burden of establishing its claim. In this case the majority erred when it shifted the burden of proof away from the State, instead requiring the property owner to prove its ownership to retain title.

II. The Majority's Arbitrary Decision Violated Property Rights And Is Nothing More Than A Thinly-Disguised Judicial Taking.

When the majority refused to follow this Court's settled standard for determining navigability and redefined ownership of property by using a new test for navigability it engaged in a judicial taking.

This Court has long held property rights are defined by "existing rules or understandings that stem from an independent source such as state law." *Preseault v. I.C.C.*, 494 U.S. 1, 20-22 (1990) (O'Connor, J., concurring) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *see also Maritrans, Inc. v. U.S.*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (property rights derive from "existing rules and understandings"). Consistent with existing property rules, the State of Montana recognized and upheld the real property interests of riparian landowners in the riverbeds of the Clark Fork, Missouri, and Madison rivers for over a century before challenging those rights through this lawsuit instead. *See, e.g.*, Mont. Code Ann. § 70-

16-201 (enacted in 1895, and providing that "[e]xcept where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream"). Montana even upheld those property rights after it promulgated its list of 37 purportedly-navigable rivers in 1986.

The majority, however, converted those existing property rights over to the State by applying a new, flawed test to define navigability. The fact that Montana's judicial branch redefined existing property rights does not render this any less a taking of property in violation of the Fifth Amendment. *See Webb's*, 449 U.S. at 164 (holding that a State "by *ipse dixit* may not transform private property into public property without compensation . . ."); *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 326 (1893) (holding that "no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner"). In short, the majority's arbitrary subversion of existing property rights is a judicial taking. *See Kaiser Aetna v. U.S.*, 444 U.S. 164, 178 (1979) (holding that when Government makes a "naked assertion" to a public right, that "assertion collides with not merely an 'economic advantage' but an 'economic advantage' that has the law back of it to such an extent that courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion'") (quoting *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945)).

In the recent case of *Stop the Beach Renourishment v. Florida Dept. of Environmental*

Protection, 560 U.S. ---, 130 S. Ct. 2592, 2601 (2010), a plurality of this Court held that there is no "textual justification" for limiting takings claims deriving from executive or legislative action. Justice Scalia concluded that "it would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat," thus recognizing the doctrine of judicial takings. *Id.* And though refusing to reach the question of whether to recognize judicial takings, Justice Kennedy suggested that "[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantively changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause." *Id.* at 2615. The result, in Justice Kennedy's view, is the same—state judges cannot do by decree what state legislators cannot do by fiat. *See id.*

The majority's holding below—adjudicating the rights of thousands of riparian owners based on a new navigability standard inconsistent with this Court's *Utah* decision and other settled law—does just that. Montana's legislature could not have taken property in this fashion—neither should its courts be able to do so.

This Court's intervention is the only hope for the thousands who will lose their property rights as a result of the majority's decision. In ruling that the entire Missouri, Clark Fork, and Madison rivers were navigable at statehood, the majority set in motion a trap that will ultimately ensnare thousands of citizens now relying on their existing rights and interests, inevitably including members of the Farm Bureau.

The ruling below, for example, is now legal precedent which the State of Montana can use to acquire title to what are currently understood to be privately-owned submerged lands and riverbeds. The state merely needs to apply this new navigability standard and rivers understood to be nonnavigable under this Court's *Utah* standard will now, by *ipse dixit*, become "navigable" and state-owned. This is so, even though a federal court has already found certain stretches of the rivers in question nonnavigable, at a time far more contemporaneous to Montana's statehood than now. *See Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910). Upsetting these established property rights and expectations is clear error.

Likewise, the effects of the majority's errors are not limited to the three rivers on which it purportedly passed judgment. The State's 1986 river study funded by its Department of State Lands and cited above, on which the majority in large part relied, purported to find that an additional 34 Montana rivers were navigable-for-title at the time of statehood.[6] Emboldened by the legal precedent set

---

[6] As Petitioner's certiorari petition points out, the State's novel navigability standard converts federally-owned riverbed lands as well, in a state where the Bureau of Land Management manages approximately eight million acres of federal lands. (Pet. 36.) Among the federal lands already converted by the ruling below are those parts of the Madison River flowing through Yellowstone National Park. (Pet. 5.) For its part, the United States has taken the position that only "portions" of the Missouri, Yellowstone, and Big Horn rivers are navigable for purposes of determining title under the "equal footing" doctrine—a limited position generally consistent with this Court's *Utah* standard. (U.S. Dep't of Interior, Letter to Montana Dep't of State Lands (dated Aug. 26, 1988).). It was

below, there is nothing to stop the State of Montana from using federal law to further its own ends, unless this Court intervenes. The *pro forma* standard adopted below is not only arbitrary and unfair—its application in the future means that the State of Montana will win every time. The navigability analysis, if anything, should be more than a judicial rubber-stamp for the states' unreasonable ambitions, much less ill-considered attempts to increase state coffers.

Moreover, when altering the existing principles by which property rights are defined, procedural due process requires notice to the affected property holders. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (explaining that a fundamental requirement of due process is 'the opportunity to be heard' . . . at a meaningful time and in a meaningful manner") (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *see also Great N. Ry. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-66 (1932); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680-81 (1930). No such notice has ever been given to the affected property holders on any of the rivers in question here, much less any of the three dozen rivers to which the State of Montana now belatedly claims ownership.

And the majority concedes that the result of its ruling will be to transfer long-held property rights to the State of Montana. In words apparently meant to

---

over this evidence—and a "mountain" of additional evidence put forth by Petitioner—that the majority granted summary judgment to the State of Montana despite the intensely factual question that navigability at the time of statehood naturally poses. (*See* Pet. App. 100-101.)

soothe—but having the opposite effect—the majority highlighted the Farm Bureau's concern by conceding that its ruling will convert existing real property rights, belonging to farmers and ranchers, in riverbeds that accompany riparian land ownership, over to Montana. These long-established rights will now be subject to Legislative control after more than a century of uninterrupted ownership by those who own land neighboring the rivers. (Pet. App. 90.) The best that can be hoped for is that the Montana legislature continues to allow farmers and ranchers to use the property and divert water—subject to a "fair market" (i.e., prohibitive) rate—while the worst-case scenario is that farmers and ranchers are barred from using water when it is leased to other parties—recreational users and wealthy landowners—able to afford "fair market" rates. That such disruptive effects can take place merely on the unverifiable assurances that non-navigable stretches of the rivers at issue are "relatively short" is nothing less than a judicial taking and a fundamental denial of due process.

III. This Court Must Intervene To Defend Federal Prerogatives Against State Encroachments

This case poses a novel, but no less crucial, twist on the federalism concerns this Court usually confronts. States take title to submerged riverbeds not unconditionally, but pursuant to the federal definition of navigability. *Brewer-Elliott*, 260 U.S. at 87-88 (navigability is a question of federal law because "the validity and effect of an act done by the United States is necessarily a federal question"). It

is this Court's definition of navigability that controls, and which the states must follow.

The question of navigability often pits the federal government against the individual States, as it did in *Utah*. By dividing the interests of the United States from those of state governments, property rights are further protected, consistent with federalism. THE FEDERALIST NO. 51 (James Madison) (explaining that federalism creates "a double security [] to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."). The majority's evisceration of *Utah* in favor of its own arbitrary standard, however, threatens that balance. Every state is now free to develop its own "relatively short" non-standard by which to justify the expropriation of long swaths of riverbed—indeed, entire rivers—long held by custom and practice by others. Should other states follow the majority below and adopt this new standard of "navigability" that is inconsistent with this Court's specific, fact-based *Utah* standard, property rights across the country are under threat of being redefined by judicial fiat.

While this Court's navigability precedents are many decades old, they were established at a time when large-scale navigability disputes would be most likely—the years after statehood. Now, more than a century later, Montana has—suspiciously to say the least—revived the navigability doctrine to claim hundreds of miles of riverbed land it has never claimed before. But even if the disputed rivers were navigable at the time of Montana's statehood (and, contrary to the majority's opinion below, the evidence demonstrates they were not), this Court's Takings and Due Process doctrines suggest that it was

improper for the Court below to adopt a revised standard unsettling a century of settled property expectations across the State of Montana. *See Leo Sheep*, 440 U.S. at 686-87 ("It is some testament to common sense that the present case is virtually unprecedented, and that in the 117 years since the grants were made, litigation over access questions generally has been rare.").

The majority below was entirely unconcerned by the devastation it wrought when it redefined navigability using a "very liberally construed" standard inconsistent both with *Utah*, and with 120 years of Montana property owners' settled rights. (Pet. App. 54.) Even if the States could "very liberally" put their thumbs on the scales of justice in their own favor, as Montana did, to do so in the face of over a century of established property rights undermines those settled interests and is inconsistent with this Court's precedent. *See Leo Sheep*, 440 U.S. at 681-82 ("[B]oth as matter of common-law doctrine and as a matter of construing congressional intent, we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here."). And the threat to settled property rights posed by the precedent set by the Montana Supreme Court multiplies across the nation should other states emulate the majority below.

The emergence of the states as a threat to redefine property rights in this manner is a clear and present danger to rights protected by the Fifth Amendment. Should this Court fail to intervene and restore the *Utah* navigability standard as the settled,

defining rule of law, the State of Montana—and other states—will be able to appropriate title to any submerged lands and riverbeds they desire, free of the Fifth Amendment obligation to pay "just compensation."

CONCLUSION

This Court should grant Petitioner's request for *certiorari*, and ultimately reverse and remand the decision of the Montana Supreme Court, restoring the *Utah* standard established by this Court as the governing rule of law defining the "navigability" of rivers for purposes of establishing ownership of the underlying submerged lands.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae The Cato Institute

MARK F. "THOR" HEARNE II
Counsel of Record
ARENT FOX LLP
1050 Connecticut Ave. NW
Washington, DC 20036
thor@arentfox.com
(202) 857-6000

ROBERT C. O'BRIEN
STEVEN A. HASKINS
ARENT FOX LLP
555 West Fifth St., Fl. 48
Los Angeles, CA 90013
obrien.robert@arentfox.com
(213) 629-7400

Counsel for Amicus Curiae Montana Farm Bureau Federation

September 15, 2010

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

FILED
SEP 15 2010
OFFICE OF THE CLERK

No. 10-218

In The
Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court
Of The State Of Montana**

BRIEF FOR THE MONTANA WATER RESOURCES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HOLLY J. FRANZ
FRANZ & DRISCOLL
21 N. Last Chance Gulch,
Suite 210
Helena, MT 59601
(406) 442-0005
hollyjo@franzdriscoll.com

JON METROPOULOS
Counsel of Record
GOUGH, SHANAHAN,
JOHNSON & WATERMAN
33 S. Last Chance Gulch
Helena, MT 59601
(406) 442-8560
jonmetro@gsjw.com

Counsel for Amicus Curiae

September 15, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river was navigable for State ownership purposes under the equal footing doctrine require a trial court to determine, after an evidentiary trial, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on observed present-day recreational use, with the question "very liberally construed" in the State's favor?

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. The Montana Supreme Court Wrongly Rewrote Federal Navigability Law 9

II. Unique Federalism Concerns Cry Out For This Court's Exercise Of Jurisdiction To Reign In Montana's Confiscatory Conduct 10

A. Montana Law Before This Decision 11

B. The Enforcement By This Court Of Its Federal Navigability Rules Is A Backstop Against Judicial Takings 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 F. 638 (9th Cir. 1917) 12

BFP v. Resolution Trust Corporation, 511 U.S. 531 (1994) 16

Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 17

Colorado v. New Mexico, 467 U.S. 301 (1984) 16

General Agriculture Corp. v. Moore, 534 P.2d 859 (Mont. 1975) 13

Jones v. Hanson, 320 P.2d 1007 (Mont. 1958) 12

Mettler v. Ames Realty Co., 201 P. 702 (Mont. 1921) 11

Montanans For The Responsible Use Of The School Trust v. State ex rel. Board of Land Commissioners, 989 P.2d 800 (Mont. 1999) 14

Peralta v. United States, 70 U.S. 434 (1865) 16

Prentice v. McKay, 98 P. 1081 (Mont. 1909) 12

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 16

Smith v. Deniff, 60 P. 398 (Mont. 1900) 12

Spratt v. Helena Power Trans. Co., 94 P. 631 (Mont. 1908) 13, 16

State ex rel. Crowley v. District Court, 88 P.2d 23 (Mont. 1939) 12

TABLE OF AUTHORITIES – Continued

Page

Stop The Beach Renourishment v. Florida Dep't of Environmental Protection, ___ U.S. ___, 130 S.Ct. 2592 (2010) 15

Wiley v. Decker, 73 P. 210 (Wyo. 1903) 12

CONSTITUTIONS AND STATUTES

U.S. Const. amend. XI 7, 15

1889 Mont. Const. Art. III, §15 12

1972 Mont. Const. Art. IX, §(3)(1) 13

Sec. 1880, Civ. C. 1895 12

INTEREST OF *AMICUS*[1]

The Montana Water Resources Association ("MWRA") is an association of holders of appropriated water rights, which are property rights specifically protected by Montana's Constitution, and other individuals and entities interested in issues related to water rights. Its members include irrigation districts, cooperative ditch companies, public water supply companies, utilities, power cooperatives and individual farmers, ranchers and others who put the waters of Montana to beneficial use. Some of their water rights are well over a century old, and all have been exercised under the equally venerable and vital beneficial use doctrine which recognizes that appropriating water for beneficial use requires a diversion and is a public good, and, therefore, one owning a water right is entitled to make free use of any state-owned riverbed to divert water.

When made aware of the State's claims against power companies seeking past and future rent for

---

[1] In accordance with Rule 37.6 *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief. In the interest of full disclosure, *amicus* states the Petitioner is a member of MWRA, and Petitioner abstained from any involvement with the decision to file this *amicus* brief and did not make any contribution to its preparation or submission. In accordance with Rule 37.3(a), *amicus* states that all parties consented to the filing of this brief and were notified ten days prior to the due date of this brief of the intention to file.

their use of allegedly navigable riverbeds, pending in Montana's district court, the MWRA issued (at its Annual Membership Meeting on October 26, 2006) the following Resolution:

> 06. DIVERSION AND IMPOUNDMENT FACILITIES ON PUBLIC BEDS AND BANKS OF STATE WATERS
>
> BE IT RESOLVED that MWRA recognizes that Montana water users have the right to place diversion and impoundment facilities on the public beds and banks of state waters as part of their water right appropriation and have not been required to pay a lease or other fee to the state;
>
> BE IT FURTHER RESOLVED that MWRA opposes any efforts to require water users, including hydropower users, to make payments to the state for diversion and impoundment facilities, including dams and reservoirs, located on the public beds and banks of state waters.

The Montana Supreme Court decision is directly contrary to this Resolution. Many of MWRA's members hold water rights to water from rivers Montana now claims are navigable, the beds and banks of which it now claims it has owned since statehood in 1889, and, most importantly, for the use of which it now claims it must charge rentals. MWRA members own and operate diversion and impoundment structures located in the beds of such rivers. Many have owned these structures for over a century and

none have paid rentals or faced the prospect of having to do so until the Montana Supreme Court's decision. These members have direct, pecuniary interest in seeking this Court's review of the Montana Supreme Court's decision because, if it is left standing, it will lead to the taking of property rights and the imposition of rent (past and future) or other user fees for their past and continued use and operation of their diversion and impoundment structures, whether as owners in fee or owners with rights by prescription or adverse possession.

The Montana Supreme Court's navigability decision is deeply troubling to MWRA's members. Those members have two equally important types of ownership interests affected by that decision. Some members own real property directly abutting the rivers and so long as the rivers have not been legally designated "navigable" at Statehood, they own the property to the middle of the stream. The Montana Court's decision presumptively decided that against them. Thus, if this Court reviews and overturns the Montana Supreme Court, they would have their fee ownership of sections of the riverbeds returned to them.

Other members own water rights, the use of which requires them to own and operate diversion and impoundment structures built on or into the riverbeds, and by deed, prescriptive easement, or rights otherwise long-settled under law hold the property right to continue to operate, for free, those

structures to divert or impound water for beneficial use.

The Montana Court's decision upsets both types of cherished rights. Whether by fee ownership or as part of their water rights under the beneficial use doctrine, MWRA's members believed their right to continue to operate their diversion and impoundment structures on the riverbeds with no payment to anyone was long settled. The Montana Supreme Court has now taken these long held, critical riverbed ownership and access rights and granted them to the State. (Pet. App. 64-66, 90-91).

Also deeply troubling for the future, the Montana Supreme Court held that no statutes of limitation apply to the ownership rights the court now declared for the state in the riverbeds. This means prescriptive and adverse possession rights to continue to operate long-established diversions on the riverbeds that would apply against anyone else who "discovered or invented" a long lost ownership interest do not exist against the state, completely devaluing water rights dependent on these diversions. (Pet. App. 66-69).

Also, retroactive "back rent" damages against ranches, farms, irrigation districts, ditch companies, and others – many of which have operated for decades or even a century – are apparently now allowed, perhaps required, under the Montana Supreme Court ruling in this matter, all arising from its first erroneous decision that Montana has owned the entirety of

the riverbeds in trust since statehood. (Pet. App. 73, 90-91).

Some MWRA members also own real property along other rivers Montana claims are navigable. They have a direct pecuniary interest in the value of that real property not being diminished by attacks on the historic and continuing right to divert, appropriate, and store water pursuant to appurtenant water rights. The value of these water rights literally depends on the right to own and operate the related diversion and impoundment structures located in and near navigable riverbeds. Without the right to divert and impound, which necessarily means the right to place these structures in a location that is effective, water rights are useless.

These members also have direct, pecuniary interests related to the extent of their title to real property (whether to the ordinary low water mark of a navigable river's banks, or to the middle of the bed of a non-navigable river), that riverbeds not be declared navigable to the benefit of the State by a court on summary judgment, without a trial being held on all the relevant evidence related to whether or not a river was navigable at statehood.

MWRA members use of their constitutionally protected water rights in Montana are crucial to the success of the long-established ranching and farming businesses of some of its members. A central component of their use of the river's water is the operation of diversion structures located within the

banks of the river. The historically unfettered access to the riverbed for purposes of operating these diversion structures will be severely jeopardized if this Court were to let stand the Montana Supreme Court's holdings that the State owns the entirety of the riverbeds at issue in trust and that no statutes of limitations apply to claims by the State seeking back rent for purported wrongful occupation of riverbeds by those structures.

Many MWRA members use diversion and impoundment structures to appropriate water from the rivers, including ditches, headgates, intake pipes, diversion dams, and pumps. Use of these structures is absolutely necessary to access, use and store water. Without such structures – which by their nature must be cut into, drilled under, or built on top of, the riverbed – it is impossible for MWRA's members to put their constitutionally protected water rights to beneficial use as required by law to maintain ownership of these rights and avoid abandonment. MWRA's members cannot access water from a river without some use of the riverbed.

To MWRA's collective knowledge, no member has ever (before this case) been asked by a representative of the State to pay a fee, rent or any other type of payment for these diversion and impoundment structures. Likewise, to MWRA's collective knowledge its members have always made unrestricted use of the riverbeds to operate their diversion and impoundment structures.

In sum, MWRA's members have strong interests in many of the issues raised by PPL Montana in its Petition, and could suffer direct, pecuniary losses if this Court declines to assume jurisdiction of this matter and lets stand the rulings of the Montana Supreme Court. Despite the Montana Supreme Court's assertions to the contrary (Pet. App. 90-91), the State as a trustee required to fulfill its fiduciary duty to collect fair market value for all use of state land will eventually have no choice but to continue, river by river, to take property rights away and assess fees and past damages against owners and users of diversion and impoundment structures in the riverbed.

MWRA's members will be forced under the constraints of the Eleventh Amendment and this Court's takings jurisprudence to file lawsuit after lawsuit against these takings in state court (which this decision preordains they will lose), with the hope that this Court will someday accept certiorari to contain the confiscatory conduct of the State of Montana, or of the other states that will surely follow suit.

At this point, only this Court can avert the slow-motion property-rights train wreck the Montana Supreme Court's decision has set in motion. The interests at stake are not just those of "out-of-state corporations" as argued by the Montana Attorney General. MWRA's members, the irrigators, ranchers, small cooperatives, ditch companies, and others will suffer the most if this Court does not act.

SUMMARY OF ARGUMENT

MWRA agrees with Petitioner and with *amicus curiae,* Montana Farm Bureau Federation ("Farm Bureau"), that the Montana Supreme Court's ruling regarding navigability is erroneous and should be reversed. The Montana Supreme Court cannot be allowed to rewrite, indeed eviscerate, this Court's navigability jurisprudence, which rests on fundamental federal questions concerning the creation of the Union. Those protective federal rules underlie an ancient doctrine that provides critical protection to owners of private property along rivers, including owners of water rights.

The rights in private property – its ownership and enjoyment – are among the most important rights protected by our constitutions, both federal and state. Stability of title is a necessity in our constitutional system. The Montana Supreme Court's overturning of a century of precedent recognizing and allowing free use of state-owned riverbeds to appropriate water for beneficial use brings into sharp focus why this Court's review and authority over state courts regarding federal navigability title rights is a necessary and required backstop against state takings of property rights that can otherwise not be effectively challenged in any other court.

ARGUMENT

The question of ownership of riverbeds in Montana, and who has the right to use them, has wide-ranging real-world impacts to thousands of Montana citizens. The Montana Supreme Court's ruling adversely affects the long-standing right to freely divert appropriated water through ditches, headgates, or pipelines located in the riverbeds and to use diversion dams, wing dams or dikes also located in the riverbeds, along the length and breadth of the 36 rivers that the Montana Department of Natural Resources and Conservation ("DNRC") claims to be navigable. The ruling also impedes the ability to freely sell or transfer real property, along with appurtenant water rights and their indispensable diversion structures which are generally located in the riverbeds. As shown below, the protection of these rights now depends on the actions of this Court.

I. The Montana Supreme Court Wrongly Rewrote Federal Navigability Law.

For this argument, MWRA relies upon and joins in with the brief of *amicus curiae,* Farm Bureau. MWRA agrees with and emphasizes Farm Bureau's argument that unless the Court accepts PPL's petition an enormous and unlawful land grab will go unchecked and will be unchallengeable.

II. Unique Federalism Concerns Cry Out For This Court's Exercise Of Jurisdiction To Reign In Montana's Confiscatory Conduct.

In order to strip away long-established rights of MWRA's members, the first step was for the Montana Supreme Court to summarily declare the rivers navigable at statehood and thus owned by the State. It did this without the benefit of an evidentiary hearing as to each section of the rivers. This preemptive navigability conclusion is the foundation of the Montana Supreme Court's erroneous decision, and if it is reversed the other concerns discussed below will go away. If it is not, that flawed foundation will remain in place and a flood of judicial takings litigation will surely follow.

Once the Montana Supreme Court declared the State the indisputable owner of the river beds, the State demanded monetary compensation for past and future uses. But to reach that point, the Montana Supreme Court wrote out of state law a doctrine that had existed since the State first came into being – that beneficial uses of water are public uses, and Montanans may freely use state lands to effectuate those public uses, as an incident to owning water rights, without payment to the State. So, in addition to dismissing the mountain of evidence on navigability and rewriting this Court's navigability precedent, the Montana Supreme Court also ignored the right to unencumbered access to state lands to appropriate water that has existed since 1889.

A. Montana Law Before This Decision.

As a territory, like most arid, western areas, Montana followed the customs of miners and ranchers that all water is subject to appropriation for such beneficial uses as mining, irrigation and stock watering, and that "first in time is first in right." *Mettler v. Ames Realty Co.*, 201 P. 702, 708 (Mont. 1921).

Drinking water, irrigation water, industry water, stock water, water needed for crops, for lawns, for faucets and toilets, for bathtubs and fish ponds – is primarily diverted from Montana rivers, and often there is not enough water for everything and everyone. Thus, water rights are sacred property rights in western states like Montana, and constitutions have long protected them as such.

The 1889 Montana Constitution formally adopted the rule of appropriation:

> The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.

Art. III, §15, 1889 Mont. Const. Most states in the Western United States follow this well recognized doctrine.[2]

In 1895, Montana's Legislature codified the appropriation doctrine. Sec. 1880, Mont. Civ. C. 1895. Cases such as *Smith v. Deniff*, 60 P. 398, (Mont. 1900); *Prentice v. McKay*, 98 P. 1081 (Mont. 1909); *State ex rel. Crowley v. District Court*, 88 P.2d 23, (Mont. 1939); and *Jones v. Hanson*, 320 P.2d 1007, (Mont. 1958), made it clear that while use of private property for water appropriation required compensation to the private property owner, because beneficial uses of water are a public use, use of public state land required no such compensation.

This long-standing recognition of the right to free and unencumbered use of state land to appropriate water for beneficial uses was recognized in MWRA's 2006 resolution supporting PPL's position in this case. This doctrine was not only clearly recognized by Montana authority, but other courts reported this as established Montana law. *See, e.g., Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co.*, 239 F. 638, 644-45 (9th Cir. 1917) (discussing *Prentice v. McKay* and appropriation upon the public lands of a state); and *Wiley v. Decker*, 73 P. 210, 214 (Wyo. 1903)

---

[2] The problems raised by PPL's petition and highlighted here by MWRA are not limited to Montana. Far from it. Property rights long settled throughout the Western United States are in jeopardy.

("In Montana it seems one may make a valid appropriation of water with the same effect on unsold state lands").

This doctrine was reaffirmed in the Montana 1972 Constitution, as explained in *General Agriculture Corp. v. Moore*, 534 P.2d 859 (Mont. 1975), which held that Article IX, Section (3)(1) of the 1972 Constitution "reaffirm[ed] the public policy of the 1889 Constitution" and "recogniz[ed] and confirm[ed] all rights acquired under that Constitution and the implementing statutes enacted thereunder." *Id.*, at 862. In short, **all** water rights that existed under Montana laws prior to July 1, 1973, are rights that still existed until the decision at issue here was made by the Montana Supreme Court – 120 years after statehood and 119 years after the first dam at issue was built on one of the riverbeds.

Construction of diversion structures and instrumentalities on the riverbeds is open and obvious, particularly for such large structures as dams, dikes and weirs. As the Montana Supreme Court, itself, described in 1908, the Hauser dam (one of the PPL dams at issue in this case) is "an immense structure of steel and concrete, built across the Missouri river . . . about 70 feet high." *Spratt v. Helena Power Trans. Co.*, 94 P. 631, 633 (Mont. 1908).

If the right to freely use Montana's public riverbeds for such a public use without charge was not firmly established and widely understood, it is difficult to understand why the State did not assert a

right to rent for use of the riverbeds for over a century. Searching for an explanation, the Montana Supreme Court resorted to characterizing the State's inaction for nearly a century regarding its now-recognized ownership interests and its purported right and duty to demand rentals as a mere "lack of diligence" on the part of the State and its land boards. (Pet. App. 68).

In fact, the State had not been dilatory all those decades, it was correct. There was no right to collect rent and no reason to request it until the Montana Supreme Court totally rewrote this Court's federal law on navigability and state law on beneficial use.

Under the decision at issue here, these long-established property rights of MWRA's members have effectively been judicially taken. This was accomplished by the artifice of the Montana Supreme Court simply saying that its earlier decisions do not say what they actually do say.

The ramifications, unknown in detail, are clearly wide in scope. Parties interested in seeing every nickel possible charged for any use of state trust lands will have every reason to force state agencies either to charge exorbitant prices for uses long free, or to lease exclusive riverbed rights to the highest bidder, stripping all value from water rights that cannot be effectively used without access to riverbeds for diversion ditches, dams, pipelines, and the like. *See, e.g., Montanans For The Responsible Use Of The School Trust v. State ex rel. Board of Land Commissioners,* 989 P.2d 800 (Mont. 1999).

River by river, diversion by diversion, riverbed structure by riverbed structure, each rancher, farmer, ditch company, or the like, next focused on by the State, will have to pay up or fight. That fight will necessarily take place in state courts because of the Eleventh Amendment, but under *Stop The Beach Renourishment v. Florida Dep't of Environmental Protection*, ___ U.S. ___, 130 S.Ct. 2592 (2010), this Court's assistance will ultimately be sought. The only way that this will not happen is for this Court to accept PPL's petition now.

B. The Enforcement By This Court Of Its Federal Navigability Rules Is A Backstop Against Judicial Takings.

As shown above, the Montana Supreme Court, by judicial fiat, took property rights that MWRA members believed they had owned since the founding of the State. It buttressed this taking by removing all defenses from MWRA's members, including statutes of limitation and rights by prescription, which would have protected MWRA's members if the long lost riverbed owner the Montana Supreme court discovered had been anyone else but the State as trustee. (Pet. App. 67-69). The Montana Supreme Court could only work these judicial takings by first erroneously concluding that the State owned these riverbeds as a matter of law, despite the mountain of evidence that PPL proffered to the contrary.

This Court has long recognized the importance of stability for property rights. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) (observing that "contractual [and] property rights [are] matters in which predictability and stability are of prime importance"); *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994) (noting "[w]e have said that 'the general welfare of society is involved in the security of titles to real estate") (*quoting American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911); *Colorado v. New Mexico*, 467 U.S. 301, 316 (1984) (recognizing society's "interest in increasing the stability of property rights" when discussing water rights); and *Peralta v. United States*, 70 U.S. 434, 439 (1865) ("The right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions.").

In its early days, Montana welcomed corporations, in-state and out-of-state, to build dams on its riverbeds and to provide electricity to its industry and citizens. It enacted a constitution and statutes precisely to encourage such conduct. *See, e.g., Spratt v. Helena Power Trans. Co.*, 94 P. 631, 634 (Mont. 1908). Likewise, as discussed above, Montana encouraged and enforced stability of title and water rights.

Sadly, in Montana today, that critical stability as to ownership of lands and water rights can only be maintained if this Court accepts certiorari and reverses the judgment that Montana owns the entirety of the riverbeds of the three rivers in question, and the underlying implicit holding that Montana also

owns all of the riverbeds of the over 30 rivers on its navigable rivers list.

Indeed, the combined action of Montana's executive and judicial branches in this matter make it clear this Court was right to question whether states can be trusted with making decisions about riverbed ownership. *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922) (recognizing the problem that "[s]ome states have sought to retain title to the bed of streams by recognizing them as navigable when they are not actually so.") Without this Court's enforcement of its federal navigability rules that were ignored by the Montana courts, the obvious answer is no. Only acceptance of PPL's petition, and reversal of the judgment, can remedy these important property ownership concerns of the members of MWRA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

JON METROPOULOS
Counsel of Record
GOUGH, SHANAHAN,
JOHNSON & WATERMAN
33 S. Last Chance Gulch
Helena, MT 59601
jonmetro@gsjw.com
(406) 442-8560
Counsel for Amicus Curiae

September 15, 2010

JOINT APPENDIX

RECORD
AND
BRIEFS

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Montana

JOINT APPENDIX, Vol. 1 of 3

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS, LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M St. NW, Ste. 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

STEPHEN C. BULLOCK
ATTORNEY GENERAL
Office of the
Attorney General
215 North Sanders
Helena, MT 59620-1401
Counsel for Respondent

ASHLEY C. PARRISH
PAUL A. MEZZINA
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
Counsel for Petitioner

August 31, 2011

Additional counsel on inside cover

Petition for Writ of Certiorari filed August 12, 2010
Petition for Writ of Certiorari granted June 20, 2011

Library of Congress
Law Library

ANTHONY JOHNSTONE
Solicitor
MONTANA DEPARTMENT
OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Additional counsel
for Respondent

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St., Ste. 1500
Billings, MT 59101
(406) 252-2166

Additional counsel
for Petitioner

TABLE OF CONTENTS

VOLUME 1

PPL Montana, LLC v. State of Montana,
No. DV-25-2004-0000846-DK,
Lewis & Clark County District Court,
Relevant Docket Entries ..... JA 1

PPL Montana, LLC v. State of Montana,
No. DA 08-0506, Montana Supreme Court,
Relevant Docket Entries ..... JA 42

Affidavit of B. McFarland (no exhibits)
May 11, 2011 (Dkt. # 85) ..... JA 45

Affidavit of J. Foley
May 10, 2006 (Dkt. # 86) ..... JA 50

Exhibit 1,
M. Burlingame & K. Toole,
A History of Montana, Vol. II
Excerpted materials ..... JA 55

Exhibit 2,
M. White,
David Thompson's Journals Relating to Montana and Adjacent Regions, 1808–1812 (1950)
Excerpted materials ..... JA 59

Exhibit 3,
M. E. Hahn,
In Retrospect:
A History of Mineral County
Excerpted materials ..... JA 92

Exhibit 4,
J. Hamilton,
From Wilderness to Statehood
A History of Montana 1805–1900
Excerpted materials ..... JA 98

Exhibit 5,
O. Johnson,
Flathead and Kootenay:
The Rivers, the Tribers, and the
Region's Traders (1969)
Excerpted materials ..... JA 102

Exhibit 6,
The Montana Almanac
(1959–1960 ed.)
Excerpted materials ..... JA 110

Exhibit 7,
Rocky Mountain Gazette
Excerpted materials
from August 18, 1866 publication . JA 115

Exhibit 8,
The Helena Herald,
Excerpted materials from
May 2, 1867, June 5, 1867,
September 12, 1867, and
February 13, 1868 publications ... JA 117

Exhibit 9,
Sanders County Ledger,
Excerpted materials from
February 6, 1958, April 19, 1907,
July 22, 1910, and
March 13, 1914 publications . . . . . JA 123

Exhibit 10,
The Missoula Pioneer,
Excerpted materials from
March 2, 1871, and July 13, 1872
publications . . . . . JA 130

Exhibit 11,
Missoula and Cedar Creek Pioneer,
Excerpted materials from
December 8, 1870 publication . . . . . JA 134

Exhibit 12,
Unnamed newspapers,
Excerpted materials from
June 9, 1882, June 30, 1882,
July 7, 1882, August 18, 1882,
September 8, 1882, and
February 24, 1883 publications . . . JA 136

Exhibit 13,
The Journals of the Lewis & Clark Expedition, Vol. 4, April 7–
July 27, 1805 (Moulton, ed.)
Excerpted materials . . . . . JA 144

Exhibit 14,
The Madisonian, Virginia City, Montana, Excerpted materials from May 9, 1913, July 4, 1913, July 25, 1913, and September 19, 1913 publications ..... JA 150

Exhibit 15,
The Journals of the Lewis & Clark Expedition, July 28–November 1, 1805 (Moulton, ed.)
Excerpted materials ..... JA 157

Exhibit 16,
Hiram M. Chittenden, *History of Early Steamboat Navigation on the Missouri River* (New York 1903)
Excerpted materials ..... JA 166

Exhibit 17,
Montana: the Magazine of Western History (April 1959)
Excerpted materials ..... JA 171

Exhibit 18,
The River Press,
Excerpted materials from April 13, 1881 publication ..... JA 179

Exhibit 19,
Great Falls Tribune,
Excerpted materials from November 9, 1887 publication .... JA 180

Exhibit 20,
Contributions to the Historical Society of Montana, Vol. 8 (1917)
Excerpted materials ..... JA 182

Exhibit 21,
General Thomas James,
Three Years Among the Indians and Mexicans (Douglas, ed. 1916)
Excerpted materials ..... JA 187

Affidavit of M. Mason Affidavit
May 15, 2006 (Dkt. # 87) ..... JA 190

Exhibit A,
Montana Navigable Water Study
(December 1986) ..... JA 196

Exhibit B,
Report on the Navigability of the Clark Fork of the Columbia River, Idaho and Montana ..... JA 225

Exhibit C,
Madison River Navigation Study
(October 25, 1974) ..... JA 245

Exhibit D,
Missouri River Navigation Study
(August 12, 1974) ..... JA 293

VOLUME 2

Affidavit of R. Blair Strong
October 4, 2006 (Dkt. # 156) . . . . . JA 347

Exhibit 4,
Report of Navigability of the Clark Fork River Above Pend Oreille Lake, Idaho and Montana, April 15, 1932;

Letter from Montana Department of State Lands to Corps of Engineers, re navigability of Clark Fork River, September 9, 1932 . . . . . JA 352

Exhibit 5,
Letter from Corps of Engineers to Montana Board of Land Commissioners regarding navigability of Clark Fork River, September 20, 1932 . . . . . JA 362

Exhibit 6,
Letter from War Department, Office of the Chief of Engineers to the Division Engineer, Pacific Division, San Fran., California, February 9, 1933 Excerpted materials . . . . . JA 364

Affidavit of D. Emmons
November 1, 2006 (Dkt. # 169) . . . . . JA 367

Exhibit A,
Curriculum Vitae . . . . . JA 383

Exhibit F
Letter from Historical Research Associates to Montana Resource Development Bureau, February 14, 1986 ..... JA 393

Exhibit H,
The Journal of the Lewis & Clark Expedition, Vol. 4, April 7–July 27, 1805 (Moulton, ed.)
Excerpted materials ..... JA 396

Exhibit I,
Elevation map of Missouri River prepared by Captain W. Clark .... JA 436

Exhibit J
The Journals of the Lewis & Clark Expedition, Vol. 5, July 28–November 1, 1805 (Moulton, ed.),
Excerpted materials ..... JA 438

Exhibit K
War Department memorandum, dated November 2, 1896, enclosing United States Engineers Office report regarding maintenance of dam, Black Eagle Falls, Missouri River, October 24, 1896 ..... JA 470

Exhibit L
War Department, Report of the Chief of Engineers, for fiscal year ended June 30, 1898
Excerpted materials ..... JA 473

Exhibit M
Report from the Chief of Engineers
on the Jefferson, Madison, and
Gallatin Rivers, Montana,
December 16, 1931
Excerpted materials ..... JA 478

Exhibit N
Executive Documents of the House of
Representatives for the First Session
of the Fifty-Second Congress 1891-1892,
Excerpt: Report of Chief of the
Engineers, U.S. Army,
March 21, 1891 ..... JA 562

Exhibit O
Letter from U.S. Corps. of Engineers to
M.O. Leighton, Consulting Engineer,
November 22, 1940 ..... JA 567

Affidavit of S. Schumm
October 23, 2006 (Dkt. # 170) ..... JA 570

Exhibit A,
Curriculum Vitae ..... JA 583

Exhibit C,
Charts Comparing Pre- and
Post-Dam Discharge on Madison
River below Ennis Lake ..... JA 625

Exhibit D,
Historical Map of Area that
Today Includes Ennis Lake
Excerpted material ..... JA 628

Supplemental Affidavit of J. Foley
November 1, 2006 (Dkt. # 175) . . . . . JA 629

Exhibit,
David Thompson's Journals Relating to Montana and Adjacent Regions, 1808–1812 . . . . . JA 632

Exhibit C to PPL Montana's Reply Brief in Support of Motion in Limine, October 8, 2007 (Dkt. # 336) — Report of the Commissioner of State Land and Investments for fiscal years beginning July 1, 1930 and ending June 30, 1932
Excerpted materials . . . . . JA 650

VOLUME 3

Report of S. Schumm — Navigability of Three Rivers (Madison, Missouri, and Clark Fork), June 15, 2007 (Dkt. # 420) . . JA 656

Fig. 1 (p. 1.3)
Channel classification based on pattern and type of sediment load . . . . . JA 665

Fig. 2 (p. 1.4)
Types of anastomosing rivers . . . . . JA 668

Fig. 7 (p. 2.6)
Madison River: View of Flume, March 10, 1905 . . . . . JA 674

Fig. 8 (p. 2.7)
Madison River: Power House Site, September 23, 1905 . . . . . JA 675

Fig. 13 (p. 2.14)
Pre- and post-dam mean monthly discharge (Madison) . . . . . JA 684

Chart (p. 3.1–3.2)
Listing obstructions and features upstream from the Fort Benton bridge . . . . . JA 686

Fig. 16 (p. 3.3)
Missouri River System profile . . . . JA 690

Fig. 17 (p. 3.4)
Missouri River in T11N, R2W upstream of Trout Creek, GLO map, 1870 . . . . . JA 691

Fig. 20 (p. 3.7)
Ryan Dam at Great Falls, 2007 . . . JA 694

Fig. 21 (p. 3.8)
Clark's map of Great Falls reach . . JA 695

Fig. 22 (p. 3.9)
Rainbow Falls, 1908 . . . . . JA 696

Fig. 23 (p. 3.10)
Great Falls, 1908 . . . . . JA 697

Fig. 24 (p. 3.11)
Black Eagle Falls, 1883 . . . . . JA 698

Fig. 25 (p. 3.12)
Crooked Falls, circa 1900 ..... JA 699

Fig. 27 (p. 3.18)
Pre- and post-dam mean
monthly discharge (Missouri) ..... JA 710

Fig. 31 (p. 4.3)
Thompson Falls, view looking
north, showing Powerhouse location,
circa 1912 ..... JA 715

Fig. 32 (p. 4.4)
Thompson Falls, Montana,
January 11, 1914 ..... JA 716

Chart (p. 4.5)
List of impediments to
navigation between St. Regis
and Thompson Falls ..... JA 717

Exhibit D
Location Maps ..... JA 723

Report of D. Emmons — Navigation Report:
A Study of the Historic Uses of the Missouri,
Madison, and Clark Fork Rivers in Montana
June 2007 (Dkt. # 420) ..... JA 729

note 12,
The Journals of the Lewis & Clark Expedition, Vol. 4, April 7–
July 27, 1805 (Moulton, ed.)
Excerpted materials ..... JA 824

note 13,
The Journals of the Lewis & Clark Expedition, Vol. 4, April 7–July 27, 1805 (Moulton, ed.)
Excerpted materials ..... JA 827

note 15,
The Journals of the Lewis & Clark Expedition, Vol. 4, July 28–August 19, 1805 (Moulton, ed.)
Excerpted materials ..... JA 831

note 16,
The Journals of the Lewis & Clark Expedition, The Journals of Joseph Whitehouse, May 14, 1804–April 2, 1806
Excerpted materials ..... JA 836

note 31,
Acts, Resolutions and Memorials of the Territory of Montana, First Legislative Assembly, December 12, 1864
Excerpted materials ..... JA 842

note 33,
Samuel Barker, *Examination of Missouri River from Hauser Lake to Cascade with Respect to Navigability,* September 6, 1916
Excerpted materials ..... JA 845

Sheet No. 9 —
Map of Missouri River ..... JA 859

Photograph (No. 12)
Bear Tooth Rapids, mile 104 . . . JA 860

Photograph (No. 25)
Lower Half Breed Rapids . . . . . JA 861

Reports from the War Department
Excerpted materials from notes 20, 21, 26, 28, 37, 38, 41, 42, 43, 45, and 46 . . . . . JA 862

Report on the Construction of a Military Road from Fort Walla-Walla to Fort Benton (1863) . . . JA 862

Report of a Reconnaissance from Carroll, Montana Territory on the Upper Missouri to the Yellowstone National Park and Return Made in the Summer of 1875 (1876) . . JA 868

Report of the Chief of Engineers: Examination of the Missouri River above the Mouth of the Yellowstone (1875) . . . . . JA 871

Report of Chief Engineers: Special Report on Improvement of the Missouri River Above the Mouth of the Yellowstone (1878) . . . . . JA 874

Report of the Chief of Engineers, U.S. Army (1880) . . . . . JA 876

H.R. Ex. Doc. No. 1, 47th Cong., Report of the Secretary of War, Appendix T: Improvement of the Missouri River Above the Mouth of the Yellowstone (1882) ..... JA 879

H.R. Ex. Doc. No. 1, 48th Cong., Report of the Secretary of War, Appendix V: Improvement of the Missouri River from Sioux City, Iowa to Fort Benton, Montana (1883) ..... JA 883

H.R. Ex. Doc. No. 1, 40th Cong., Report of the Secretary of War, Appendix XX: Report of the Chief of Engineers, U.S. Army (1885) . JA 890

H.R. Ex. Doc. No. 1, 40th Cong., Report of the Secretary of War, Appendix XX: Reports of the Missouri Rivers Commission (1885) ..... JA 893

H.R. Ex. Doc. No. 1, 52d Cong., Report of the Secretary of War, Improvement of Missouri River Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1891) ..... JA 898

H.R. Ex. Doc. No. 1, 52d Cong., Annual Report of the Chief of Engineers, Preliminary Examination of Missouri River, Montana, between Great Falls and Cañon Next Below Stubbs Ferry (1892) . . . . . JA 900

H.R. Ex. Doc. No. 1, 54th Cong., Report of the Secretary of War, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1895) . . . . . JA 905

Letter from Secretary of War regarding Maintenance of Dam, Black Eagle Falls, Missouri River (1896) . . . JA 908

H.R. Ex. Doc. No. 1, 54th Cong., Report of the Secretary of War, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1896) . . . . . JA 910

H.R. Ex. Doc. No. 2, 55th Cong., Annual Reports of the War Department for the Fiscal Year ended June 30, 1898, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1898) . . . . . JA 913

Annual Reports of the War Department for the Fiscal Year ended June 30, 1915, Historical Summary Giving Scope of Previous Projects for Improvement of Rivers and Harbors in the Kansas City, Missouri, District (1915) . . . . . JA 918

Rebuttal Report of S. Schumm July 13, 2007 (Dkt. # 420) . . . . . JA 922

Exhibit A, River Map of the Madison . . . . . JA 951

Exhibit B, River Maps of the Missouri . . . . . JA 953

Exhibit C, River Maps of the Clark Fork . . . . . JA 956

PPL Montana, LLC v. State of Montana, No. DA 08-0506, Montana Supreme Court, Amicus Brief of School Trust Representatives, April 20, 2009, Excerpted materials . . . . . JA 959

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

PPL Montana, LLC v. State of Montana,
No. DA 08-0506, Opinion of the
Supreme Court of Montana,
dated March 30, 2010 . . . . . Pet.App.1

PPL Montana, LLC v. State of Montana,
No. CDV-2004-846, Memorandum of
Decision of the Montana First Judicial
District Court, Lewis & Clark County,
dated June 13, 2008 . . . . . Pet.App.118

PPL Montana, LLC, et al. v. State of Montana,
No. CDV-2004-846, Memorandum and
Order on the Navigability of the Missouri,
Madison and Clark Fork Rivers of the
Montana First Judicial District Court,
Lewis & Clark County,
dated August 28, 2007 . . . . . Pet.App.130

PPL Montana, LLC, et al. v. State of Montana,
No. CDV-2004-846, Memorandum and
Order of the Montana First Judicial
District Court, Lewis & Clark County,
dated April 14, 2006 . . . . . Pet.App.145

RELEVANT DOCKET ENTRIES

LEWIS & CLARK COUNTY DISTRICT COURT
Civil Docket for Case #DV-25-2004-0000846-DK

PPL MONTANA, LLC, *et al* v. STATE OF MONTANA, *et al*

Date Filed	#	Document
11/12/2004	1.000	Complaint For Declaratory Relief
11/24/2004	2.000	State Of Montana's Answer And Counterclaims
11/24/2004	3.000	State Of Montana's Motion For Summary Judgment And Brief In Support
		* * *
02/04/2005	16.000	Motion To Intervene - Richard Dolan, Denise Hayman, Great Falls Public School Elementary School District No. 1, High School District No. 1A and Mea-mft (Collectively 'Intervenor-defendant")
02/04/2005	17.000	Intervenor-defendants' Answer In Intervention And Counterclaims
02/07/2005	18.000	Avista Corporation's Answer To State Of Montana's Counterclaims
02/07/2005	19.000	Avista Corporation's Rule 56(F) Motion

02/07/2005	20.000	Avista Corporation's Brief In Support Of Rule 56(F) Motion
02/07/2005	21.000	Avista Corporation's Response To State Of Montana's Motion For Summary Judgment
02/07/2005	22.000	Affidavit Of Robert D. Anderson - Avista Corporation
02/07/2005	23.000	Affidavit Of Donald J. Malisani - Avista Corporation
02/07/2005	24.000	Affidavit Of David J. Meyer - Avista Corporation
02/07/2005	25.000	Plaintiff Ppl Montana, Llc's Answer To Defendant's Counterclaims And Affirmative Defenses
02/07/2005	26.000	Ppl Montana, Llc's Alternative Motion For Rule 56(F) Relief
02/07/2005	27.000	Ppl Montana Llc's Brief In Support Of Its Alternative Motion For Rule 56(F) Continuance Of State's Motion For Summary Judgment Pending Discovery
02/07/2005	28.000	Ppl Montana, Llc's Brief In Opposition To State's Motion For Summary Judgment
02/07/2005	29.000	Affidavit Of David B. Kinnard In Support Of Ppl Montana, Llc's Opposition To State's Motion for Summary Judgment And Ppl Montana, LLC's Alternative Motion For Rule 56(F) Relief - Plaintiff
02/07/2005	30.000	Plaintiff Pacificorp's Answer To

		Defendant's Counterclaims And Affirmative Defenses
02/07/2005	31.000	Plaintiff Pacificorp's Alternative Motion For Rule 56(F) Continuance
02/07/2005	32.000	Plaintiff Pacificorp's Brief In Opposition To State's Motion For Summary Judgment And Brief In Support Of Alternative Motion For Rule 56(F) Continuance
02/07/2005	33.000	Affidavit Of Chad E. Paulson In Opposition To State's Motion For Summary Judgment And In Support Of Pacificorp's Motion For Rule 56(F) Continuance
		* * *
02/11/2005	35.000	Intervenor-defendant's Brief In Support Of Intervention - Intervenor/defendants
		* * *
03/01/2005	41.000	Ppl Montana Llc's Brief In Opposition To Motion to Intervene - Plaintiff
		* * *
03/01/2005	44.000	Montana's Opposition To Applicant's Motion To Intervene
		* * *
03/07/2005	46.000	Avista Corporation's Response To Proposed Defendant-intervenor's Motion To Intervene
		* * *

03/04/2005	48.000	Plaintiff Pacificorp's Opposition To Motion To Intervene
	* * *	
03/11/2005	52.000	Reply In Support Of Summary Judgment On Dam Corporation's Claims - Defendant State Of Montana
03/25/2005	53.000	Intervenor-defendant's Combined Reply To Ppl Montana, Llc's Avista Corporation's And Pacificorp's Opposition To Motion To Intervene
	* * *	
03/28/2005	56.000	Plaintiff Pacificorp's Reply Brief In Support Of Alternative Motion For Rule 56(F) Continuance - Plaintiff Pacificorp
03/28/2005	57.000	Intervenor-defendants' Reply To Montana's Opposition To Applicants' Motion To Intervene
03/29/2005	58.000	Ppl Montana Llc's Reply Brief In Support Of Its Alternative Motion For Rule 56(F) Continuance Of State's Motion For Summary Judgment Pending Discovery - Plaintiff
03/29/2005	59.000	Affidavit Of Kyle A. Gray In Support Of Ppl Montana, Llc's Alternative Motion For Rule 56(F) Relief - Plaintiff
04/06/2005	60.000	Avista Corporation's Joinder In Reply Briefs In Support Of

		Alternative Motion For Rule 56(F) Relief - Plaintiff
04/15/2005	61.000	Memorandum And Order On Motion To Intervene - Applicant's Motion To Intervene Is Denied
	* * *	
06/09/2005	64.000	Avista Corporation's Motion For Leave To Amend Complaint
06/09/2005	65.000	Memorandum In Support Of Avista Corporation's Motion To Amend Complaint
06/15/2005	66.000	Affidavit Of Robert L. Sterup Attaching 1910 Federal Court Decree Discussed In Pplm's Rule 56(F) Motion And Briefs On File With The Court - Plaintiff Ppl Montana, Llc
	* * *	
06/17/2005	68.000	Affidavit Of Robert L. Sterup Attaching Right Of Way Deeds Produced By The State Of Montana - Plaintiff Ppl Montana, Llc
06/21/2005	69.000	Montana's Opposition To Motion To Amend Complaint
06/28/2005	70.000	Minute Entry (6/28/2005) - Time Set For Hearing On State's Motion For Summary Judgment And Utility's Alternate Motion For Rule 56(F). Arguments Made, Court Deemed Matter Submitted.
	* * *	

07/07/2005	72.000	Avista Corporation's Reply To Montana's Opposition To Motion To Amend Complaint (Fax)
07/08/2005	73.000	Avista Corporation's Reply To Montana's Opposition To Motion To Amend Complaint
	* * *	
10/07/2005	78.000	Notice Of Ruling In Case - Plaintiff Ppl Montana, Llc
	* * *	
04/14/2006	81.000	Memorandum And Order On Avista's Motion To Amend Its Complaint - Avista's Motion To Amend Its Complaint To Allege The Clark Fork River Is Not Navigable Is Granted. Avista's Motion To Amend Its Complaint To Add Claims For Breach Of Contract And Negligent Misrepresentation Is Denied. The State Is Granted Ten Days From The Date Of Avista's Amended Complaint Is Filed To Answer The Amended Complaint.
04/14/2006	82.000	Memorandum And Order - The Utilities' Rule 56(F) Motion Is Denied. The State's Motion For Summary Judgment Is Granted.
05/12/2006	83.000	State's Rule 56(C) Motion For Partial Summary Judgment On Liability And Rule 37(C) Expenses
05/12/2006	84.000	Brief In Support Of State's Rule

		56(C) Motion For Partial Summary Judgment On Liability And Rule 37(C) Expenses
	* * *	
05/12/2006	86.000	Affidavit Of Jodie Foley - State
05/12/2006	87.000	Affidavit Of Monte Mason - State
	* * *	
05/15/2006	89.000	Ppl Montana's Motion For Partial Summary Judgment Regarding Successor Liability - Plaintiff, Ppl Montana, Llc
05/15/2006	90.000	Ppl Montana's Brief In Support Of Motion For Partial Summary Judgment Regarding Successor Liability - Plaintiff, Ppl Montana, Llc
05/15/2006	91.000	Affidavit Of David B. Kinnard In Support Of Ppl Montana's Motion For Partial Summary Judgment Regarding Successor Liability - Plaintiff, Ppl Montana, Llc
05/15/2006	92.000	Affidavit Of Paul T. Champagne In Support Of Ppl Montana's Motion For Partial Summary Judgment Regarding Successor Liability - Plaintiff, Ppl Montana, Llc
	* * *	
05/15/2006	94.000	Affidavit Of Bob Mcfarland - State
	* * *	

05/23/2006	96.000	Plaintiff Ppl Montana, Llc's Motion For Leave To File An Amended Answer To Defendant State Of Montana's Counterclaims And Affirmative Defenses
05/23/2006	97.000	Plaintiff Ppl Montana, Llc's Brief In Support Of Motion For Leave To File An Amended Answer To Defendant State Of Montana's Counterclaims And Affirmative Defenses
05/23/2006	98.000	Affidavit Of David B. Kinnard In Support Of Ppl Montana's Motion To File An Amended Answer To Defendant State Of Montana's Counterclaims And Affirmative Defenses
	* * *	
06/09/2006	101.000	Scheduling Order - Trial Is Set For 10/15/2007 At 9:00 Am. Final Pretrial Conference Is Set For 10/5/2007 At 10:00 Am. See Order For Deadlines. Oral Arguments On Pretrial Motions On Liability Issues Will Be Held On December 14, 2006 At 9:00 A.m.
06/16/2006	102.000	Pacificorp's Motion For Leave To File Amended Answer To Defendant State Of Montana's Counterclaims And Affirmative Defenses - Plaintiff
05/12/2006	103.000	Pacificorp's Brief In Support Of

		Motion For Leave To File Amended Answer To Defendant State Of Montana's Counterclaims And Affirmative Defenses - Plaintiff
06/16/2006	104.000	Avista Corporation's Motion For Leave To File Amended Answer To State Of Montana's Counterclaims - Plaintiff
06/16/2006	105.000	Plaintiff, Avista Corporation's Brief In Support Of Motion For Leave To File Amended Answer To State Of Montana's Counterclaim And Affirmative Defenses - Plaintiff
06/16/2006	106.000	Avista Corporation's First Amended Complaint For Declaratory Relief - Plaintiff
06/16/2006	107.000	Response Of State Of Montana To The Motion Of Ppl Montana Regarding Successor Liability - Defendant
06/16/2006	108.000	Answer Brief Of State Of Montana In Response To The Motion Of Ppl Montana To The Counterclaim Of The State - Defendant
06/16/2006	109.000	Affidavit Of Donald J. Malisani -Plaintiff, Avista Corporation
* * *		
07/05/2006	111.000	Ppl Montana's Reply In Support Of Its Motion To File An Amended Answer To Defendant's Counterclaims And

		Affirmative Defenses - Plaintiff
07/05/2006	112.000	Affidavit Of Kyle A. Gray - Plaintiff
07/05/2006	113.000	Answer Brief In Opposition To Pacificorp's Motion For Leave To File Amended Answer To Defendant State Of Montana's Counterclaims And Affirmative Defenses - Defendant/ counterclaimant State Of Montana
07/05/2006	114.000	Answer Brief In Opposition To Avista's Motion For Leave To Amend Answer To State's Counterclaim - Defendant/ counter-claimant State Of Montana
07/17/2006	115.000	Avista Corporation's Reply In Support Of Its Motion To file Amended Answer To Defendant's Counterclaims And Affirmative Defenses - Plaintiff
		* * *
07/24/2006	119.000	Pacificorp's Reply In Support Of Motion For Leave To File Amended Answer To Defendant State Of Montana's Counterclaims And Affirmative Defenses (Fax)
07/25/2006	120.000	Pacificorp's Reply In Support Of Motion For Leave To File Amended Answer To Defendant State Of Montana's Counterclaims And Affirmative

		Defenses
	* * *	
07/27/2006	122.000	Stipulation For Order Granting Ppl Montana's Motion For Partial Summary Judgment Regarding Successor Liability
07/28/2006	123.000	Order Granting Ppl Montana's Motion For Partial Summary Judgment Regarding Successor Liability - Ppl Montana's Motion For Partial Summary Judgment Regarding Successor Liability Granted. State Barred From Seeking Monetary Relief From Ppl Montana, Llc For Time Period Pre-dating 12/17/1999.
	* * *	
10/06/2006	127.000	Ppl Montana's Motion For Partial Summary Judgment Regarding Status Of School Trust Lands - Plaintiff
10/06/2006	128.000	Ppl Montana's Brief In Support Of Motion For Partial Summary Judgment Regarding Status Of School Trust Lands - Plaintiff
10/06/2006	129.000	Ppl Montana's Decision Tree And Terminology Used In Its Motions For Partial Summary Judgment - Plaintiff
10/06/2006	130.000	Ppl Montana's Motion For Partial Summary Judgment Regarding Status Of Flooded Lands - Plaintiff
10/06/2006	131.000	Ppl Montana's Brief In Support

		Of Motion For Partial Summary Judgment Regarding Status Of Flooded Lands - Plaintiff
10/06/2006	132.000	Ppl Montana's Motion To Dismiss Flooded Lands Declaratory Claims For The Failure To Name All Persons Affected Thereby - Plaintiff
10/06/2006	133.000	Ppl Montana's Brief In Support Of Motion To Dismiss Flooded Lands Declaratory Claims For The Failure To Name All Persons Affected Thereby - Plaintiff
10/06/2006	134.000	Ppl Montana's Motion For Partial Summary Judgment Regarding Prima Facie Evidence Of Ownership Of Lands - Plaintiff
10/06/2006	135.000	Ppl Montana's Brief In Support Of Motion For Partial Summary Judgment Regarding Prima Facie Evidence Of Ownership Of Lands - Plaintiff
10/06/2006	136.000	Ppl Montana's Motion For Partial Summary Judgment That The Right To Appropriate Water For The Beneficial Use Of Hydropower Includes The Incidental Right To Use State Lands - Plaintiff
10/06/2006	137.000	Ppl Montana's Brief In Support Of Motion For Partial Summary Judgment That The Right To

		Appropriate Water For The Beneficial Use Of Hydropower Includes The Incidental Right To Use State Lands - Plaintiff
10/06/2006	138.000	Ppl Montana's Motion For Partial Summary Judgment On Application For 1931 Hydroelectric Resources Statute - Plaintiff
10/06/2006	139.000	Ppl Montana's Brief In Support Of Motion For Partial Summary Judgment On Application For 1931 Hydroelectric Resources Statute - Plaintiff
10/06/2006	140.000	Ppl Montana's Motion For Partial Summary Judgment Barring Damages Claims Under Statutes Of Limitation - Plaintiff
10/06/2006	141.000	Ppl Montana's Brief In Support Of Motion For Partial Summary Judgment On Liability And Rule 37(C) Expenses - Plaintiff
10/06/2006	142.000	Ppl Montana's Motion To Strike Affidavits And/or Exhibits In State Of Montana's Rule 56(C) Motion For Partial Summary Judgment On Liability And Rule 37(C) Expenses - Plaintiff
10/06/2006	143.000	Ppl Montana's Brief In Support Of Motion To Strike Affidavits And/or Exhibits In State Of Montana's Rule 56(C) Motion For Partial Summary Judgment

		On Liability and Rule 37(C) Expenses - Plaintiff
10/06/2006	144.000	Affidavit Of David B. Kinnard (October 5, 2006) - Plaintiff
10/06/2006	145.000	Affidavit Of Clare H. Young (October 5, 2006) - Plaintiff
* * *		
10/06/2006	147.000	Avista Corporation's Motion No. 1: Motion To Strike - Plaintiff
10/06/2006	148.000	Avista Corporation's Brief In Support Of Motion No. 1: Motion To Strike - Plaintiff
10/06/2006	149.000	Avista Corporation's Motion No. 2: Motion For Partial Summary Judgment Regarding Navigability Of The Clark Fork River - Plaintiff
10/10/2006	150.000	Avista Corporation's Motion No. 2: Motion For Partial Summary Judgment Regarding Navigability Of The Clark Fork River -Plaintiff
10/06/2006	151.000	Avista Corporation's Motion No. 3: Motion For Partial Summary Judgment Regarding Status Of Flooded Lands - Plaintiff
10/06/2006	152.000	Avista Corporation's Brief In Support Of Motion No. 3: Motion for Partial Summary Judgment Regarding Status Of Flooded Lands - Plaintiff
10/06/2006	153.000	Affidavit Of Donald J. Malisani In Support Of Avista Corporation's Motion For Partial

		Summary Judgment Regarding Status Of Flooded Lands - Plaintiff
10/06/2006	154.000	Avista Corporation's Motion No. 4: Motion For Summary Judgment (School Trust Lands) - Plaintiff
10/06/2006	155.000	Avista Corporation's Brief In Support Of Motion No. 4: Motion For Summary Judgment (School Trust Lands) - Plaintiff
10/06/2006	156.000	Affidavit Of R. Blair Strong In Support Of Avista Corporation's Motions For Summary Judgment - Plaintiff
10/06/2006	157.000	Avista Corporation's Motion No. 5: Motion For Partial Summary Judgment Regarding The Incidental Right To Use State Lands To Appropriate Water - Plaintiff
10/06/2006	158.000	Avista Corporation's Brief In Support Of Motion No. 5: Motion For Partial Summary Judgment Regarding The Incidental Right To Use State Lands To Appropriate Water - Plaintiff
10/10/2006	159.000	Order Granting Plaintiff Ppl Montana's Request For Leave To File Original Depositions - Ppl Montana Has Leave Of Court To File All Original Depositions

10/13/2006	160.000	Pacificorp's Joinder In Motions For Summary Judgment, To Dismiss, And To Strike (Fax) - Plaintiff
10/13/2006	161.000	Affidavit Of Chad E. Paulson In Support Of Pacificorp's Joinder Of Motions (Fax) - Plaintiff
10/16/2006	162.000	Pacificorp's Joinder In Motions For Summary Judgment, To Dismiss, And To Strike - Plaintiff
10/16/2006	163.000	Affidavit Of Chad E. Paulson In Support Of Pacificorp's Joinder Of Motions - Plaintiff
10/24/2006	164.000	Avista Corporation's Joinder In Motions Filed By Ppl Montana, Llc - Plaintiff Avista Corporation
11/03/2006	165.000	Pacificorp's Response To State's Rule 56(C) Motion For Partial Summary Judgment On Liability And Rule 37(C) Expenses
11/03/2006	166.000	Affidavit Of Robert L. Aldisert In Support Of Pacificorp's Response To State's Motion for Summary Judgment On Liability And Expenses
11/03/2006	167.000	Affidavit Of Leslie Ann Budewitz - Plaintiff Pacificorp
11/03/2006	168.000	Ppl Montana's Brief In Opposition To The State's Motion For Partial Summary Judgment On Liability & Rule

		37(C) Expenses
11/03/2006	169.000	Affidavit Of David M. Emmons In Support Of Ppl Montana's Opposition To The State's Motion For Partial Summary Judgment And Rule 37(C) Expenses
11/03/2006	170.000	Affidavit Of Stanley A. Schumm In Support Of Ppl Montana's Opposition To The State's Motion For Partial Summary Judgment And Rule 37(C) Expenses
11/03/2006	171.000	State's Combined Brief In Opposition To Utilities' Motion For Summary Judgment
11/03/2006	172.000	Affidavit Of Jon Ellingson - Defendant
11/03/2006	173.000	Affidavit Of Tommy Butler - Defendant
11/03/2006	174.000	State's Opposition To Utilities' Motion To Strike
11/03/2006	175.000	Supplemental affidavit Of Jodie Foley - Defendant
11/03/2006	176.000	State's Brief In Opposition To Motion To Dismiss Submerged Lands Claims
		* * *
11/03/2006	178.000	Avista Corporation's Response To The State Of Montana's Motion for Partial Summary Judgment On Liability And Rule 37(C) Expenses (Fax)
11/06/2006	179.000	Avista Corporation's Responses

		To The State Of Montana's Motion For Partial Summary Judgment On Liability And Rule 37(C) Expenses
		* * *
11/22/2006	181.000	Motion To Strike Improper Opinions Of Undisclosed Experts - Defendant
11/22/2006	182.000	Brief In Support Of Motion To Strike Improper Opinions Of Undisclosed Experts - Defendant
12/08/2006	183.000	Reply In Support Of Partial Summary Judgment On Liability And Rule 37(C) Expenses - Defendant
12/08/2006	184.000	Affidavit Of Anthony Johnstone - Defendant
12/08/2006	185.000	Ppl Montana's Reply Brief In Support Of Motion For Partial Summary Judgment Regarding Status Of Flooded Lands - Plaintiff
12/08/2006	186.000	Ppl Montana's Reply Brief In Support Of Motion To Dismiss Flooded Lands Declaratory Claims For The Failure To Name All Persons Affected Thereby - Plaintiff
12/08/2006	186.500	Ppl Montana's Reply Brief In Support Of Motion For Partial Summary Judgment Barring Damages Claims Under Statutes Of Limitation

12/08/2006	187.000	Ppl Montana's Reply Brief In Support Of Motion For Partial Summary Judgment Regarding Status Of School Trust Lands - Plaintiff
12/08/2006	188.000	Ppl Montana's Brief In Opposition To State's Motion To Strike Improper Opinions Of Undisclosed Experts - Plaintiff
12/08/2006	189.000	Ppl Montana's Brief In Support Of Partial Summary Judgment Regarding Prima Facie Evidence Of Ownership Of Lands - Plaintiff
12/08/2006	190.000	Ppl Montana's Reply In Support Of Motion For Partial Summary Judgment That The Right To Appropriate Water For The Beneficial Use Of Hydropower Includes The Incidental Right To Use State Land - Petitioner
12/08/2006	191.000	Ppl Montana's Reply Brief In Support Of Motion To Strike Affidavits And/or Exhibits In State of Montana's Rule 56(C) Motion For Partial Summary Judgment On Liability And Rule 37(C) Expenses - Plaintiff
12/08/2006	192.000	Ppl Montana's Reply Brief In Support Of Partial Summary Judgment On Application Of 1931 Hydroelectric Resources Statute - Plaintiff
12/08/2006	193.000	December 6, 2006 Affidavit Of

		David B. Kinnard - Plaintiff
12/08/2006	194.000	Affidavit Of Clare H. Young (December 7, 2006) - Plaintiff
12/08/2006	195.000	Exhibits 1-23 - Plaintiffs
12/08/2006	196.000	Exhibits 24-56 - Plaintiffs
		* * *
12/11/2006	215.000	Pacificorp's Joinder In Replies In Support Of Motions For Summary Judgment, To Dismiss, And To Strike (Fax) - Plaintiff
12/11/2006	216.000	Avista Corporation's Brief In Opposition To State Of Montana's Motion To Strike Improper Opinions Of Undisclosed Experts - Plaintiff
12/11/2006	217.000	Avista Corporation's Reply Brief In Support Of Motion No. 1: Motion To Strike - Plaintiff
12/11/2006	218.000	Avista Corporation's Reply In Support Of Motion No. 2: Motion For Partial Summary Judgment Regarding Navigability Of The Clark Fork River - Plaintiff
12/11/2006	219.000	Avista Corporation's Reply Brief In Support Of Motion No. 3: Motion For Partial Summary Judgment Regarding Status Of Flooded Lands - Plaintiff
12/11/2006	220.000	Avista Corporation's Reply Brief In Support Of Motion No. 4: Motion For Partial Summary Judgment Regarding School

		Trust Lands - Plaintiff
12/11/2006	221.000	Avista Corporation's Reply In Support Of Motion No. 5: Motion For Partial Summary Judgment Regarding Incidental Right To Use State Lands To Appropriate Water - Plaintiff
12/12/2006	222.000	Pacificorp's Joinder In Replies In Support Of Motions For Summary Judgment, To Dismiss, And To Strike - Plaintiff
	* * *	
12/14/2006	224.000	Minute Entry (12/14/2006) - Time Set For Oral Arguments. Matter Submitted
	* * *	
06/18/2007	237.000	Pacificorp's And Montana's Motion For Rule 41(A)(2) Voluntary Dismissal
06/19/2007	238.000	Order Dismissing Pacificorp As Plaintiff And Counterclaim-defendant - Dismissed With Prejudice, Each Party To Bear Its Own Costs And Fees
	* * *	
08/28/2007	245.000	Memorandum And Order On Motions For Summary Judgment On Whether The Streambeds Of The Missouri, Madison And Clark Fork Rivers Are School Trust Lands - State's Motion For Partial Summary Judgment Is Granted; Avista

		And Ppl's Motion For Summary Judgment Is Denied; Ppl's Motion For Partial Summary Judgment Is Denied
08/28/2007	246.000	Memorandum And Order On Navigability Of The Missouri, Madison And Clark Fork Rivers - State's Motion For Partial Summary Judgment Is Granted. Avista's Motion Is Denied
08/28/2007	247.000	Memorandum And Order On Ppl's Motion For Partial Summary Judgment Barring The State's Counterclaims For Monetary Damages - Ppl's Motion For Partial Summary Judgment Is Denied
09/04/2007	248.000	Ppl Montana's Motion For Partial Summary Judgment Regarding Damages, Or, Alternatively, Motion In Limine To Exclude Testimony And Evidence Related To Shared Net Benefits Theory
09/04/2007	249.000	Ppl Montana's Brief In Support Of Motion For Partial Summary Judgment Regarding Damages, Or, Alternatively, Motion In Limine To Exclude Testimony And Evidence Related To Shared Net Benefits Theory
09/04/2007	250.000	August 31, 2007 Affidavit Of David B. Kinnard In Support Of Motion For Partial Summary Judgment Regarding Damages,

		Or, Alternatively, Motion In Limine To Exclude Testimony And Evidence Related To Shared Net Benefits Theory - Plaintiff, Ppl Montana, Inc.
		* * *
09/04/2007	253.000	Memorandum And Order On Ppl and Avista's Motion For Partial Summary Judgment Regarding The Flooded Lands And Ppl And Avista's Motion To Dismiss The Flooded Lands Claim - Motion For Partial Summary Judgment That The State Does Not Own The Flooded Lands Is Granted. Plaintiff And Counterdefendants Ppl And Avista's Motion To Dismiss The Flooded Lands Claim Is Denied.
09/04/2007	254.000	Memorandum And Order On Ppl's Motion For Partial Summary Judgment Regarding Prima Facie Ownership Of Lands
		* * *
09/05/2007	257.000	Affidavit Of Robert D. Anderson (Dated August 30, 2007) - Plaintiff Avista Corporation
09/05/2007	258.000	Avista Corporation's Motion For Partial Summary Judgment As To Damages
09/05/2007	259.000	Avista Corporation's Brief In Support Of Motion For Partial

		Summary Judgment As To Damages
		* * *
09/06/2007	261.000	Avista Corporation's Motion For Partial Summary Judgment Regarding Cabinet Gorge Damages
09/06/2007	262.000	Avista Corporation's Brief In Support Of Motion For Partial Summary Judgment Regarding Cabinet Gorge Damages
09/06/2007	263.000	Memorandum And Order On Ppl And Avista's Motion For Partial Summary Judgment On The Application Of The Hydroelectric Resources Act Of 1931 - Motion For Partial Summary Judgment Is Denied
09/06/2007	264.000	State Of Montana's Motion For Summary Judgment On Damages
09/06/2007	265.000	State Of Montana's Brief In Support Of Motion For Summary Judgment On Damages
		* * *
09/12/2007	266.400	Attorney's Lien And/or Claim For Reasonable Attorneys Fees And Costs Under The Common Fund Doctrine Or Equitable Powers Of Court - Beneficiaries
		* * *
09/13/2007	267.000	Memorandum And Order On The Utilities' Motion For Partial

		Summary Judgment That The Right To Appropriate Water For The Beneficial Use Of Hydropower Includes The Incidental Right To Use State Land - Motion For Partial Summary Judgment Is Denied
09/13/2007	268.000	Memorandum And Order On The Parties' Motions To Strike - Motions Are Denied.
09/14/2007	269.000	Brief In Support Of Motion To Amend Counterclaim - Defendant
		* * *
09/20/2007	271.000	Opposition To Utilities' Motions For Partial Summary Judgment On Damages - Defendant
		* * *
09/21/2007	274.000	State's Motion In Limine To Exclude Evidence On Previously Adjudged Issues
09/21/2007	275.000	Brief In Support Of Motion In Limine On Expert Witnesses - Defendant
09/21/2007	276.000	Brief In Support Of Motion In Limine To Exclude Evidence On Previously Adjudged Issues - Defendant
09/21/2007	277.000	State's Motion In Limine On Expert Witnesses
		* * *
09/21/2007	287.000	Ppl Montana's Motion In Limine To Limit Damages Evidence For Purported Wrongful Occupation

		Of Streambeds To Acreage Occupied By Dams Or Other Physical Structures
		* * *
09/24/2007	290.000	Avista's Motion In Limine No. 1: To Exclude Evidence Of State of Montana's Settlement With Pacificorp And The Little Falls Settlement Agreement
09/24/2007	291.000	Avista's Brief In Support Of Motion In Limine No. 1: To Exclude Evidence Of State Of Montana's Settlement With Pacificorp And The Little Falls Settlement Agreement
09/24/2007	292.000	Avista's Motion In Limine No. 2: To Exclude John Duffield, Ph.d
09/24/2007	293.000	Avista's Brief In Support Of Motion In Limine No. 2: To Exclude John Duffield, Ph.d.
09/24/2007	294.000	Avista's Motion In Limine No. 3: To Limit Evidence Of The State Of Montana's Damages
09/24/2007	295.000	Avista's Brief In Support Of Motion In Limine No. 3: To Limit Evidence Of The State Of Montana's Damages
09/24/2007	296.000	Avista's Motion In Limine No. 4: To Exclude Evidence Of Acreage Above The Low Water Mark Of The Clark Fork River
09/24/2007	297.000	Avista's Brief In Support Of Motion In Limine No. 4: To Exclude Evidence Of Acreage

		Above The Low Water Mark Of The Clark Fork River
09/24/2007	298.000	Avista's Brief In Response To State Of Montana's Motion For Summary Judgment On Damages
09/24/2007	299.000	September 21, 2007 Affidavit Of David B. Kinnard In Support Of Ppl Montana's Brief In Opposition To State Of Montana's Motion For Summary Judgment On Damages
09/24/2007	300.000	Ppl Montana's Brief In Opposition To State Of Montana's Motion For Summary Judgment On Damages
09/24/2007	301.000	Ppl Montana's Brief In Support Of Motion In Limine To Limit Damages Evidence For Purported Wrongful Occupation Of Riverbeds To Acreage Occupied By Dams Or Other Physical Structures
09/24/2007	302.000	Brief In Opposition To Avista Corporation's Motion For Partial Summary Judgment Regarding Cabinet Gorge
09/25/2007	303.000	Avista Corporation's Motion To Continue Trial
09/25/2007	304.000	Avista Corporation's Brief In Support Of Motion To Continue Trial
* * *		
09/27/2007	306.000	(Ppl Montana) (Copy Of

		Supreme Court) Order - Cdv 2004-846 Stayed Pending Decision Of The Supreme Court
		* * *
10/04/2007	309.000	Avista Corporation's Brief In Opposition To State's Motion To Amend Counterclaim
		* * *
10/05/2007	313.000	Avista's Response Opposing State Of Montana's Motion In Limine To Exclude Evidence On Previously Adjudged Issues
		* * *
10/05/2007	324.000	State's Reply In Support Of Summary Judgment On Damages
10/05/2007	325.000	Brief In Opposition To Avista's Motion In Limine To exclude The Testimony Of John Duffield - Defendant
10/05/2007	326.000	Brief In Opposition To Avista Corporation's Motion To Continue - Defendant
10/05/2007	327.000	Response To Avista's Motion In Limine No. 3: To Limit Evidence Of The State Of Montana's Damages - Defendant
10/05/2007	328.000	Response To Ppl Montana's Motion In Limine To Exclude Evidence Damages For Wrongful Occupation Of The Riverbeds And allow The Testimony Only As To The Dam Footprint - Defendant

10/05/2007	329.000	Response To Avista's Motion In Limine No. 4: To Exclude Evidence Of Acreage - Defendant
10/05/2007	330.000	State's Opposition To Avista's Motion In Limine To Exclude Evidence Of Past Rental Agreements - Defendant
		* * *
10/05/2007	338.000	Amended Scheduling Order - Final Pretrial Conference Set For 10/1/0207 At 10:00 Am. Trial Will Start On 10/17/2007 At 8:30 Am. See Order For Details
10/09/2007	339.000	Avista's Reply In Support Of Motion In Limine No. 4: To Exclude Evidence Of Acreage Above The Low Water Mark Of The Clark Fork River
10/09/2007	340.00	Avista's Reply In Support Of Its Motion In Limine No. 2: To Exclude John Duffield, Ph.d
10/09/2007	341.000	Avista's Reply In Support Of Motion In Limine No. 3: To Limit Evidence Of The State Of Montana's Damages
10/09/2007	342.000	Ppl Montana's Brief In Opposition To State's Motion In Limine To Exclude Evidence On Previously Adjudged Issues
10/08/2007	343.000	Ppl Montana's Brief In Support Of Avista Motions In Limine No. 1 And No. 4

10/09/2007	344.000	Ppl Montana's Brief In Opposition To State's Motion In Limine On Expert Witnesses
10/09/2007	345.000	Affidavit Of Bernard Hallin In Support Of Ppl Montana's Joinder In Avista Motions In Limine No. 1 And No. 4 - Plaintiff
10/09/2007	346.000	Affidavit Of R. Blair Strong - Plaintiff Avista Corporation
	* * *	
10/09/2007	348.000	Avista's Response Opposing State Of Montana's Motion In Limine On Expert Witnesses
10/09/2007	349.000	Avista's Reply In Support Of Motion For Partial Summary Judgment As To Damages
	* * *	
10/10/2007	354.000	Avista's Joinder In Ppl Montana's Motion In Limine To Limit Damages Evidence For Purported Wrongful Occupation Of Riverbeds To Acreage Occupied By Dams Or Other Physical Strucures
10/10/2007	355.000	Avista's Reply In Support Of Motion In Limine No. 1: To Exclude Evidence Of State Of Montana's Settlement With Pacificorp And The Little Falls Settlement Agreement
10/10/2007	356.000	Ppl Montana's Reply Brief In Support Of Motion For Partial Summary Judgment Regarding

		Damages
10/10/2007	357.000	Ppl Montana's Reply Brief In Support Of Motion In Limine To Limit Damages Evidence For Purported Wrongful Occupation Of Riverbeds To Acreage Occupied By Dams Or Other Physical Structures
10/10/2007	358.000	Affidavit Of Kyle A. Gray In Support Of Ppl Montana's Reply Brief In Support Of Motion For Partial Summary Judgment Regarding Damages
10/10/2007	359.000	Affidavit Of Bernard Hallin In Support Of Ppl Montana's Joinder In Avista Motions In Limine No. 1 And No. 4
		* * *
10/10/2007	361.000	Replacement Page 5 To Ppl Montana's Reply Brief In Support Of Motion For Partial Summary Judgment Regarding Damages / Praecipe / Plaintiff
10/10/2007	362.000	Pretrial Order
10/10/2007	363.000	Findings Of Fact And Conclusions Of Law
10/10/2007	364.000	Minute Entry (10/10/2007) - Time Set For Oral Argument On All Pending Motions. Counsel Presented Argument And The Court Deemed The Matter Submitted. Bench Trial Set For 10/17/2007 Is Reset For 10/22/2007 At 9:00 A.m.

	* * *	
10/15/2007	367.000	State's Proposed Redacted Findings Of Fact And Conclusions Of Law
10/15/2007	368.000	Montana's Motion To File Proposed Unredacted Findings & Conclusions Under Seal - Defendant
10/16/2007	369.000	Avista's Proposed Findings Of Fact And Conclusions Of Law
10/16/2007	370.000	Ppl Montana's Brief In Opposition To State Of Montana's Motion To Quash Subpoenas
10/16/2007	371.000	Pretrial Findings Of Fact And Conclusions Of Law [Ppl Montana's Proposed]
	* * *	
10/16/2007	373.000	**Filed Under Seal** - State's Proposed Unredacted Findings Of Fact And Conclusions Of Law
10/16/2007	374.000	Avista's Response To The State's Motion To Quash Subpoenas
10/16/2007	375.000	Avista's Proposed Findings Of Fact And Conclusions Of Law
10/16/2007	376.000	Order On Avista Corporation's Motion To Continue Trial - Motion Is Denied
10/16/2007	377.000	Order On Ppl Montana's Motion In Limine To Limit Damages Evidence For Purported Wrongful Occupation Of Streambeds To Acreage Occupied By Dams Or Other

		Physical Structures - Motion To Limit Damages Is Denied
10/16/2007	378.000	Memorandum And Order On Avista's Motion For Partial Summary Judgment On Damages Relating To The Cabinet Gorge Project And The State's Motion To Amend Its Counterclaim - State's Motion To Amend Counterclaim Is Denied. Avista's Motion For Summary Judgment On Damages Relating To The Cabinet Gorge Project Is Denied
10/16/2007	379.000	Order On The Parties' Motions For Summary Judgment On The Issue Of Damages (See Order)
10/16/2007	380.000	Order On Avista's Motion In Limine No. 4 - Denied
10/16/2007	381.000	Order On Avista's Motion In Limine No. 2 - Denied
10/18/2007	382.000	Order On The State's Motion In Limine To Exclude Evidence O f Previously Adjudged Issues - Motion To Exclude Evidence Is Denied. Motion To Exclude George Carter And Neil Colwell Is Granted.
10/17/2007	383.000	Order On Avista's Motion In Limine No. 3 - Motion In Limine No. 3 Is Denied
10/17/2007	384.000	Memorandum And Order On The State's Motion In Limine To Exclude Expert Witnesses -

		Motion In Limine To Exclude Richard K. Aldrich And David M. Emmons, Ph.d. Is Granted. Motion In Limine To Exclude John E. Wicks, Bruce S. Jolicoeur, Gary Saleba And Thomas Zepp is Denied.
10/17/2007	385.000	Order On Avista's Motion In Limine No. 1 (See Order)
		* * *
10/17/2007	387.000	Reply Brief In Support Of Motion To Quash Subpoenas Expedited Consideration Requested - Defendant
10/18/2007	388.000	Avista Corporation's Trial Brief - Plaintiff
		* * *
10/18/2007	390.000	Ppl Montana's Trial Brief
		* * *
10/22/2007	393.000	Stipulation And Joint Motion For Stay Under Seal
10/22/2007	394.000	Order Granting Stay Under Seal - Proceedings Between Avista And The State Are Stayed Pending Finalization Of Consent Decree Motion And This Order Shall Be Placed Under Seal Until 10/23/2007
10/22/2007	394.500	Letter Dated 10/17/2007 To Judge Honzel From Robert Sterup Regarding Motion To Quash Testimonial Subpoenas
10/22/2007	395.000	Ppl Montana's Unopposed Motion To Withdraw Subpoenas

		Of Mike Mcgrath And Candace West
10/22/2007	396.000	Exhibits Replaced On 10/24/2007/ Praecipe / Defendant
		* * *
10/23/2007	398.000	State's Motion In Limine To Exclude October 5, 2007 Hallin Report And Opinions
10/23/2007	399.000	State's Brief In Support Of Motion In Limine To Exclude October 17 Saleba Report And Opinions
10/23/2007	400.000	State's Motion In Limine To Exclude Evidence Of State Estoppel, Consent, Waiver, Inducement, Notice, Etc.
10/23/2007	401.000	Brief In Support Of State's Motion In Limine to Exclude Evidence Of State Estoppel, Consent, Waiver, Inducement, Notice, Etc.
10/23/2007	402.000	State's Motion In Limine To Exclude October 17, 2007 Saleba Report And Opinions
10/23/2007	403.000	State's Brief In Support Of Motion In Limine To Exclude October 5, 2007 Hallin Report And Opinions
10/22/2007	404.000	Minute Entry (10/22/2007) - Time Set For Bench Trial. Sworn Testimony Given. Exhibits Offered And Admitted. Hearing Is Continued To

		10/23/2007 At 9:00 Am
		* * *
10/23/2007	406.000	Minute Entry (10/23/2007) - Time Set For Continuation Of Bench Trial. Sworn Testimony Given. Exhibits Offered And Admitted. Hearing Is Continued To 10/24/2007 At 9:00 Am
10/24/2007	407.000	Ppl Montana's Brief In Opposition To State's Brief To Exclude October 5, 2007 Hallin Report And Opinions
10/24/2007	408.000	Affidavit Of Kyle A. Gray In Opposition To State's Brief In Support Of Motion In Limine To Exclude October 5, 2007 Hallin Report And Opinions - Plaintiff, Ppl
10/24/2007	409.000	Ppl Montana's Opposition To State's Motion In Limine Of State Estoppel, Consent, Waiver, Inducement, Notice, Etc.
10/24/2007	410.000	Ppl Montana's Opposition To State's Motion To Exclude October 17 Saleba Report And Opinions
10/24/2007	411.000	Order Granting Ppl Montana's Unopposed Motion To Withdraw Subpoenas Of Mike Mcgrath And Candace West - Motion Is Granted
10/24/2007	412.000	Minute Entry (10/24/2007) -

		Time Set For Continuation Of Bench Trial. Sworn Testimony Given. Exhibits Entered. Hearing Was Continued to 10/25/2007 At 9:00 Am
10/25/2007	413.000	Minute Entry (10/25/2007) - Time Set For Continuation Of Bench Trial. Sworn Testimony Given. Exhibits Offered And Admitted. Hearing Was Continued To 10/26/2007 At 9:00 Am
10/26/2007	414.000	Minute Entry (10/26/2007) - Time Set For Continuation Of Bench Trial. Testimony Given. Exhibits Admitted. Hearing Continued To 10/29/2007 At 9:00 am.
10/29/2007	415.000	Ppl Montana's Motion For Reconsideration Of State's Motion To Exclude October 5, 2007 Hallin Report And Opinions
10/29/2007	416.000	Ppl Montana's Brief In Support Of Motion For Reconsideration Of State's Motion To Exclude October 5, 2007 Hallin Report And Opinions
10/29/2007	417.000	Affidavit Of Kathryn Mahe - Plaintiff, Ppl Montana, Llc
10/29/2007	418.000	Affidavit Of Ray H. Breuninger, Ph.D. - Defendant
10/29/2007	419.000	Affidavit Of Dr. Harry W. Fritz - Defendant

10/29/2007	420.000	Ppl Montana's Offer Of Proof Regarding Navigability
10/29/2007	421.000	Ppl Montana's Offer Of Proof Regarding Acreage
10/29/2007	422.000	Ppl Montana's Offer Of Proof Regarding State's Hydroelectric Resources Act Claim And Common Law Claims
10/29/2007	423.000	Ppl Montana's Offer Of Proof Regarding The Right To Appropriate Water For The Beneficial Use Of Hydropower Includes The Incidental Right To Use State Land
10/29/2007	424.000	Ppl Montana's Offer Of Proof Regarding School Trust Lands
10/29/2007	425.000	Minute Entry (10/29/2007) - Time Set For Continuation Of Bench Trial. Sworn Testimony Given. Exhibits Were Offered And Entered. Hearing Is Continued To 10/30/2007 At 9:00 Am
10/30/2007	426.000	Minute Entry (10/30/2007) - Time Set For Continuation Of Bench Trial. Sworn Testimony Given. Exhibits Were Offered And Admitted. Court Gave Counsel Until 11/30/2007 To File Any Post-hearing Briefs. Reply Briefs Are Due 12/7/2007 As Well As Parties' Proposed Findings Of Fact And Conclusions Of Law

10/31/2007	427.000	Record Of Exhibits - Bench Trial, 10/22/2007 - 10/26/2007 And 10/29/2007 - 10/30/2007
11/09/2007	428.000	Notice Of Settlement And Public Hearing - Hearing On Consent Judgment And Settlement Set 11/19/2007 At 9:00 A.m. In Front Of The Montana Board Of Land Commissioners
11/19/2007	429.000	Joint Motion Of Avista And State For Approval Of Consent Judgment And Entry Of Final Judgment - Defendant
11/19/2007	430.000	Consent Judgment Between Avista Corporation And The State Of Montana
11/19/2007	431.000	Final Order And Judgment On Avista-state Claims - See Consent Judgment Between Avista Corporation And The State Of Montana For Details
	* * *	
11/30/2007	433.000	State Of Montana's Post-trial Brief
12/03/2007	434.000	Ppl Montana's Post-trial Brief
12/10/2007	435.000	Montana's Motion To File Proposed Unredacted Post-trial Findings & Conclusions Under Seal - Defendant
12/07/2007	436.000	State's Response To Ppl's Post-trial Brief - Defendant
12/07/2007	437.000	State's Post-trial Proposed Findings Of Fact And Conclusions Of Law To Be Filed

		Under Seal - Defendant
	* * *	
12/10/2007	440.000	Post-trial Findings Of Fact And Conclusions Of Law (Ppl Montana's Proposed)
12/10/2007	441.000	Ppl Montana's Post-trial Reply Brief
12/10/2007	442.000	Order - The Proposed Unredacted Post-trial Findings Of Fact And Conclusions Of Law Will Be Filed Under Seal
01/18/2008	443.000	PPL Montana's Motion to Maintain Confidentiality By Sealing Select Documents
01/18/2008	444.000	PPL Montana's Brief in Support of Motion to Maintain Confidentiality by Sealing Select Documents
01/18/2008	445.000	Affidavit of David B. Kinnard in Support Of PPL Montana's Motion to Maintain Confidentiality by Sealing Select Documents
02/05/2008	446.000	State's Response to PPL's Motion to Seal Select Documents
02/20/2008	447.000	PPL Montana's Reply Brief in Support of Motion To Maintain Confidentiality by Sealing Select Documents
	* * *	
06/13/2008	449.000	Memorandum of Decision - See Order
06/13/2008	450.00	Findings of Fact And

		Conclusions of Law - (See Order)
08/15/2008	451.000	Unopposed Motion To Amend Finding Of Fact No. 41 - State
08/15/2008	452.000	Unopposed Motion For Entry Of Judgment - State
		* * *
08/19/2008	457.000	Order Amending Finding Of Fact No. 41
08/19/2008	458.000	Judgment
		* * *
10/10/2008	458.500	(Copy) (Supreme Court) Notice Of Appeal - Plaintiff PPL Montana
10/15/2008	459.000	(Copy) (Supreme Court) Notice Of Appeal
		* * *
11/18/2008	466.000	Certificate of Exhibits
		* * *
12/19/008	469.000	Transmittal of Record - Supreme Court
		* * *

RELEVANT DOCKET ENTRIES

MONTANA STATE SUPREME COURT
Civil Docket For No. 08-0506

PPL MONTANA, LLC, *et al* v. STATE OF MONTANA, *et al*

Date	Document
	* * *
10/10/2008	Notice - Incoming - Notice of Appeal Filed (CHECK COUNSEL WHEN DIST. COURT FILE IS RECEIVED) (JP)
	* * *
12/23/2008	Notice - Outgoing - District Court Record Filed (RR)
	* * *
02/12/2009	Motion - Unopposed - Amicus - Leave to Participate (Assoc. of Gallatin Agricultural Irrigators AGAI) sent to Court. (JP)
02/13/2009	Order - Grant; Assoc. of Gallain Agricultural Irrigators granted leave to file amicus brief on or before Feb. 19, 2009, or w/in 3 days of its receipt of this Order, whichever is later. (JP)
02/13/2009	Motion - Amicus - Leave to Participate. (MT Water Resources Assoc.) Copies sent to Court. (JP)
02/17/2009	Motion - Amicus - Leave to Participate. (MT Farm Bureau Federation) copies to Court. (JP)
02/17/2009	Response/Objection - to Motions for leave

	to file amicus briefs. Copies to Court. (JP)
	* * *
02/19/2009	Brief - Appellant (DG)
02/19/2009	Brief - Amicus (Association of Gallatin Agricultural Irrigators) (DG)
02/19/2009	Affidavit - in Support of Motion of Montana Farm Bureau Federation for leave to file Amicus Brief. Copies to Court. (JP)
02/20/2009	Affidavit - of Holly Jo Franz in Support of Motion of Mont. Water Resources Assoc. for leave to file amicus brief. Copies to Court. (JP)
02/25/2009	Order - Grant; Movants' motions to file briefs amicus curiae are GRANTED. Briefs supporting PPL must be filed before or with PPL's opening brief on appeal. (JP)
02/26/2009	Brief - Amicus (Water Resources Assoc.) (JP)
02/27/2009	Brief - Amicus (Montana Farm Bureau Federation) (DG)
	* * *
03/06/2009	Motion - Unopposed - Amicus - Leave to Participate (MEA-MFT; Mt. School Board Assoc., School Administrators, Mt Rural Education Assoc., Mt quality Education Coalition) Copies to Court. (BS)
	* * *
03/18/2009	Order - MEA-MFT, Montana School Board Association, Montana Rural Education Association, School Administrators of Montana, and Montana

	Quality Education Coalition are granted leave to file an amicus brief. (DG)
04/20/2009	Brief - Appellee (DG)
04/20/2009	Brief - Amicus (School Trust Representatives) (BS)
	* * *
06/03/2009	Brief - Appellant Reply (JP)
	* * *
07/09/2009	Order - Classified - Oral Argument - Wed. September 16, 2009, 9:30 a.m. Hon. Kurt Krueger shall sit in the place of Chief Justice McGrath and the Hon. Mike Salvagni shall sit in the place of Justice Brian Morris. (DG)
07/10/2009	Notice - Outgoing - Oral Argument Scheduled (DG)
	* * *
09/01/2009	Order - the Honorable Ed McLean, District Court judge, will sit in the place of Justice John Warner, who has recused himself. (DG)
	* * *
09/16/2009	Event - Oral Argument Presented by Paul J. Lawrence for the appellant and Holly Franz for the Amicus Montana Water Resources Association and Anthony Johnstone for the appellee. The case was taken under advisement at 11:01 a.m.. (ES)
03/30/2010	Opinion - Published - Cotter, affirmed. (DG)
	* * *

MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
JON ELLINGSON
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549

COUNSEL FOR STATE OF MONTANA

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No. CDV 2004-846

[Dated May 11, 2006]

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; AVISTA CORPORATION, a Washington Corporation; and PACIFICORP, an Oregon Corporation,	)
Plaintiffs,	)
v.	)
STATE OF MONTANA,	)
Defendant.	)

AFFIDAVIT OF BOB McFARLAND

STATE OF MONTANA)
: ss.
County of Gallatin

Bob McFarland, having first been duly sworn, deposes and says:

1. I am the supervisor of the Information Services Unit for the Fisheries Division for the Montana Department of Fish, Wildlife and Parks.

2. In that capacity I conduct the statewide angling use mail survey in odd-numbered years to determine licensed angling use estimates on individual bodies of water in Montana. In 2003, the last full year for which data is available, we mailed surveys to a random sample of 89,861 anglers and received 48,349 responses. Based on these responses, the Department calculates river use by the angler day, which is one angler fishing one body of water for any amount of time on one day.

3. **The Clark Fork River.** In 2003, the section of the Clark Fork River between the Flathead River and the Idaho State Line was used for an estimated 34,723 angler-days (including 9,323 angler-days of use by non-residents). Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 25.3% of anglers surveyed floated in boats on the section of the Clark Fork River between the Flathead River and the Idaho State Line. Therefore, the Department estimates that in 2003 approximately 8800 angler-days were floated in boats on the section

of the Clark Fork River between the Flathead River and the Idaho State Line.

4. **The Madison River.** In 2003, the Madison River was used for an estimated 183,227 angler-days (including 123,054 angler-days of use by non-residents). That year, the Madison River was the second most heavily used river in Montana by angler-days, behind the Missouri River with an estimated 195,622 angler-days. Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 25.9% of anglers surveyed floated in boats on the Madison River. Therefore, the Department estimates that in 2003 approximately 47,000 angler-days were floated in boats on the Madison River. For comparison, the Department estimates that in 2003 approximately 51,000 angler-days were floated in boats on the entire Missouri River within Montana.

5. In 2003, the section of the Madison River between Hebgen Darn and Ennis Lake was used for an estimated 115,342 angler days (including 85,263 angler-days of use by non-residents). The section of the Madison River between Hebgen Dam and Ennis Lake was the most heavily used section of river in Montana. Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 30.8% of anglers surveyed floated in boats on the section of the Madison River between Hebgen Darn and Ennis Lake. Therefore, the Department estimates that in 2003 approximately 35,000 angler-days were floated in boats on the section of the Madison River between Hebgen Dam and Ennis Lake.

6. **The Missouri River.** In 2003, the section of the Missouri River between Morony Dam and Cascade Bridge was used for an estimated 20,368 angler-days (including 4,164 angler-days of use by non-residents). Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 13.7% of anglers surveyed floated in boats on the section of the Missouri River between Morony Dam and Cascade Bridge. Therefore, the Department estimates that in 2003 approximately 2800 angler-days were floated in boats on the section of the Missouri River between Morony Dam and Cascade Bridge.

7. In 2003, the section of the Missouri River between Holter Lake and Hauser Dam was used for an estimated 22,175 (including 4,748 angler-days of use by non-residents). Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 32.2% of anglers surveyed floated in boats on the section of the Missouri River between Holter Lake and Hauser Dam. Therefore, the Department estimates that in 2003 approximately 7100 angler-days were floated in boats on the section of the Missouri River between Holter Lake and Hauser Dam.

8. **The Swan River.** In 2003, the section of the Swan River between Swan Lake and its mouth at Flathead Lake was used for an estimated 5,344 angler-days (including 1,705 angler-days of use by non-residents). Based on more detailed surveys conducted over the years 1989, 1991, and 1993, the Department found that 33.0% of anglers surveyed floated in boats on the section of the Swan River between Swan Lake and its mouth at Flathead Lake. Therefore, the

Department estimates that in 2003 approximately 1800 angler-days were floated in boats on the section of the Swan River between Swan Lake and its mouth at Flathead Lake.

/s/ Bob McFarland
BOB McFARLAND

SUBSCRIBED AND SWORN to before me this 11th day of May, 2006.

(Notarial Seal)

/s/ Kari Janikula
NOTARY PUBLIC for the State of Montana
Printed Name: Kari Janikula
Residing at Bozeman
My Commission expires: 11-19-2007

MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
JON ELLINGSON
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549

COUNSEL FOR STATE OF MONTANA

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No. CDV 2004-846.

[Dated May 10, 2006]

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; AVISTA CORPORATION, a Washington Corporation; and PACIFICORP, an Oregon Corporation,	)
Plaintiffs,	)
v.	)
STATE OF MONTANA,	)
Defendant.	)

AFFIDAVIT OF JODIE FOLEY

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

JODIE FOLEY, State Archivist of the Montana Historical Society, being first duly sworn upon oath, deposes and says:

Attached are true copies of the following publications and documents from the collection of the Montana Historical Society, 225 North Roberts, Helena, Montana:

CLARK FORK RIVER

1. Burlingame, Merrill, and Toole, K. Ross, A History of Montana, Vol. II, at 70 (Lewis Histories Publishing Company, Inc., 1957).

2. David Thompson's Journals Relating to Montana and Adjacent Regions, 1808-1812, at c-cxx, 43 (M. Catherine White ed., Montana State University Press, 1950).

3. Hahn, Margaret, In Retrospect: A History of Mineral County, at 9-10 (Mineral Publishing Company, 1985).

4. Hamilton, James McClellan, From Wilderness to Statehood, a History of Montana, at 114 (Merrill Burlingame ed., Binford and Mort, 1957).

5. Johnson, Olga Weydemeyer, Flathead and Kootenay, at 57-58, 181, 185-86 (Arthur H. Clark Co., 1969).

6. The Montana Almanac, 1959-60, at 252 (Montana State University Press, 1958).

7. Rocky Mountain Gazette, August 18, 1866.

8. Helena Herald, dated: May 2, 1867; June 5, 1867; September 12, 1867; February 13, 1868.

9. Sanders County Ledger, dated: February 6, 1958; April 19, 1907; July 22, 1910; March 13, 1914.

10. Missoula Pioneer, dated: March 2, 1871; July 13, 1872.

11. Missoula and Cedar Creek Pioneer, December 8, 1870.

12. Missoulian, August 19 and 26, 1881; February 24, 1882; June 9 and 30, 1882; July 7, 1882; August 18, 1882; September 8 and 29, 1882; February 9, 1883.

MADISON RIVER

13. Moulton, Journals of Lewis & Clark Expedition, at 428-29, Vol. 4, University of Nebraska Press, 1988.

14. Madisonian, dated: May 9, 1913; July 4 and 25, 1913; August 8, 1913; September 19, 1918.

MISSOURI RIVER

15. Moulton, Journals of Lewis & Clark Expedition, at 63-66, Vol. 5, University of Nebraska Press, 1988.

16. Chittenden, Hiram, History of Early Steamboat Navigation on the Missouri River, at 219-21 Vol. I (Minneapolis, MN 1962, Francis P. Harper Pub. 1903).

17. Davison, Stanley, Montana, the Magazine of Western History, at 2, 5-6 (1959) ["White Hopes of the Big Muddy"].

18. Fort Benton River Press, April 13, 1881.

19. Great Falls Tribune, February 18, 1888, November 9, 1887.

20. Holter, A.M., Pioneering Lumbering in Montana: Contributions to the Historical Society of Montana, at 270-72 Vol. VIII (Helena 1917).

21. James, Thomas, Three Years Among the Indians and Mexicans, at 66 (Walter Douglas ed., Missouri Historical Society, 1966).

SWAN RIVER

22. Elwood, Henry, Kalispell, Montana and the Upper Flathead Valley, at 200 (Kalispell 1980).

23. Wibert and Craney, Swan Lake, Montana: 1914-1919.

Further affiant sayeth not.

/s/ Jodie S. Foley
JODIE FOLEY

Subscribed and sworn to before me this 10th day of May, 2006.

/s/ Katherine E. Stelling
NOTARY PUBLIC for the State of Montana
Printed Name: Katherine E. Stelling
Residing at Helena, Montana.
My Commission Expires: 07/31/07.

(SEAL)

[*Certificate of Service omitted in printing this appendix*]

* * *

1

JA 56

A HISTORY

of

Montana

By

MERRILL G. BURLINGAME, PH.D.
Chairman of the Department of History, Montana State College

and

K. ROSS TOOLE, PH.D.
Director of the Historical Society of Montana and Editor of "Montana, the Magazine of Western History"

With the assistance of a number of contributors as noted under the chapter title

VOLUME II

I attest that this is a true copy of a published document held by the Montana State Archives

/s/ Jody A. Foley
State Archivist

LEWIS HISTORICAL PUBLISHING COMPANY, INC.
NEW YORK

[p.70]

The Clark Fork of the Columbia—The precipitous mountains on Montana's western border, and the extensive lake and swamp area to the northwest, made the travelers in that area receptive to water transport. The Oregon Steam Navigation Company attempted to extend its business from the lower Columbia in 1865 by building the *Mary Moody* on Lake Pend d'Oreille, and sending it in 1866 to the Cabinet Landing, just inside the present state boundary. In 1867 two other boats were added which ran in relay, the *Cabinet* running from Cabinet Landing to Rock Island Rapids, and the *Missoula* taking the passengers and freight on to Thompson Falls, the upper limit of navigation. These boats operated until 1870 when the decline in fur trading made their continuation unprofitable.

On the Kootenai—When the Great Northern Railroad reached the Kootenai River in 1891 near the present location of Jennings, transportation possibilities opened to the north in Canada where Fort Steele and mines in the vicinity offered markets and freight. The *Annerly* launched in 1892 was the first of the little fleet, and it continued in service until 1897. Other boats included the *White Swan*, the *Fool Hen*, the *Libby* and the *Rustler*. Old timers still tell of the time when the British boat, the *Gwendoline* and the American boat, the *Ruth*, smashed on the rocks in the canyon within an hour, completely wrecking the Ruth. The *Rustler* was also lost on the same rocks which were eventually removed. The *North Star*, built in 1897, was considered the best built boat on the river. It earned a return as high as $30,000 a year. The last boat built for the Kootenai was the *J. D. Farrel*, financed by the Great Northern and launched in 1898.

The decline of the mines and the improvement of highways made the steamboats unnecessary and unprofitable.[13]

Navigation on Flathead Lake—Population was slow in moving into the Upper Flathead region, north of Flathead Lake because of its inaccessibility. Its advantages were well known, and when the new Northern Pacific brought population into the region south of the Lake in 1883, the demand for water transportation arose because of the rugged terrain on either side of the Lake.

The first boat, the *Swan*, was apparently built by Neil and George Nelson and Fred Lindgren. It was a 20-ton sailboat built near Polson in 1883 or 1884. It ran from Polson to Dooley's Landing, a few miles up the North Flathead River. Calms and river currents often prolonged the trip to as much as a week, and in 1885 the boat was sold to Captain Kerr, who installed a steam engine, and gave it the name of *U.S. Grant*.

2

JA 60

David Thompson's Journals Relating to Montana and Adjacent Regions

1808-1812

Transcribed from a Photostatic Copy of The Original Manuscripts and Edited with an Introduction by

M. CATHERINE WHITE

MONTANA STATE UNIVERSITY PRESS
MISSOULA, 1950

I attest that this is a true copy of an [JF] published book held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

[p.c]

Kootenai with a load of goods and instructed him to winter among the Indians.[236] On the north bank of the river, just above Kootenai Falls and almost opposite the present town of Libby, Montana, McDonald and his companions pitched their two leather tents and built a "hangard" or log storehouse for their goods. This first commercial establishment in western Montana was only a temporary outpost.[237] It was not until three years later that a trading post was erected several miles further up the Kootenai River, at a place nearly opposite Jennings, Montana. In April, Thompson again started eastward with the packs of furs, but this time he descended the Saskatchewan only as far as Fort Augustus,[238] where he found his former companion, James Hughes. From there Thompson

---

[236] *Ibid., pp. lxxxix-xc.* Thompson gives the year as 1807 (p. 378), but Dr. Tyrrell states the date is 1808 in the notebooks.

[237] In two histories of Montana this storehouse is referred to as the first trading post established in Montana by David Thompson. See annotations for Montana histories entered in the Bibliography prepared for this work. Errors in information concerning David Thompson are noted there.

[238] New Fort Augustus, built by James Hughes in 1808, at the foot of a high bank within the present city of Edmonton. The same year a Hudson Bay trader built a post nearby, known as Edmonton. Thompson, in his notebook, under the date of September 25, 1807, mentions the destruction of old Fort Augustus by a band of Blackfeet. The old fort had been built about 1794 by Angus Shaw and Duncan McGillivray on the North Saskatchewan, a short distance above the mouth of Sturgeon River. The Hudson's Bay Company also had a post there, known as Edmonton, *Narrative,* p. 432 n. See also Frank Oliver, "The Founding of Edmonton," *Queen's Quarterly,* XXXVII (1930), 78-94.

sent two canoes on to Rainy Lake with the furs while he remained at the fort in order to prepare for a more extended journey west of the mountains.

Leaving Fort Augustus on July 18, he crossed by Howse Pass to the Columbia and continued on to "McGillivray's Portage,"[239] which he reached on August 20. Between that date and September 8, he descended the Kootenay River to the vicinity of the present city of Bonners Ferry and from there transported his goods overland to Pend Oreille Lake by an old Indian trail known as the "Great Road of the Flatheads."[240] On September 10, Thompson selected a place at the eastern end of the lake, near the mouth of the Clark Fork river, and began building his Kullyspel House.[241]

---

[239] The strip of land between Columbia Lake (source of the Columbia River) and the Kootenay River. The portage is now known as Canal Flat.

[240] This followed up Deep Creek and over the divide to the Pack River, crossed that stream, and reached Pend Oreille Lake just east of Sandpoint. For entries Aug. 18-Sept. 8, 1809, see Journals, Pt. II. Concerning entries Sept. 8-26, see the Chronology given after the Introduction

[241] Located on a point of land, identified by Elliott Coues (*New Light*, p. 673) as Hodgkins Point, extending into Pend Oreille Lake between the stations of Hope and Clarks Fork, Idaho, on the Northern Pacific Railway. The chimney piles of the house were located in 1923 by the late Duncan McDonald, son of Angus McDonald, one of the early-day Hudson's Bay traders, with the aid of Alex Kai Too, aged and blind brother of Chief Merchelle of the same Kalispel tribe that inhabited the region prior to the coming of the white men. The site was a beautiful level spot, sloping gently to the lake and overlooking the sheltered cove in the lea of Mameloose Island. See C. I. White, "Old Trade Post, Is Found Again." Daily Missoulian, [Mont.], Sept. 16, 1923.

This was the first trading post in the Inland Empire, and the first west of the Rocky Mountains in the United States.[242] Thompson, hoping to discover another route to his "Mountain Portage" (Howse Pass) that would be less open to attack from the Piegan Indians than the Kootenay River route, set out on September 27 to examine the country below the lake. With one of his men and an Indian lad, he traveled on horseback around the north side of the lake and down the river flowing from it, to a point about twenty miles below the present town of Newport, Washington. There he borrowed a canoe from some Indians and proceeded farther, but near the site of Cusick, Washington, he turned back and on October 6 reached Kullyspel House.[243] He remained there for several days, assisting with the building and making preparations for a journey up the Clark Fork river.[244]

On October 11, Thompson set off on horseback and traveled along the north bank of the Clark Fork for a distance of about sixty miles and then crossed to the Kootenai River. There he met his men, who were on their way down the river with goods that had been left on the Columbia. He embarked with them and

---

[242] Henry's Fort," established by Andrew Henry of the Missouri Fur Company, on Henry's Fork of the Snake River, near the present town of St. Anthony, Fremont County, Idaho, is generally thought to be the first trading post west of the Rockies in the United States, but it was not built until the fall of 1810. See H. M. Chittenden, *The American Fur Trade of the Far West* (New York, 1902), III, 974; also E. M. Ledyard, "American Posts," *Utah Historical Quarterly*, II (1929), 127.

[243] Concerning journal entries Sept. 27-Oct. 6, see Chronology.

[244] Thompson's "Saleesh" River. For Oct. 6-11, see Chronology.

descended the Kootenai to the "Great Road of the Flatheads," where horses were obtained to carry the goods across to Pend Oreille Lake. Thompson arrived at Kullyspel House on the twenty-ninth, but the men with the goods did not reach there until the thirtieth. The next few days he spent preparing for a second journey up the Clark Fork.[245] David Thompson is the first white man known to have traveled the Indian trail from Pend Oreille Lake up the Clark Fork river, and also the trail northward to the Kootenai, though Finan McDonald and his men may have been over a part of it during the preceding winter when they were living in their leather tents just above the Kootenai Falls. Free trappers from the United States may also have penetrated this far westward before 1809, but no authentic record of their presence in this region is available.[246]

---

[245] For Oct. 7-31, see Journals, Pt. III. For Oct. 30-Nov. 2, see Chronology.

[246] Under date of August 13, 1807, David Thompson, while at Kootanae House, wrote, "They [the Indians] also inform me that about three weeks ago the Americans, to the number of 42, arrived to settle a military Post at the confluence of the two most southern & considerable Branches of the Columbia, & that they were preparing to make a small advance post lower down on the River; two of these who were with Captain Lewis were also with them of whom the poor Kootanaes related several dreadful stories." Thompson, "Narrative of Expedition, 1807," *Oregon Hist. Quart.*, XXVI, 43. In April, 1807, Manuel Lisa (see note 247) with about forty Americans left St. Louis for the upper Missouri. Among them were three members of the Lewis and Clark expedition, and later they were joined by another, John Colter. It is possible that news of this party was carried to Thompson by the Indians, but the information he recorded does not check with the facts, for Lisa and his men did not reach the confluence of the Big Horn and Yellowstone Rivers until October or November. The

On November 2, Thompson started off again on horseback and after traveling up the Clark Fork for

---

Indians may have combined facts with rumors; they may even have been misinformed, purposely, concerning the intended destination of Lisa. Thompson also received a letter, dated July 10, 1807, at Fort Lewis, Yellow River, Columbia, which contained what purported to be United States regulations for foreigners carrying on trade with the Indians. This was signed by James Roseman, Lieutenant, and Zachary Perch, Captain and Commanding Officer. Another letter relating to the same subject, dated September 29, 1807, at Poltito Palton Lake, and signed "Jeremy Pinch, Lieut.," was delivered to Thompson by the Indians in December 1807. The names Roseman, Perch, Pinch, and Braithwaite, a general mentioned in one of the letters, do not appear in any of the army rolls, and an extensive search carried on by several scholars has failed to reveal any other record of a miltiary establishment in the Columbia Valley at that time. There have been many speculations and conjectures concerning the persons involved in these communications. According to the supposition of one authority on western history, these letters, signed with fictitious names, were a scheme devised by Lisa in order to deter the North West Company from exploring and trading in the Columbia country. Another authority suggests that Pinch, or Perch, was the assumed name of a person acting for the civil governor and military commandant of the territory, Gen. James Wilkinson, a master of intrigue, who saw in the fur trade an opportunity for personal gain. The real solution of the mystery must await the discovery of new evidence. See T. C. Elliott, "The Strange Case of David Thompson and Jeremy Pinch," *Oregon Hist. Quart.*, XL (1939), 188-99; W.H. Ghent, "'Jeremy Pinch' Again," *ibid.*, 307-14; J. B. Tyrrell, "Letter of Roseman and Perch," *ibid.*, XXXVIII (1937), 391-97; J. S. Douglas, "Jeremy Pinch and the War Department," *ibid.*, XXXIX (1938), 425-31; F. E. Ross, "Early Fur Trade in the West," *ibid.*, 396-401; J. N. Barry, "Lieutenant Jeremy Pinch," *ibid.*, XXXVIII (1937), 323-27; G. W. Fuller, *History of the Pacific Northwest* (New York, 1931), pp. 75-76; C. H. Carey, *General History of Oregon* (Portland, 1935), I, 146-47; R. C. Clark, *History of the Willamette Valley, Oregon* (Chicago, 1927), I, 122-23, 839-41.

seven days, came to a place not far from the Northern Pacific railway siding of Woodlin, Montana. There he built his Saleesh House, the first trading post erected in Montana west of the Rockies.[247] He remained there until February 23, when, accompanied by three of his men and two Indians, he set out to look for birch rind for canoes. The party rode up the river as far as the great camp of the Salish Indians, located about twenty miles above the mouth of the Flathead River, and returned to Saleesh House on March 6. Between March 8 and 14, Thompson made another journey to the Salish camp, where he built a canoe in which he returned down the river, surveying the course of the stream as he went. A third trip to the camp was undertaken between March 17 and 25. On this occasion Thompson loaded the horses with the furs and provisions traded from the Indians, and sent them back to the house in charge of four of his men and two Indians while he and the rest of the party descended the river in a newly constructed canoe. In April, Thompson and his men returned to Kullyspel House, arriving there on the twenty-first.[248]

---

[247] Two years earlier, Manuel Lisa, a young fur trader from St. Louis, had ascended the Missouri and the Yellowstone Rivers to the mouth of the Big Horn, where in November 1807 he built a trading post, the first in the present state of Montana. It was known as "Manuel's Fort," although Lisa named it for his son, Raymond, and in his writings referred to it as "Remon." See W. B. Douglas, "Manuel Lisa," in *Missouri Hist. Soc., Collections, III* (1911), 255-256.

[248] For entries Nov. 2, 1809-Apr.23, 1810, see Journals, Pt. IV. Concerning entries Apr. 21-24, 1810, see the Chronology.

During the next three days Thompson was busy making arrangements for the summer and preparing for another trip down the Pend Oreille River, for he still hoped to find a safer and more practical route to his "Mountain Portage" by way of that river and the Columbia. On the twenty-fourth he set out on a journey of exploration–this time in a canoe–and descended the Pend Oreille as far as Box Canyon, where he put ashore to examine the country downstream for a distance of about a mile.[249] His survey and the information he had gathered from numerous Indians, convinced him that for the time being, at least, he would have to abandon his plan of returning by a new route. He therefore retraced his course and on May 1, camped not far from Kullyspel House.[250]

Between May 3 and 16, Thompson and his men were engaged in transporting the furs and provisions across to the Kootenai. The task was exceedingly difficult because of the deep snow and the consequent lack of grass for the horses. On May 17 the brigade of canoes started up the Kootenai, while Thompson, James McMillan,[251] and one other man went by land with the horses. On May 21 they reached the lower end of the portage around the Kootenai Falls; on June 9 they came to "McGillivray's Crossing;" on the eleventh the party began to descend the Columbia River; and on the sixteenth they arrived at Howse

---

[249] Thompson was then about three miles above Metaline Falls, Washington.

[250] Concerning the entries, Apr. 24-May 1, see the Chronology.

[251] For biographical sketch, see Appendix A.

Pass. Thompson, having left the men to follow with the pack horses, crossed to the Saskatchewan and once more made the long journey to Rainy Lake House, reaching there on July 22. After obtaining goods for the trade, he started westward again.[252]

It has long been a moot question whether or not David Thompson, while at Rainy Lake House, received orders from the partners of the North West Company, to proceed with all haste across the mountains in order to establish a fort at the mouth of the Columbia before the men sent out by John Jacob Astor's Pacific Fur Company[253] could reach there. The North West

---

[252] For entries May 6-June 13, see Journals, Pt. V. Concerning entries May 1-7, see the Chronology. For events from June 13-July 22, see *Narrative*, pp. 430-37.

[253] Articles of agreement were signed June 23, 1810. Astor had already amassed a fortune in the fur trade, had become a ship owner, and had established commercial relations with the far parts of the world. He carried on his trade in furs first from Montreal, later from New York. When the United States purchased Louisiana, he foresaw an almost unlimited field for future development. His general plan included the establishment of a central depot at the mouth of the Columbia, from which trade in the interior could be carried on. Supplies were to be sent from New York in an annual ship, which would take on the furs and dispose of them in China, and then return to New York with goods for the home market. A coastwise trade and the business of supplying the Russian settlements to the north, and a line of posts along the Columbia, across to the Missouri and down that stream to St. Louis, were also part of the plan (*Cf.* with McKenzie's scheme, *ante*, p. xciii). In order to forestall competition with the North West Company in the interior, Astor proposed that that company join him in the undertaking, but his offer was refused. Nevertheless, Astor recruited most of his company from Canada-many of them former "Nor'westers." The Canadian partners were

Company was well aware of Astor's plans. On January 23, 1810, the company's agents at Montreal wrote to their representatives in London concerning Astor's proposed settlement at the mouth of the Columbia and asked them to ascertain whether the British government would permit such an establishment.

Alexander McKay, Duncan McDougall, Donald McKenzie, David and Robert Stuart and John Clarke. The other partners, besides Astor, were Wilson P. Hunt, Ramsay Crooks, Robert McLellan, and Joseph Miller. Two expeditions were sent out to the Columbia, one sailing in September 1810 on the *Tonquin*, by way of Cape Horn, and the other going overland in the spring of 1811. On the *Tonquin* were McKay, McDougall, the two Stuarts, and among the clerks, the two Canadians, Alexander Ross and Gabriel Franchere, whose narratives are an important source of information concerning the undertaking. The other partners, with the exception of Astor and Clarke, went overland with a large party of interpreters, hunters, etc. After suffering terrible hardship, the first of the overland expedition arrived at Astoria in January 1812, but the last of the stragglers not until January 1813. The *Tonquin* reached the Columbia in March 1811, and on April 12, the construction of the fort was begun. Several factors entered into the failure of Astor's enterprise, chief among them the War of 1812. In the fall of 1813 the North West Company negotiated for the purchase of Astoria and took over the fort, the property, and the posts in the interior. Summarized from Chittenden, *op. cit.*, I, 163-246; III, 903-11. Contemporary sources concerning affairs at Astoria: Gabriel Franchere, *Narrative of a Voyage to the Northwest Coast of America* (New York, 1854); Alexander Ross, *Adventures of the First Settlers on the Oregon* or Columbia River. 1810-1813 (London, 1849); Ross Cox, *Adventures on the Columbia River* (London, 1831); Robert Stuart, *The Discovery of the Oregon Trail; Robert Stuart's Narratives of His Overland Trip Eastward from Astoria in 1812-13* (New York, 1935); Elliott Coues, *New Light on the Early History of the Greater Northwest: The Manuscript Journals of Alexander Henry* ... (New York, 1897), II. Best known secondary account: Washington Irving, *Astoria* (Philadelphia, 1836). See also K. W. Porter, *John Jacob Astor* (Cambridge, Mass., 1931), I.

They also requested that application be made to the government for assistance, and particularly for the exclusive right to trade on the Columbia and the adjacent coast for a certain term of years from the date of the first establishment they should make there. In conclusion they wrote:

> It would be highly necessary that we were informed next Spring of the intentions of the Government in this respect in order to take the proper measures at our place of Rendezvous on Lake Superior, next Summer; otherways a years time will be lost, and the Emergency Requires, that immediate measures should be adopted.[254]

The minutes of the meeting of 1810 show that David Thompson was again assigned to the Columbia department, but no measures relative to the Columbia were adopted.[255] Some historians, particularly the earlier ones, believed that Thompson actually received orders from the North West Company to make a dash across the country and establish a post on the Pacific Coast,[256] and one historian recently asserted that when

---

[254] McTavish McGillivrays & Co., John Oglivy, Thomas Thain, Agents North West Company, to Messrs. McTavish Fraser & Co., Inglis Ellice & Co., Sir Alexander Mackenzie, Can. Arch., *Q*, CXIII, 228-30, as quoted in *Can. Hist. Rev.*, XVII (1936), 305-6.

[255] See *Documents...North West Company*, pp. 264-65; also, Tyrrell, "David Thompson and the Columbia River," *Can. Hist. Rev.*, XVIII, 22.

[256] This was the opinion of the Astorians, as expressed by Franchere. See his *Narrative*, pp. 120-23. See also Robert Greenhow, *Memoir, Historical and Political, on the Northwest Coast of North America*, in 26th Cong., 1st Sess., Sen. Doc. 174, pp.

Thompson reached Rainy Lake House in July, 1810, "he was sent back post-haste to reach the mouth of the Columbia and to build a fort and raise the Union Jack on the breezes of the Oregon, before Jacob Astor's expedition should arrive."[257] There is no evidence in Thompson's notes, journals, or *Narrative*, that he received such orders.[258] Further confirmation of the statement that the North West Company did not issue orders in 1810 for the erection of a fort at the mouth of

---

157-58, and his *History of Oregon and California and the Other Territories on the North-West Coast of North America* (London, 1844), p. 297; W. H. Gray, *A History of Oregon*, 1792-1849 (Portland, Oreg., 1870), pp. 16-17; Laut, *op. cit.*, II, 89-93; Chittenden, *op. cit.*, I, 201; C. N. Cochrane, *David Thompson, the Explorer* (Toronto, 1924), p. 128; Sydney Greenbie, *Frontiers of the Fur Trade* (New York, 1929), p. 142; R. G. Raymer, *Montana, the Land and the People* (Chicago, 1930), I, 86.

[257] Morton, "The North West Company's Columbian Enterprise," *Can. Hist. Rev.*, XVII, 284-85.

[258] Professor Morton, *ibid.*, pp. 238-88, condemned Thompson for failure to carry out the North West Company's orders and stated, "It has been assumed by some, on the evidence, or strictly on the lack of evidence in Thompson's journals, that even now there was no race between the British and the Americans to occupy the mouth of the Columbia. But it is not safe to rely on the evidence of the man, himself, all the more as there is a strange, perhaps determined, silence in his journals on this point." However, Professor Morton produced no direct evidence of any orders issued to Thompson, though he cited correspondence between the agents and supporters of the North West Company and the government in London, among which is the letter quoted here in the text. While this letter shows that the North West Company desired to establish settlements on the Columbia and to prevent the Americans from taking possession there, it does not prove that the company in 1810 ordered Thompson to do so; rather it indicates the contrary.

the Columbia, is found in a letter written in London, on November 10, 1810, by Simon McGillivray, brother of William, and an acting partner in the firm of McTavish, Fraser & Company, which represented the North West Company's interests in England. The letter, addressed to the prime minister, the Earl of Liverpool, contains the following statements:

> The subject of these Papers (namely the fitting out of an Expedition from New York to establish Settlements upon the Columbia River) was mentioned to your Lordship in March last by a Deputation of the Committee when I had the honor of being present, and it appeared to be considered by your Lordship as Entitled to some attention.
>
> . . . . . .
>
> I have now to inform your Lordship that the American expedition to the Columbia River has actually sailed from New York, and consequently I fear it may almost be too late to accomplish the object which the North West Company had in view, if they could have obtained the Sanction of His Majesty's Government in sufficient time. That object was to establish Settlements on the Columbia River, and so to secure the right of Possession to Great Britain before the arrival of the Americans.
>
> Still however this object might probably be accomplished and His Majestys right to the Territorial possession of the Northwest Coast of America preserved, if one of His Majesty's Ships could immediately be dispatched to take formal possession of and establish a Fort or Settlement

> in the Country. The Ship is to make a trading Voyage on her way along the Coast of South America, and His Majesty's Ship would probably get to the Columbia River before her.
>
> . . . . . .
>
> If the Plan which I have presumed to suggest should be adopted, and one of His Majesty's Ships sent to take possession of the Country in Question the Northwest Compy would send an Expedition across the Continent to meet her, and to form trading Establishments under the protection of His Majesty's Fort; but unless they can obtain such protection they cannot embark in their intended undertaking, and that Country and its Trade will be left to the possession of the Americans.[259]

From Simon McGillivray's letter it is evident that the North West Company had given up its plan to build at the mouth of the Columbia because its proposal had not received the sanction of the British government, and furthermore that the Company did not intend to establish any post there unless the government first sent a ship and built a fort to afford protection to the traders. No doubt Thompson, since he first crossed the mountains in 1807, had contemplated a journey to the Pacific Ocean, in order to realize his ambition to map the whole of the northern part of North America, and he may even have hoped to reach the mouth of the Columbia before Astor's party arrived there, but it is more likely that

---

[259] Can. Arch., Q, CXII, 221-3, as quoted in *Can. Hist. Rev.*, XVII, 310-11.

his statement regarding his desire to be at the Pacific Ocean before the first of August,[260] has reference to the date he must reach the mouth of the Columbia in order to be back upon its upper waters in time to cross the mountains for supplies before winter set in. David Thompson, although essentially a geographer, was nevertheless extremely conscientious in the performance of his work as a trader. He had established the posts west of the mountains and was responsible for the success of the Columbia department, and therefore he devoted his efforts first to the trade and then to exploration.[261]

When Thompson left Rainy Lake in the summer of 1810, he intended to return at once to the west side of the Rockies by his usual route across Howse Pass, but as he approached the mountains he found that his canoes, which had been sent up the Saskatchewan with the supplies for the following year, had been turned back by the Piegan Indians. They were determined to prevent Thompson from furnishing their enemies, the Salish, with more guns and ammunition. Having lived among the Piegans, Thompson was thoroughly familiar with their character and ways. From the first[262] he had realized that these Indians

---

[260] *Narrative*, p. 448.

[261] Professor Morton arraigned David Thompson for failure to make the main object of the "Columbian enterprise" the main object of his activities west of the Rockies. A discussion of this "enterprise" and of Professor Morton's charges against Thompson will be found in Appendix B.

[262] In the *Narrative* (p. 375) Thompson states: "I have already related how the Peeagans watched us to prevent our crossing the

would be relentless in their attacks upon traders who attempted to cross the mountains by way of Howse Pass, and he therefore wisely decided to avoid any further encounters with them.[263] Although it was already late in the year, he was resolved to try a more northern route along the headwaters of the Athabaska

---

Mountains and arming the natives on that side; in which for a time they succeeded, and we abandoned the trading Post near the Mountains in the spring of 1807; the murder of two Peagan Indians by Captain Lewis of the United States, drew the Peagans to the Missisouri to revenge their deaths; and thus gave me an opportunity to cross the Mountains by the defiles of the Saskatchewan River, which led to the head waters of the Columbia River." For Lewis' encounter with the Blackfeet on the Marias River in Montana, on July 27, 1806, see *Original Journals of the Lewis and Clark Expedition*, ed. R. G. Thwaites (New York, 1904), V, 219-28.

[263] With regard to Thompson's decision, Professor Morton expressed this opinion: "It was a grave mistake on Thompson's part not to go bravely up to the Piegans, and seek for some arrangement by which at least the part of the brigade going down to the mouth of the Columbia could be allowed to pass through unmolested. It can scarcely be doubted that such would have been the course followed by Alexander Mackenzie or Simon Frazer." Morton, "The North West Company and the Columbian Enterprise," *Can. Hist. Rev.*, XVII, 286. Alexander Henry, the younger (see Appendix A), who was assisting Thompson to get his canoes and goods across the mountains, comments on the advantage of the new northern route but says nothing in his journal about the necessity for Thompson to be at the mouth of the Columbia before the Astorians. Thompson's career offers ample proof of his courage and also of the common sense and good judgement by which he avoided unnecessary recklessness likely to endanger the lives of his men and himself.

River.[264] By December 4, Thompson and his men reached a place five miles north of Brule lake, where they camped until December 29 and spent the time constructing snowshoes and sleds to use on the rest of their journey. The hardships, dangers, and almost insurmountable obstacles of that journey across the mountains in the winter of 1810-11 are related in the *Narrative*.[265]

With three horses, and eight sleds drawn by two dogs each, Thompson and his men made their way, in twenty-below-zero weather, into the defiles of the Rocky Mountains, following up the headwaters of the Athabaska River. On the sixth of January they left the horses, there being no more grass for them. On the tenth the party reached the height of land now known as Athabaska Pass[266] and on the next day began to

---

[264] Professor Morton cited this decision as further evidence that Thompson or McGillivray had crossed Athabaska Pass in 1801, and stated, "He must have had personal knowledge that the route was feasible." *ibid.*, pp. 275-75, note 14. However, some Nipissings (of an Algonquin tribe) and freemen had been across a few years before, and it is probable that Thompson had obtained information about the route from them. In his journal he mentions finding along the way evidence that these men had been across the same pass. Coues, *op. cit.*, II 652.

[265] Pt. II, chaps. vi-vii. For Alexander Henry's account see Coues, *op. cit.*, II, chap. xx.

[266] This pass, a little over 5700 feet, was reached by ascending the Whirlpool river, a tributary of the Athabaska River. To the east of the pass is Mt. Hooker, altitude 10,782 feet, and to the west Mt. Brown, altitude 9156 feet. Thompson estimated the altitude of the pass and the mountains to be very much greater, as did David Douglas, the botanist, who named the two peaks in 1821. For early accounts of travel over this pass, see Franchere, *op. cit.*, pp.

descend the western slope by way of the present Wood River, which they followed to its mouth near the confluence of the Canoe River and the Columbia, arriving there on January 18. With great difficulty they hauled their sleds a short distance up the Columbia, but when some of the men refused to go farther, Thompson decided to return to the junction of the Canoe River with the Columbia and there wait for men, goods, and provisions. Three men deserted, and one, being ill, returned to the east side of the mountains with two others whom Thompson sent back with letters, written on boards, to Mr. William Henry,[267] requesting him to send goods and provisions. Only two of the party remained with Thompson.[268] On the seventeenth of February, the men[269] whom Thompson had sent across the mountains returned with two sled loads of goods and dried provisions. The party passed the days in hunting and in building a canoe of cedar boards split out from the large trees about them. As there were no nails, these boards had

---

288-93; Cox, *Adventures on the Columbia River* (New York, 1832), pp. 246-52; see also Farther Pierre-Jean de Smet's account of a journey in May 1846, in his *Life, Letters and Travels*, ed. H. M. Chittenden (New York, 1905), II, 541-46.

[267] William, a cousin of Alexander, was in charge of goods at an outpost on the headwaters of the Athabaska River during the winter of 1810-11. Coues, *op. cit.*, II, p. 642.

[268] L'Amoureoux and Rene Vallade. The latter accompanied Thompson on the rest of the journey, and his name appears frequently in the Journals, Pt. VI.

[269] Pierre Pareil and Joseph Cote. These two also went with Thompson and are mentioned in the Journals, Pt. VI.

to be sewed to a framework with a line made of moose hide.[270]

Having finished the canoe, Thompson set out on April 17, ascended the Columbia[271] to the mouth of

---

[270] Part VI of the Journals begins with the entry for Feb. 27, 1811, while Thompson was still at his camp at the mouth of Canoe River, and continues through June 3.

[271] In the early histories of the Pacific Northwest, Thompson is first mentioned in connection with this journey of 1810-11. Evidently nothing was known of his previous activities in the Columbia Valley. Robert Greenhow's *History of Oregon and California* (London, 1844), p. 297, states "While the Astorians were thus engaged, they were unexpectedly visited, on the 15th of July, by a party of the North-West Company's men, under the direction of Mr. David Thompson, the surveyor or astronomer of that body. These men had been despatched from Canada in the preceding year, with the object of forestalling the Americans in the occupation of the mouth of the Columbia, which they hoped to effect before the end of that season; but they were so long delayed in seeking a passage through the Rocky Mountains, they were obliged to winter in that ridge, near the northernmost sources of the Columbia, under the 52d parallel of latitude; whence they hastened down the river in the spring of 1811, building huts, and erecting flags at various places, by way of *taking possession* of the country." It is noted that Greenhow used the phrase *down the river*. Thompson did not *descend* the Columbia; he *ascended* it to Columbia Lake and crossed the portage to the Kootenay River. See Journals, Pt. VI. The following passage is found in W. H. Gray's *A History of Oregon, 1792-1849* (Portland, Oregon, 1870), pp. 16-17: "... this Canadian Northwest Fur Company dispatched Mr. Thompson to explore the Columbia River, and make an establishment at its mouth; but, on account of delays and mistaking the courses of the various rivers through which they party traveled, Mr. Thompson did not arrive at Mr. Astor's American establishment till in July, 1813 [*sic*]; his object was to forestall Mr. Astor in the settlement of the country." Both historians derived their information largely from Washington

Blaeberry River,[272] his former route across the mountains, and continued on to "McGillivray's crossing," which he reached on May 14. He then crossed to the Kootenay River and descended that stream as far as the site of Jennings, Montana. From there he followed the Indian trail to the Clark Fork. When he arrived at Saleesh House on May 27, he found the place deserted. The next day he resumed his journey down the Clark Fork. Coming upon a good stand of cedar, he camped for a few days in order to construct a canoe of that material. On June 4, he embarked and descended the river to a point near the present town of Usk, Washington, where on June 11,

---

Irving's *Astoria*, and from the narratives of Gabriel Franchere and Ross Cox (see Appendix A). H. H. Bancroft, in his *History of the Northwest Coast (Works*, XXVII-XXVIII. San Francisco, 1886), XXVIII, 122-25, elaborated upon the idea of Thompson's mistaking the course of the various rivers. According to Bancroft's wholly imaginary account, Thompson crossed the mountains to the south of the Peace River, probably through Yellowhead Pass, then descended the present North Thompson River to Kamploops Lake, but there, finding that the stream undoubtedly emptied into the river that Simon Fraser had just explored, he retraced his route, crossed over the Canoe River, and descended that stream to the Columbia. As it was then late in the year 1810, he went into winter quarters, and in the spring, *descended* the Columbia, passing the Little Dalles and Arrow Lakes, and continuing on to Astoria. Agnes Laut, in her *Conquest of the Great Northwest* (New York, 1918), II, 91, repeated the error in a more dramatic manner: " ... the canoe is launched down the Columbia through the Big Bend - a swollen, milky tide, past what is now Revelstoke, past Nakusp, through the Upper and Lower Arrow Lakes and what is now known as the Rossland mining region."

[272] The route up the Columbia from the Canoe River to the Blaeberry river, a distance of approximately ninety miles, was new to Thompson.

Finan McDonald met him with horses to transport the goods across to Spokane House.[273] This post had been built in 1810 or 1811 by Finan McDonald and Jacques Finlay, on the east bank of the Spokane River about a mile above the Little Spokane River.[274]

Leaving Spokane House on June 17, Thompson made a three-day journey on horseback to Kettle Falls[275] in the Columbia River. There he spent nearly two weeks searching for cedar and building a canoe.[276] On July 3, he embarked, with seven men and two "Simpoil" Indians[277] and set off to explore the Columbia River to its mouth. On the ninth of July, at

---

[273] For this post, see T. C. Elliott, "Spokane House," *Washington Hist. Quart.*, XXI (1930), 3-7.

[274] Concerning entries June 4-16, 1811, see the Chronology.

[275] Referred to as "Ilthkoyape" Falls by Thompson. The word, pronounced with a deep gutteral sound and a slight accent on the middle syllable, was a Salish name derived from *ilth-kape*, meaning "kettle," and *hoy-ape*, meaning "net." The name was descriptive of a place where fish were caught in a net or basket kettle, hence the present name, Kettle Falls. The Indians constructed baskets of hazel or birch osiers woven together with withes and roots. These they hung from the end of poles across and close to the falls. The fish, after a vain attempt to swim up through the water running over the ledge or reef forming the falls, dropped in the baskets. The number of fish caught in this matter was enormous. T. C. Elliott, "David Thompson's Journeys in the Spokane Country," *Wash. Hist. Quart.*, IX, (1918), 11.

[276] Concerning the entries for June 17-July 2, see the Chronology.

[277] Sanpoil, a tribe of Interior Salish.

the mouth of the Snake River,[278] near the present city of Pasco, Washington, he erected a small pole with a half sheet of paper well tied about it, on which he had written:

> Know hereby that this country is claimed by Great Britain as part of its territories and that the N.W. Company of Merchants from Canada, finding the factory for his people inconvenient for them, do hereby intend to erect a factory in this place for the commerce of the country around. D. Thompson. Junction of the Shawpatin River with the Columbia, July 9, 1811.[279]

On July 15, 1811, Thompson arrived at Fort Astoria, the trading post built three months earlier by the men of John Jacob Astor's Pacific Fur Company.[280] Thompson was cordially received by the Astorians[281]

---

[278] Called the "Shawpatin" river by Thompson.

[279] David Thompson, "Journal," ed. T. C. Elliott, *Oregon Hist. Quart.*, XV (1914), 57.

[280] For a description of the fort, see Franchere, *op. cit.*, pp. 1123-24, 129; Alexander Ross, *Adventures of the First Settlers on the Oregon or Columbia River*, in *Early Western Travels*, ed. R. G. Thwaites (Cleveland, 1904), VII, 88-89, 97-98; Stuart, *op. cit.*, pp. 3-4, 252; See also Ross Cox, *Adventures on the Columbia River* (New York, 1832), pp. 68-69. Cox arrived in 1812, and describes the fort as it was then. Thompson, in his *Narrative*, p. 501, merely mentions The "four low Log Huts, the far famed Fort Astoria of the United States."

[281] Franchere, *op. cit.*, pp. 120-22; Ross, *op. cit.*, pp. 101-102. Franciere and Ross were both at Astoria when Thompson arrived.

and remained with them until July 22, when he set off for the interior again, in company with Mr. David Stuart of the Pacific Fur Company. The latter was on his way up the Columbia to establish a post.[282] At the mouth of the Snake river, Thompson turned up that stream and ascended it as far as the Palouse River. Having obtained horses from a band of Indians encamped there, he proceeded along a well-worn trail to Spokane House, arriving on August 13.

As Thompson was expecting goods and supplies to be sent to him from the east side of the mountains, he left Spokane House on August 17, and rode over to Kettle Falls.[283] There he and his men built canoes, and on September 2, accompanied by eight canoes of Indians, they began the difficult voyage up the

---

Franchere notes: "Mr. Thompson kept a regular journal, and traveled, I thought, more like a geographer than a fur-trader." That Thompson carried no trading goods with him would indicated that he did not intend to establish a post at the mouth of he Columbia. Although Ross Cox did not arrive until the next year, in his *Adventures*, p. 59, he refers to Thompson's arrival at Astoria.

[282] Alexander Ross went up the Columbia with David Stuart's party. See his *Oregon Settlers op. cit.*, pp. 115-39, *passim*. Of the three men who have left a record of occurrences at Astoria, only Ross speaks ill of Thompson. The British flag and the paper that Thompson had planted near the mouth of the Snake River on his way down seem to have aroused Ross' resentment and suspicions. He accuses Thompson of bribing the Indians in order to get them to prevent the Astorians from establishing a post north of the Snake river. See Thompson's own journals, covering the period July 3 through August 13, ed. T. C. Elliott, in *Quarterly of the Oregon Hist. Soc*, XV, 39-63, 104-25.

[283] Concerning the entries Aug. 14-20, see the Chronology.

Columbia. Three days later, at the mouth of the Kootenai River, the Indians left them. Thompson and his men continued up the Columbia and on September 18, reached the hut at the mouth of the Canoe River, where they had camped the previous winter.[284] Thus between April and September 1811, Thompson completed his survey of the Columbia River, having traveled its entire course from source to mouth.[285] After sending down the river to Kettle Falls the part of the trading goods that had been brought across the mountains, Thompson made a trip to Henry's House on the east side of the Rockies, and returned with the rest of the goods. Descending the Columbia, he arrived at Kettle Falls on October 31. Between that date and November 10, he was engaged in transporting his supplies from the Columbia to Spokane House.[286]

Leaving Spokane House again on the eleventh, Thompson traveled up the Spokane River for about twenty-five miles and then turned northward toward the Pend Oreille River, which he reached at a point twelve miles below the lake. From there he followed his old trail along the north side of the lake and up the

---

[284] A description of this first journey up the Columbia above Kettle Falls, a part of the river not previously traveled, has been compiled from Thompson's notebooks by Dr. Tyrrell. It includes the dates September 2-18. See *Narrative*, pp. xciv-xcvi.

[285] In 1921, M. J. Lorraine, a civil engineer, descended the Columbia River from its source to its mouth in a row boat of his own construction. See his *The Columbia Unveiled* (Los Angeles, Calif., 1924).

[286] *Narrative*, pp. xcvi-xcvii. See the Chronology, Aug. 21-Oct. 30, 1811.

north bank of the Clark Fork river, to Saleesh House.[287] He found that post deserted and in a ruinous state when he arrived there on November 19. Thompson and his men began at once to rebuild the house. On November 25, Mr. J. G. McTavish[288] and James McMillan arrived with supplies, having come by way of the Kootenai River. Thinking that a more favorable spot for the trading post might be found farther upstream, Thompson, with one of his men and an Indian lad, set off on December 20, to explore the "south branch" of the Clark Fork.[289] After examining the country for a short distance up that stream and talking with the Indians concerning the nature of the country, Thompson concluded that the location was unfavorable because the mountains extended too close to the river. He returned to Saleesh House on December 24 and spent the rest of the month in getting out timber and in constructing a canoe.

During the first six weeks of the new year, Thompson and his men worked on the canoe, finishing it on February 13. Two days later, Thompson, with Finan McDonald, an interpreter, and ten men, set off to visit the Salish Indians. At the Indian camp, located on the Flathead River just below the mouth of Jocko Creek,[290] Thompson obtained two horses and

---

[287] Concerning Thompson's journal entries for Oct. 31-Nov. 19, 1811, see the Chronology. The entries for Nov. 11, 1811-March 23, 1812 are given here in Part VII of the Journals.

[288] For biographical sketch, see Appendix A.

[289] Often referred to locally as the Missoula River.

[290] Named for Jaco, or Jacques Raphael Finlay. See Appendix A.

with an Indian guide rode up the bank of the Flathead River to Jocko Creek, followed the latter stream for some distance, and then ascended a hill to a narrow defile about a mile long, at the entrance of which the two men camped late on the night of February 25. The next day they came out upon the plains in the vicinity of the city of Missoula and went up what Thompson described as a "high Knowl," probably Mount Jumbo. From the summit Thompson sketched off the surrounding country and traced the route Lewis and Clark had followed up Lolo Creek, and also the separate routes those explorers took on their return journey. The next day Thompson and his guide returned to the Flathead camp. On the twenty-ninth of February, Thompson again engaged a guide and two horses from the Indian chief and on March 1, rode up to Flathead Lake, returning to the camp about nine o'clock the same evening.[291] On the following day he and his whole party embarked in their canoes and returned to Saleesh House.

During the next ten days they were busy pressing the furs into packs, tying up the meat in bales, gumming the canoes, and making other preparations for their departure. On March 13, Thompson and his men loaded their two canoes, embarked, and voyaged

---

[291] During the Columbia River Historical Expedition of 1926, Dr. Tyrrell and Mr. T. C. Elliott, accompanied by Mr. Ralph Budd of the Great Northern Railway, who sponsored the expedition, and the late Sidney M. Logan of Kalispell, made a trip to Flathead lake on July 24 and located the knowl from which David Thompson viewed the lake on March 1, 1812. Mr. Logan's article on the trip and Mr. Elliott's account of the first coming of white men to the shores of Flathead Lake were printed in the *Helena* [Mont.] *Independent* for August 29, 1926.

downstream to the place known as the north end of the "Skeetshoo Road," the Indian trail leading from the Pend Oreille River across to the Spokane River. There they camped for four days awaiting Mr. J. G. McTavish with men and horses from Spokane House. The party continued on to that post, arriving there on the twenty-fourth, and the following day set out for Kettle Falls.[292] For the next three weeks the men were employed in carrying the furs, provisions, and baggage from Spokane House to Kettle Falls and in constructing canoes of birch and cedar. Finally, on April 22, Thompson, accompanied by McTavish, started up the Columbia with a brigade of six canoes, each manned by five men and carrying 300 pounds of provisions, in addition to the furs. The furs amount to 122 packs.[293]

After a difficult journey, the party reached the western end of the trail across Athabaska Pass on May 5.[294] There Thompson left the men to dry the packs of

---

[292] Concerning entries Mar. 14-29, see the Chronology.

[293] *Narrative*, pp. 555-56.

[294] The Athabaska route was the subject of discussion at the annual meeting of the North West Company at Fort William in 1811, as the following extract from the minutes shows:

"11TH July. The first meeting assembled for the purpose of taking into consideration the state of the Trade hitherto carried on across the Rocky Mountains by the sources of the Shaskatchiwan River–and also to consider the propriety of adopting the new Plan proposed by Mr. David Thompson, of carrying on that Trade in future by way of the Beaver & Athabasca Rivers.

"After a full discussion it was determined that the route newly proposed, and which Mr. Thompson attempted last winter to pass

furs and to put everything in order to cross the mountains as soon as the melting of the snow permitted. He, himself, having made "Bear Paws," or rough snowshoes round at each end, set off on foot with three hunters to cross to the east side. On the eighth of May he reached the summit of Athabaska Pass on what proved to be his last journey across the Rocky Mountains.[295] Although David Thompson was only forty-two when he left the country west of the Rockies in 1812, he never returned to that region, nor to any of his old posts on the Saskatchewan.[296]

---

through–would be attended with more expense & difficulty than the old one, and that therefore the Trade should continue to be carried on by the route of the Shaskatchiwane River." *Documents ... North West Company*, p. 265-66.

Mr. John McDonald of Garth, J. G. McTavish, and James McMillan used the Saskatchewan route across Howse Pass in 1811 (the arrival of the two latter at Saleesh House is noted in the Journals, Pt. VII, the entry for Nov. 25), but after that it was abandoned in favor of the Athabaska route. The latter continued to be used by the North West Company and the Hudson's Bay Company until some time in the 1840's.

[295] For occurrences from Mar. 30-May 8, 1812, see *Narrative*, pp. 554-57.

[296] Among the numerous errors in Miss Agnes C. Laut's chapter on David Thompson, in her *The Conquest of the Great Northwest*, is the statement that on November 15, 1813, David Thompson returned to Astoria with Alexander Henry, and that on the 30, the two men, with John George McTavish, "scuttle upstream to hide ninety-two packs of furs and all ammunition and provisions and canoes." In her "Preface to the Sixth Edition" in 1981 (I, xvi) she has stated, with reference to the original edition, "Some criticisms are made of Thompson's Life. Elliot Coues and J. B. Tyrrell are the most exhaustive authorities on Thompson; and I followed Coues." Miss Laut did not correct her errors in the sixth edition although a careful reading of Elliott Coues' work would have

On his way eastward Thompson picked up his family and then continued on to Fort William for the annual meeting of the North West Company.[297] He was due to "go down in rotation" that year, but his case had first to be reviewed at the annual meeting and approved by the partners. The North West Company, in its Agreement of 1790, had provided for a kind of "sabbatical leave" for the wintering partners. According to the text of Article 3:

> ...two of the parties [partners] may winter below [in Montreal] each year, in rotation, or as they may agree amongst themselves, upon paying the salary of an able clerk each, to take

---

convinced her that the errors were hers, not Mr. Coues'. In his *New Light*, II, 747, the entry in Henry's journal reads: "Monday, Nov. 15, 1813. Arrived at Astoria, as per Journal from Fort William." He says nothing about David Thompson being with him. In Henry's journal entry for November 30 (II, 760), occurs this sentence: "At five, Mr. Thompson embarked with all our packs, 92 in number, and a stock of arms, ammunition, and provisions, in one large boat and two canoes." Mr. Coues' footnote 23 reads in part: "Henry repeatedly mentions this Mr. Thompson, but neither Franchere, nor Ross, nor Cox, has a word to say about him, and who he was seems uncertain, except that he was *not* David Thompson." The italics are Mr. Coues'. With regard to the criticisms of her chapter on Thompson, Miss Laut has concluded: "To me the discrepancies seem very non-essential. The fact is -- Thompson was too late to preempt the Lower Columbia; but he blazed the way to the capitulation or sale--as you like to call it--of Astoria ... Thompson's importance to me is rather as an explorer than as an international figure."

[297] *Narrative*, p. 559.

> their places, and to return the year following to their stations, cases of sickness only excepted.[298]

This provision for going down to Montreal in rotation was retained, with some modification, in the Agreement of 1802,[299] and reaffirmed in the Agreement of 1804.[300] Appended to the minutes of the annual meeting of 1808 is a "Review of Rotations founded on a Resolve passed the 8th July 1805," in which the names of the wintering partners entitled "to go down in Rotation," each year for the period 1805-1812, are recorded. Thompson's name appears among those listed for 1808, and again for 1812.[301] But there was no "leave" for him in 1808. That year he

* * *

---

[298] *Documents ... North West Company*, pp. 85-86.

[299] Article 9 of the Agreement of 1802 provided that the number of wintering partners allowed to go down to Montreal each year in rotation should be regulated at the annual meeting, according to circumstances, but not to exceed five in any case whatever. *Ibid.*, pp. 114-15.

[300] See Article 16. L. R. Masson, *Les Bourgeois de la Compagnie du Nord-Quest, Deuxieme Serie* (Quebec, 1890), p. 494.

[301] *Documents ... North West Company*, pp. 258-60.

[p.43]

PART III.

HIS FIRST JOURNEY UP THE CLARK FORK RIVER

From Pend Oreille Lake, up the Clark Fork River, Overland to the Kootanai, down that River, and back to the Lake, October 7-31, 1809

Octr 7th[1] *Saturday* - A rainy Night & cold blustering Morng. Wind SW - the / Men have cut & hauled all the wood for the House[2] & this Morng began / to dig the Holes for the Posts &c - which will be all up today I hope - very / rainy cold blowy Afternoon - - set up all the Posts &c - & Needles[3] - /

---

[1] The journal entries for Sept. 8 (the last date in Pt. II) - Oct. 11, and for Oct. 30 - Nov. 2, edited by T. C. Elliott, have been published in *The Washington Historical Quarterly*. See *ante*, the Chronology, p. clix. The photostatic copy for this part includes the entries for Oct. 4-6, but these have been omitted from the transcript given here. For Thompson's activities during this period, see the Introduction, pp. ci-cii. On Oct. 7, he was at Pend Oreille Lake assisting with the building of his first trading post in the Inland Empire.

[2] Known as Kullyspel House; also as Fort Kullyspel. See the Journals, Pt. IV, entry for Jan. 7, 1810. The location is described in the Introduction, p. ci, note 241. Angus McDonald, a distant relative of Finan McDonald, referred to the ruins of the trading post in his manuscript, "A Few Items of the West," which, ed. by F. W. Howay, W. S. Lewis, and J. A. Meyers, has been published in Wash. Hist. Quart., VIII (1917). See p. 194.

[3] A short stout timber passing through a hole in a wall to support the end of a shore or prop.

Octr 8 Sunday - A cloudy cold blowy Day. Snowed last Night & the Hills / are laden with it almost down to the level of the Plains & Lake Early / most of the Pointed Hearts[4] went away -they had all along wished to exhibit /

* * *

[4] Coeur d'Alene Indians, of Salishan stock, belonging to the tribal division known as the Interior Salish. U. S. Bureau of the Census, *The*

3

JA 93

IN RETROSPECT

A History Of

Mineral County

Margie E. Hahn

Printed By
Mineral Publishing Company
Superior, Montana

I attest that this is a true copy of published document held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

[p.9]

* * *Under the care of Dr. James Mullan and the use of the fresh vegetables and vinegar the men soon recovered.

Mullan had noted on his trip to the mission that as they approached the river the snow was not nearly so deep and the temperature was much milder. Conditions were such that road work could be started at once from the ferry site up the Clark Fork River.

To avoid confusion the reader must understand that when Mullan and his men wrote of the Bitterroot River they were referring to the present Bitterroot River and the Clark Fork River from Missoula to its confluence near Paradise with the Flathead River. Then the two rivers became the Clarke's Fork. They referred to the upper Clark Fork east of Missoula as Hell Gate River.

On February 20, 1860 Mullan wrote orders and detailed duties to the entire group of men: these orders were to be carried out while he was on another trip to the Bitterroot. Work was to begin from the crossing of the Clark Fork at the mouth of the St. Regis River and continue up the river since there were many small prairies bared of snow that would provide forage for the stock.

Plans to build a road from Cantonment Jordan to the river were abandoned until such time as the snow melted. The entire camp was moved over the mountains to the ferry site.

Work began immediately to construct a flatboat forty two feet long and twelve feet wide to be used as a ferry; five flatboats fifteen feet long and two and a half feet wide at the bottom were also built from the lumber Strachan and his companions had whipsawed during the winter.

In a letter to a Mr. Hildreth, Mullan wrote, "Dear Sir: You are hereby placed in charge of the stores, storehouse and ferry at the crossing of the Bitterroot (Clark Fork) River. You will issue provisions to the working men as chiefs of parties shall call for them."

"You will see that the boats are properly cared for and white persons and Indians will have the free and willing use of the boats at all hours. You will lend every co-operation and aid to such persons, citizens and others, as may desire to cross the ferry; and, by a good understanding with the Indians, promote the best results for the expedition."

During the fall of 1859 and the early winter, Mullan had had survey parties scouring the entire area from Couer d'Alene north to Colville and eastward to Pend d'Oreille Lake and up the Flathead River. The men involved in these explorations gathered either at Fort Owen or Cantonment Jordan and spent much time compiling survey notes and writing detailed reports of their work. Many of these reports are included in the book REPORT OF JOHN MULLAN TO THE ARMY.

W.W. DeLacy, a civil engineer and two other men, were sent to explore the river from St. Regis to its confluence with the Flathead River near Paradise. This is known locally as the Cutoff. In his report to

Mullan he wrote: "Sir: In obediance to your orders of March 27 (1860) I started on April 4th from the wagon road crossing on the Bitterroot River to make a survey of part of the Bitterroot River, Clarke's Fork and Flathead rivers. I took with me one of the flat bottomed boats built at the ferry, about twelve feet long, two men and rations for thirty days. The weather at first was unfavorable, and delayed us several days. I was successful in getting the boat over all the rapids in the Bitterroot river and down Clarke's Fork about ten miles and thus ascend the Flathead to the mouth of Plum Creek, on which the Pend d'Oreille mission is situated. I visited the mission, where I was hospitably received by the reverend fathers, Louis and Minetrey, and connected it with my survey, and finally returned to the wagon road crossing on the 21st of April, having to cordelle my boat all the way up the Bitterroot River and haul it unloaded over the two worst rapids."

DeLacy wrote a very graphic description of the geographical features of the entire area surveyed including the area around Plains.

"This is an extensive flat, on a high plateau, more than a mile wide and very long," he wrote of Plains which was called Horse Plains.

It is interesting to note that the Burlington Northern freight line from St. Regis to Plains was built nearly where DeLacy recommended, should a railroad ever be built.

DeLacy closes his report to Mullan with these words: "The rock formation seems to be trap (a dark colored igneus rock, a form of basalt) ... Thus has been an upheaval and disturbance of the whole of this

region. Neither fossils nor evidence of metallic minerals were found, though both were looked for when opportunities presented . . ."

"In conclusion, I would beg leave to mention in terms of praise the two men who accompanied me, Issac Grier and Dan Smith, privates, 3rd Artillery, for their good conduct throughout the trip, but particularly when dragging the boat up the Bitterroot River, where they were in the water nearly from morning till night."

According to Mullan evidences of gold, silver and copper were observed in most areas from Walla Walla to the present Helena but the men were discouraged from seeking it or talking of it. It was feared if gold was discovered it would be difficult to keep men on the surveying and road building project.

Road building from the ferry crossing at St. Regis eastward for thirty miles was completed without difficulty. The topographical character of the river required that the north bank be followed that far. By the tenth of May the road had been completed from the winter camp (Cantonment Jordan) to the Big Mountain north of the present Scenic Bridge with only three miles of excavation necessary.

4

JA 99

From Wilderness
to Statehood

A HISTORY OF MONTANA

1805 - 1900

By
JAMES MCCLELLAN HAMILTON, B.A., M.A., L.L.D.
President, Montana State College, 1904-1919
Professor of Economics and Dean of Men, 1919-1940

Foreword by
A.L. STRAND, Ph.D.
President, Montana State College, 1937-1942
President, Oregon State College, 1942- ——

Edited by
MERRILL G. BURLINGAME, Ph.D.
Professor of History, Montana State College

Pen Sketches by
BETTY G. RYAN, Butte

BINFORDS & MORT, Publishers, Portland, Oregon

I attest that this is a true copy published document held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

[p.114]

lived on a farm in Garry visited the camp of the Governor and reported that a large party of whites had just arrived at Fort Colville. Satisfied that this party was McClellan's, Stevens pushed on to that post, leaving his pack train to follow, and arrived October 18. Angus McDonald was in charge of the Hudson's Bay post at Colville and gave him a hospitable reception. McClellan was camped near by and the two commanders sat down to a fine supper prepared by Mrs. McDonald.

VI

Tinkham attempts to Find Maria's Pass

The thoroughness of the Stevens survey is indicated by the assignments given to W. A. Tinkham, an engineer in the party, and to Dr. George Suckley, the expedition surgeon, and a naturalist. Suckley was given the unenviable task of navigating the Clark Fork in order to make careful observation of the stream, the geographical features of its valley, its resources, the Indians and their attitudes toward the missions which had been established, and toward white men generally. A boat was constructed of three bullock hides stretched over a frame. With two white men and an Indian

guide, Dr. Suckley left Fort Owen October 15. The little party made excellent time and despite the hazards of the precipitous river, arrived safely at the Jesuit Mission on the upper end of Lake Pend d' Oreille, where they were hospitably received. From here they continued overland to Fort Colville, and then embarked upon the Columbia for the remainder of the journey to the coast.

Tinkham was given the task of attempting to find the elusive Marias Pass from the west. His small party traveled with Lieutenant Donaldson's larger detachment up the Corriacan Defile and down the Jocko to its mouth. He then struck out north and passed up the Flathead River to the Lake. The trail wound along the western shore of the lake and gave many opportunities to see the wondrous beauty of this seventh largest fresh water lake in the United States, its shores heavily forested and its

5

JA 103

Flathead and Kootenay

The Rivers, the Tribes and the Region's Traders

by

OLGA WEYDEMEYER JOHNSON

THE ARTHUR H. CLARK COMPANY
Glendale, California
1969

I attest that this is a true copy of published [JF] document held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

[p.57]

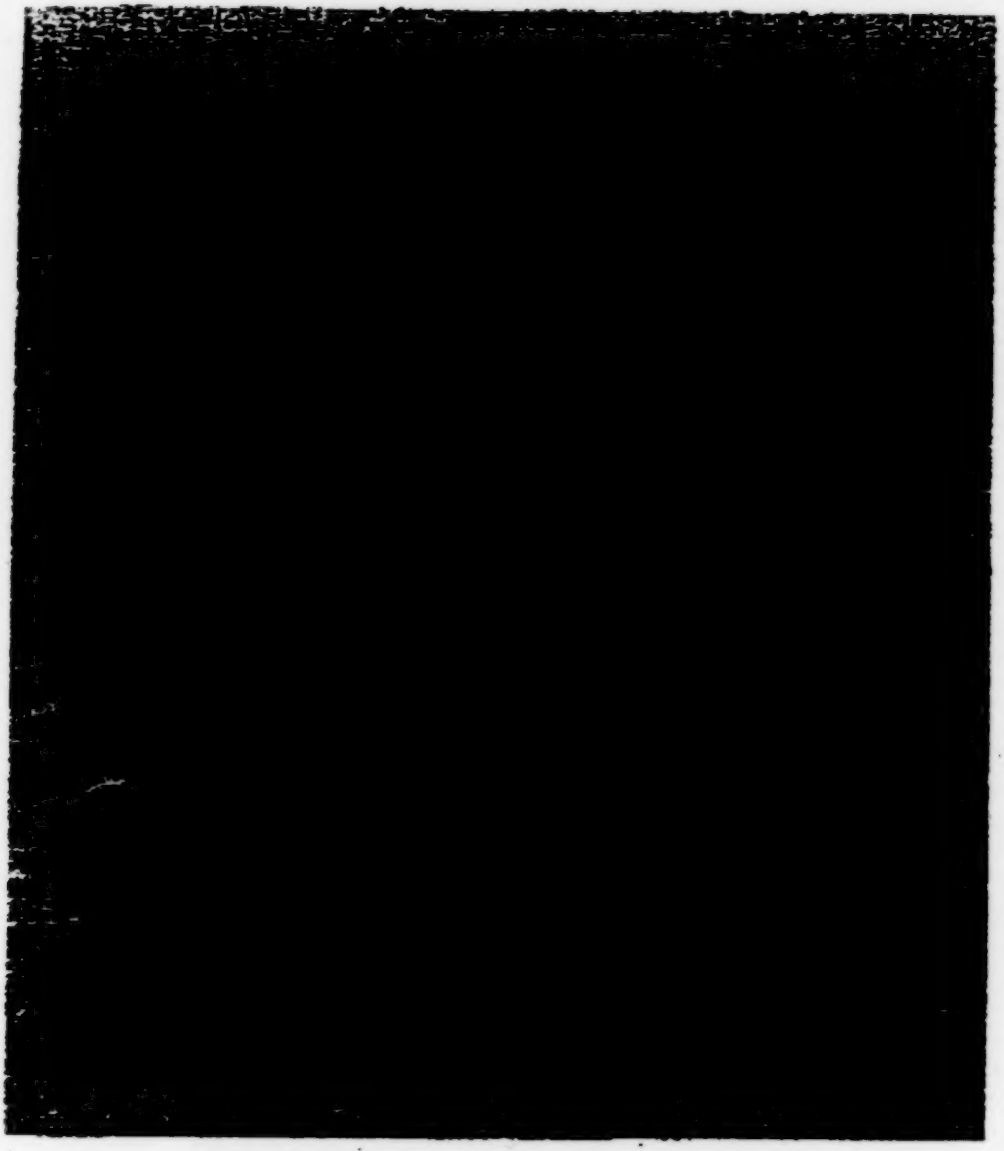
eilles ever had home villages on Sun River, and how early they lived in the Missoula Valley, we do not exactly know. Teit was told that after the extinction of the *Semte'use*, who were supposed to have lived to the south of the Swan Valley, the Pend d'Oreilles, "claiming to be the tribe most related to them, occupied their -country for hunting and root digging, including the large camas grounds near Missoula. The latter, however, were also used to some extent by the [Southern] Flathead."[34]

An alert young Flathead of today, whose wife has a strong strain of Pend d'Oreille blood, insists with feeling that the notion of definite boundaries separating the peoples of the region was invented by the White men, who can't conceive of a life without private real estate protected by fences and laws. Just because the first White men in here found some Pend d'Oreilles camped in a certain locality, he says, they declared this to be Pend d'Oreille land – and so forth – when actually all the tribes were at peace and hunted and visited back and forth, intermarried, and used the same land. This is an extreme viewpoint, but enlightening. It may apply only to the Flathead groups of the region. Simon Francis writes that although a modern treaty between the Kutenais and the Flatheads allowed temporary encampments in each other's territory, before the treaty "No Kootenai was ever any good to be seen along the Flathead River [referring to the lower Flathead-Clark Fork-Pend d'Oreille] at any time, and no Flathead was ever any

---

[34] Teit, *Salishan Tribes*, 308.

good to be seen along the Kootenai river." Such a state of affairs would have to antedate the fur-trading era, during which the Kutenais often traded on the Clark Fork and occasionally at other posts far outside their more customary range. Certainly with the changing conditions that began even before the traders arrived, the different groups of the region shifted readily from supposedly traditional camping and hunting grounds, and peaceably intermingled.



CABINET GORGE ON THE CLARK FORK OF THE COLUMBIA.
Along the canoe route from Kullyspell House to Salish House.
Photo by Ross Hall.

* * *

[p.185]

must procure horses to take up to the Flat Head River [Clark Fork, also called by Thompson the Saleesh] where we hope, please Heaven to pass a good quiet winter."[20]

KULLYSPELL HOUSE AND SALEESH HOUSE

On the Clark Fork Thompson selected a site near present East Hope, Idaho, on a peninsula near the mouth of the Clark Fork River, and ordered the building of Kullyspell House. Here at Indian Meadows tribesmen collected each fall to fish, hunt and gather berries.[21] It required four or five men to lift the heavy logs for the seven-foot walls. The roof was of cedar poles chinked with clay and long grass. For living and trading quarters, uprights were set into the rocky ground, and horizontal logs dovetailed into place in grooved slots, making a tight, weatherproof dwelling.[22]

This was Kullyspell House, the first permanent structure with roof and fireplace in the present Pacific Northwest of the United States. Lisa's man Andrew Henry did not set up his temporary post on Henry's

---

[20] *Ibid.*, Aug. 28, 1809.

[21] See Jim Parsons, "David Thompson," in *Spokesman-Review* (Spokane, Wash.), Oct. 12, 1958. Parsons gives the location as east of Sheepherder's Point, just opposite Memaloose Island. (Cf. Coues, *op. cit.*, 673.)

[22] Peltier, "Thompson Built Trading Post."

Fork of the Snake River until 1810; John Jacob Astor's Pacific Fur Company post at the mouth of the Columbia was not founded until 1811. Most of the trading at Kullyspell House that fall was with the Pointed Heart or Coeur d'Alene Indians.

That man Thompson! Already this year he had twice crossed the Continental Divide; he had canoed up the upper Columbia and some hundred and fifty miles down the Kootenay; had crossed to Pend d'Oreille Lake through unknown country, and built a substantial trading post; in late October he had explored the lower Pend d'Oreille River as a possible way to the Columbia, but had been turned back by the falls. Now, although it was getting late in the season, and he had promised himself an easy winter, he set off up the Clark Fork, crossed overland to the mouth of the Fisher River on the Kootenai, circled back down his previous course to the new Kullyspell House – and re-ascended the Clark Fork to build a second post before the year was out!

The new post, Thompson wrote, "is in a small bay of the river, close to us is a spur of hills which come on to the river in a cliff sixty feet high. The Saleesh when hard-pressed always made for the rock, as a natural defense."[23] Eventually this post was to have seven buildings of hewed logs. In early November, according to Thompson's account: "We fasted, except for a chance goose or duck among us, until the 14th, when Jaco, a, fine half-breed, arrived and relieved us. From him we

---

[23] Thompson, *Narrative*, 542. This location according to Coues was "between Eddy and Belknap stations, close to the mouth of Ashley Creek" (*op. cit.*, 674 fn. 17).

traded 28 beaver tails, 40 pounds bear meat and 30 pounds of dried meat, and now, thank God, enjoyed a good meal."[24] This was Flathead House or "Saleesh House."

The new location was especially convenient to the Middle Kutenais. Ugly Head of the Flat Bows also came up the river to hunt for the White men; with him were two companions, Deceitful Dog and Large Kidney. Other Kutenais came and went during December,

---

[24] Thompson, *Narrative*, 417.

6

JA 111

THE

MONTANA ALMANAC

1959-60 EDITION

I attest that this is a true copy of published document held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

MONTANA STATE UNIVERSITY

MISSOULA, MONTANA

[p.252]

TRANSPORTATION AND COMMUNICATIONS

The first steamboat to arrive at Fort Union was the "Yellowstone", in 1831. From this point the head of navigation moved slowly up the Missouri River until 1860 when the "Chippewa" reached Fort Benton. In the years that followed, river boats made approximately 550 trips to Fort Benton and nearby points. However, it has been nearly fifty years since a commercial boat arrived at Fort Benton. In 1864 the **Chippewa Falls** ascended the Yellowstone River to the present site of Glendive, and in 1875 the **Josephine** reached a point near the present site of Billings. Most rivermen, however, were content to stop at the mouth of the Big Horn River. Records indicate that steamboats navigated the Big Horn River as far as Fort Custer (at the mouth of the Little Big Horn River), forty miles above its confluence with the Yellowstone. The peak year for transportation on the Yellowstone evidently was 1878, when, during a less than four months period, 54 trips were made by steamboats up to Miles City. Commencing in 1882 (when the Northern Pacific Railway reached Billings), traffic on the Yellowstone gradually dwindled until 1910 when the construction of a dam at Intake brought it to a complete halt.

Westbound, the steamboats of this era carried all the commodities necessary for the expansion of the nation. These goods were unloaded at the upstream terminals and transferred to smaller boats or wagons destined for more remote places. Eastbound, the vessels carried pelts and other frontier products. Large gold shipments from Bannack and Virginia City

were also loaded at Fort Benton for shipment to St. Louis.

West of the Divide, water transportation of any significance was limited to the lower Clark Fork, Kootenai and Flathead Rivers, and Flathead Lake. The first steamboat to navigate the waters of western Montana was the **Mary Moody**, which in 1866 commenced operations from Lake Pend d'Oreille in Idaho up the Clark Fork of the Columbia River into Montana. Services to as far east as Thompson Falls was conducted until 1870 by a combination of vessels, each plying between sets of rapids. The Kootenai River at one time was navigated for about 65 miles in Montana, from Jennings to the International Boundary, and then about 70 miles upstream to Fort Steele, British Columbia. The first steamboat operation of record took place in May, 1893; by 1901 navigation had ceased, as the result of the construction by the Canadian Pacific Railway of the Crow's Nest Post Branch into the Fort Steele area. Traffic was at no time considerable; in 1897, the peak year, a total of 2,212 tons, valued at $49,025, crossed the International Boundary.

The Flathead River and Flathead Lake were used for a longer period of time, with navigation on the river extending 27 miles upstream from the lake. Traffic commenced in 1883 or 1884, and was stimulated by the entrance into the area north of the lake of the Great Northern Railway in 1891-2. In 1897, 363 tons of general merchandise, lumber, hay and grain, and 282 passengers were transported; in addition 20,000 railroad ties were floated out. In 1901, 311 tons of similar commodities and 2,221 passengers were transported with 60,000,000 board feet of saw logs

floated out. By 1908, the volume had increased to 3,000 tons and 6,000 passengers. In 1912, 250,000 tons of miscellaneous merchandise, 4,500 tons of wheat and 14,000 head of horses and cattle were transported. The peak year for transportation on the lake was 1915. This was in large part due to the settlement of the Flathead Indian Reservation. In that year 20 boats, with a capacity of over 1,000 passengers and 900 tons of freight, were in operation. From 1930 to 1949, the annual average commercial traffic on Flathead Lake amounted to 58,500 tons.

7

ROCKY MOUNTAIN GAZETTE

*** * *Agriculture, Politics, Commerce Literature, The Arts, Sciences, etc. – A Paper for the Miner, Farmer, Mechanic,* * ***

HELENA, MONTANA TERRITORY, SATURDAY, AUGUST 18, 1866

* * *

The Coeur d'Alene Route

Is shorter, but at this season of the year presents so many difficulties, by reasons of swollen streams, that pack trains take this route in preference. The rate of freight on this steamer is ½ c per lb to the upper landing from where it is taken by pack trains, no wagon road being opened. The necessity of either, however, will be obviated in about three months at the outside, as a gang of men have already gone forward for the purpose of building another steamer above the portage of seven miles which exists at this point. This second steamer will run to Thompson's Prarie, from which a flat country extends suitable for a wagon road, thereby entirely doing away with pack trains.

* * *

8

I attest that this is a true copy of newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

THE HELENA HERALD

**HELENA, MONTANA TERRITORY,
THURSDAY, MAY 2, 1867**

NAVIGATION OF THE PEN D'OREILLE LAKE.

X. tells us that they are now running their steamer on the Pen d'Oreille Lake, a distance of 60 miles across, making the trip in less than a day, and by this route, bad mountain spurs and extensive marshes, and a hundred and fifty miles of roundabout land travel are saved in the carrying of the mails, freight, passengers, etc., traveling between Montana and the navigable waters of the Columbia. A scheme is also now projected to run a light boat from the Lake up the Pen d'Oreille river to the mouth of the Jocco, which is within a short distance of the Flathead agency.

[see back for certification

THE HELENA HERALD

HELENA, MONTANA TERRITORY,
THURSDAY, JUNE 5, 1867

* * *

FROM PEN d'OREILLE LAKE

* * *

They will have their third boat completed and ready for service by the 1st of June, which will give a complete and reliable line of steamers for a distance of 125 miles, from Pen d'Oreille landing to Thompson's river, with good wagon roads to the Columbia river and to Missoula City and Helena. Fare and transportation will be on the line through, correspondingly cheap, as now on the steamer Mary Moody or lake boat. This route avoids the Coeur d'Alene range of mountains, giving speedy and easy transportation for at least eight months in each year. Last winter, boats could have run without interruption, excepting for the very short space of ten days, when the river was closed with ice...

* * *

I attest that this is a true copy of newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

Helena Weekly Herald
Helena, Montana, Thursday, September 12, 1867

CHEAP FREIGHTS BETWEEN WALLA WALLA AND HELENA

* * *

We are informed by the agent H.A. Hogue, that he has succeeded in getting the steamer Missoula above Rock Island without the slightest damage, and made a successful trip to Thompson's landing, below Thompson's Falls, and found the river much better than was expected, making eight miles an hour up stream. The company is now fully prepared to transport freight and passengers from Pen d'Oreille to Thompson's, a distance of 130 miles, through the Coeur d'Alene range of mountains without delay. Traveling time from Walla Walla to Pen d'Oreille, three to four days; thence to Thompson's (by boat) two days; thence to Helena, three to four days, making the entire trip in from eight to ten days with ease and comfort, and with a line of good stages the time can be reduced regularly to six days. The boats make the down trip from Thompson's to Pen 'dOreille in one day.

I attest that this is a true copy of newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

Helena Weekly Herald
Helena, Montana, Thursday, February 13, 1868

FROM PEND D'ORIELLE LAKE.— We had the pleasure of meeting, to-day, an old friend, Mr. W.A. Clark, to whom our people are indebted for the regularity with which the mails are carried between Walla Walla and Missoula. Mr. Clark informs us that, although there were three feet of snow at Pend d'Oreille Lake, and the thermometer had indicated a temperature of twenty-six degrees below zero, yet that this remarkable lake-some fifty miles in length-is unfrozen, and that the mails are carried across it sail boats. Although the regular time for the mails to be in transit between Missoula and Walla Walla is twelve days, they have recently come through in ten. The steamers at the lake and on the river are having wood cut and making every preparation to commence running as soon as Spring travel begins. The steamer "Missoula" runs from Thompson's Falls sixty miles down the river to Rock Island rapids, where there is a portage of half a mile. The steamer "Cabinet" then runs sixteen miles further down, to a portage eight miles in length, terminating at Cabinet Landing. The "Mary Moody" then runs down the river and across the lake—fifty miles in all—to Pen D'Oreille City. It will thus be seen that a chain of water communications,

one hundred and twenty-six miles in length, has been established in the heart of the mountains.

* * *

9

SANDERS COUNTY LEDGER
Most Widely Circulated Newspaper in Sanders County

THOMPSON FALLS, MONTANA, Thursday, February 6, 1958

I attest that this is a true copy of newspaper held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

STEAMBOATS ONCE OPERATED ON CLARK FORK RIVER

* * *

Because of so much travel each spring over the Clark Fork route from Hellgate on the east to Ft. Walla Walla on the west, the Oregon Steam Navigation Co. of Portland decided to put a line of Steamboats on the Clark Fork. The company commenced operations in the fall of 1865 and the spring of 1866 the "Mary Moody" crossed Pend Oreille lake and traveled up the Clark Fork about fifteen miles to Cabinet Landing where Washington Water Co.'s Cabinet Gorge Dam is located now. Later a second steamboat, the "Cabinet", ran from the upper end of Cabinet Falls on the rapids at Rock Island, near the present town of Noxon and practically the exact site of the new Noxon Rapids dam. Here cargo was transferred to a third vessel, the "Missoula" which ran from the upper end of Rock Island Rapids to Thompson Falls. These boats continued operation throughout the

year 1869. Although this particular line of steamers was discontinued, boats were in use between Noxon and Thompson Falls until after the coming of the railroad.

* * *

I attest that this is a true copy of an newspaper held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

THE SANDERS COUNTY LEDGER

**THOMPSON, MONTANA,
FRIDAY, APRIL 19, 1907**

---

* * *

The Hope Lumber Company's men arrived here last week to drive the logs cut along the river between Eddy and the Idaho line to the mill at Hope. The men expect that it will take about four weeks to complete the drive.

* * *

SANDERS COUNTY LEDGER

THOMPSON, MONTANA, FRIDAY, JULY 22, 1910

Power Rights Settled

The action commenced in December, 1909, in the United States Circuit Court of Montana, by Steele, Wenham and Maher against the Northwestern Development company and Edward Donlan, was heard and determined July 18, 1910.

A judgment was rendered therein whereby the Northwestern Development company was adjudged to have the prior right to the use of the waters of the Clarks Fork of the Columbia River, and an injunction was granted permanently restraining Steele, Wenham and Maher, their agents and employees, from interfering with the rights and property of the Northwestern Development company.

The court found and the decree recites that the Clarks Fork of the Columbia river is a non-navigable river, and that the Northwestern Development company is the owner of both banks of the river as it flows through the whole of township 21 north of range 29 west, and that the company has the legal right to permanently flood and submerge both banks of said river, and that the Northwestern Development company is the sole owner of the bed of said river in the whole of said township.

The court also found that the water rights of Steele, Wenham and Maher are null and void, also the deeds

by which said water rights were attempted to be conveyed.

The result of the decision of the court leaves the Northwestern Development company in undisputed possession of the water and power right and removes all obstacles in the way of construction work. It is confidently believed that the long delayed work of constructing the big dam and power plant at this place will be commenced in the very near future, and in all probability thirty days will see operations well under way.

THE SANDERS COUNTY LEDGER
OFFICIAL PAPER OF SANDERS COUNTY
MARCH 4, 1914 TO MARCH 4, 1916.

THOMPSON FALLS, MONTANA,
FRIDAY, MARCH 13, 1914

I attest that this is a true copy of an newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

* * *

Several expert log drivers left Clarksfork this week to assist in breaking up the log jam at Heron, Mont. This jam is stated by old river men to be the largest they have ever seen in the Clarks Fork river. After it is broken the men will drive the logs down the river to the sorting works at the mouth of the river.—Clarksfork Times.

* * *

10

JA 131

The Missoula Pioneer

MISSOULA, MARCH 2, 1871

I attest that this is a true copy of newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

* * *

NAVIGATION OPEN

Thomas D. Beebe and T.L. Hodge left Frenchtown on Sunday last in an open boat, and passed and arrived at the mouth of Quartz on Tuesday evening, without accident. This, in connection with the cruise of the *Kangaroo* last season, and the uninterrupted transportation of hay and lumber between the Mouth of Cedar and the Missoula Ferry, demonstrates the practicability of navigating the Deer Lodge, Hellgate and Missoula rivers from Deer Lodge City to the Pen d'Oreille.

THE PIONEER
Missoula, Montana Territory,
Saturday, July 13, 1872

* * *

I attest that this is a true copy of newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

* * *

A SAD MISHAP ON THE MISSOULA

A.H. Ross, of Missoula, Drowned.

Mr. Beltner's party of the N.P.R.R. engineers having reached the confluence of the Pen d'Oreille and Missoula rivers, the Chief of the party returned to Missoula a few days ago, and on last Saturday morning started in a small boat from Missoula to explore the Missoula river route, with a view to running a survey line down that stream should the route look favorable. Among those who accompanied him from Missoula was Mr. A.H. Ross, druggist, one of the best of Missoula's citizens. On the evening of the day they started the boat capsized in the canyon about three miles above Moose Creek Ferry. The party-five in number-were thrown into the stream in the swift rapids; but all except Mr. Ross succeeded in making shore. He was carried under the waters and drowned, and up to latest advices his body had not been

recovered. The stream in the canyon is very wild and full of boulders, and at the present stage of the water the voyage was known to be perilous. We believe all the Cedar bound boats of 1871 were abandoned by the voyagers at its head, and that no one has ever made the trip.

11

MISSOULA AND CEDAR CREEK PIONEER

MISSOULA CITY, DECEMBER 8, 1870

I attest that this is a true copy of an newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

RIVER THIEVES.—The A1 clipper-built and copper-fastened bark *Kangaroo*, which had been lying at our levee for several months past awaiting profitable charter, was cut loose from her moorings a few nights since, by river-pirates, and carried [illegible] to Cedar Creek. It will be remembered that the Kangaroo, on her late voyage from Deer Lodge to this port, shifted [illegible] deck-load and was thrown on her [illegible]-ends, no less than three times, in a typhoon off the mouth of Bear Gulch. In order to cause her head to [illegible] off from [illegible] dangerous shoals in that vicinity, the crew were obliged to [illegible] her forefoot [illegible] the binnacle. It was during this [illegible] time that Captain S.D. Johns resorted to the desperate alternative unparalleled in the annals of seamanship, picking up the vessel's [illegible] and throwing it in the [illegible] in order to make her lay her course. To weather such dangers only to find in the end that the [illegible] craft has been ignobly stolen by [illegible] is indeed adding insult to injury.

12

MISSOULA, MONTANA TERRITORY
FRIDAY, JUNE 9, 1882

I attest that this is a true copy of newspaper held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

* * *

Dr. W.B. Clowe, of Walla Walla, came in last Tuesday from the lower country, . . . He reports that a man was drowned at Ewart's Landing. He fell over a truck on the steamer and was knocked overboard, the undercurrent of the Clarke's Fork river carrying him to the bottom. He was unable to learn the man's name.

* * *

MISSOULA, MONTANA TERRITORY
JUNE 30, 1882

I attest that this is a true copy of newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

* * *

At the end of the track a steam boat is loaded with goods and supplies and runs to Cabinet Landing—seven miles. At this place falls in the river obstruct navigation, and further progress for the boat is impossible. A boat is being built, and will be completed in a month at Rock Island, which will run to Thompson Falls, a distance of fifty miles, which connects with the wagon road to Weeksville and Missoula. From the latter place to Weeksville it is ninety-five miles and from Weeksville Falls it is twenty miles. The wagon road is completed to Rock Island from Cabinet Landing a distance of twenty-five miles, and is being pushed on to Thompson Falls. The railroad crosses Clarke's Fork a second time at Thompson Falls.

I attest that this is a true copy of newspaper held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

MISSOULA, MONTANA TERRITORY
FRIDAY, JULY 7, 1882

DOWN THE ROAD

* * *

The new supply boat, being built at Rock Island, is expected to be running on the river between Rock Island and Thompson Falls by the first of August. She will be 130 feet in length and be outfitted with powerful machinery suitable to running the rapids which she will encounter between these points.

* * *

Mr. Eddy started a raft of lumber down the river a few weeks ago from Weeksville, in charge of Mr. Drenning, (one of the partners of Stephens, Wilcox & Co.) and Charley Caldwell-better known as "Blud," the man with his coffin on his back. The next thing known of them was that the raft had shot the rapids at Thompson Falls, and that Drenning was drowned, while Caldwell escaped. The survivor states that he was pretty drunk and went to sleep, telling Drenning to wake him at the point where they were to land

(Thompson River). He was awakened by a shout from his companion, who was holding [article is cut off here]

* * *

MONTANA TERRITORY, AUGUST 18, 1882. NO. 13.

* * *

I witnessed the launching of a handsome little side-wheel steamer called the Missoula. This boat is intended to run on Clarke's Fork of the Columbia, between the end of the track at Rock Island and Thompson's Falls, carrying freight, railroad stores, etc.

* * *

The boat is forty feet long and is light enough to be hauled around the falls and be re-launched on the river when the road reaches the present head of navigation.

* * *

MISSOULA, MONTANA TERRITORY, SEPTEMBER 8, 1882

N.P.R.R.

Important to Merchants!
The time has arrived for the
Resumption of Trade
Between
MONTANA AND IDAHO AND THE
Pacific Coast!

The line of the Northern Pacific R.R. Co. is now in operation to Rock Island, 526 miles from Portland, Oregon. Connecting with the railroad at Rock Island a commodious steamer will afford rapid transportation thirty-four miles farther east to the vicinity of Thompson river, whence a first-class wagon-road leads to Missoula-offering a wagon haul of twenty-five miles less than from Butte City.

* * *

Col. Wheeler received a letter from Col. E.C. Denning, of Virginia city, but now in Washington, in which he says: "I met Captain John Mullan here, the man who in 1865 laid out a road from the head of navigation on the Missouri to the head of navigation on the Columbia." . . . He also proposes to make a trip over the road between Benton and Walla Walla which he surveyed in 1858.

MISSOULA, MONTANA TERRITORY
FRIDAY, FEBRUARY 24, 1883.

I attest that this is a true copy of newspaper held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

* * *

It is situated near the river in a body of fine timber, and when the supply of logs in the immediate neighborhood gives out, they can be floated right to the locality down the Missoula and Pen d'Oreille rivers.

* * *

13

JA 145

A Project of the Center for

Great Plains Studies,

University of Nebraska-Lincoln

Gary E. Moulton, Editor

Thomas W. Dunlay, Assistant Editor

The Journals of the Lewis & Clark Expedition

Volume 4, April 7 - July 27, 1805

I attest that this is a true copy of published book held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

University of Nebraska Press
Lincoln and London

[p.428]

From the Great Falls to Three Forks

South	3	to the center of a Stard. bend
S. 75° E.	1 ½	to a bluff point on Stard. here the river again enters the mountains I beleive it to be a second grand chain of the rocky Mots.
S. 55° E.	1	to a point in a Lard. bend at some large springs.
S. 30° E.	½	to a point in the Lard. bend, high clifts.
South	½	to a Clift of rocks in a Lard. bend; opst. to which we encamped for the night under a high bluff[7]
Miles	16	

[Clark] *July 25th Thursday 1805*

a fine morning we proceeded on a flew miles to the three forks of the Missouri those three forks are nearly of a Size, the North fork appears to have the most water and must be Considered as the one best calculated for us to assend middle fork is quit as large about 90 yds. wide. The South fork is about 70 yds wide & falls in about 400 yards below the midle fork. those forks appear to be very rapid & Contain Some timber in their bottoms which is verry extincive,— on the North Side the Indians have latterly Set the

Praries on fire, the Cause I can't account for. I Saw one horse track going up the river about four or 5 days past. after Brack-fast (which we made on the ribs of a Buck killed yesterday), I wrote a note informing Capt Lewis the rout I intended to take, and proeeded on up the main North fork thro' a vallie, the day verry hot about 6 or 8 miles up the North fork a Small rapid river falls in on the Lard Side which affords a great Deel of water and appears to head in the Snow mountains to the S W.[8] this little river falls into the Missouri by three mouthes, , haveing Seperated after it arrives in the river Bottoms, and Contains as also all the water courses in this quarter emence number of Beaver & orter maney thousand enhabit the river & Creeks near the 3 forks (Pholosiphie's River)— We Campd on the Same Side we assended Starboard 20 miles on a direct line up the N. fork. Shabono our intrepreter nearly tired one of his ankles falling him— The bottoms are extencive and tolerable land Covered with tall grass & prickley pears The hills & mountains are high Steep & rockey. The river verry much divided by Islands Some Elk Bear & Deer and Some Small timber on the Islands Great quantities of Currents, red, black, yellow, Purple, also Mountain Currents which grow on the Sides of Clifts; inferior in taste to the others haveing Sweet pineish flaver and are red & yellow, Choke Cheries, Boin roche,[9] and the red buries also abound— musquitors verry trouble Som untill the mountain breeze Sprung up which was a little after night.

1. On *Atlas* map 64, Clark labeled them "Little Gate," and elsewhere "Little Gate of the Mountain." The place is in Broadwater County, Montana, between present Toston and Lombard.

2. Now Crow Creek, Broadwater County, correctly named "Gass's Creek" on *Atlas* map 64, MRC map 82.

3. The Lombard thrust fault cuts through here. Steeply dipping rocks, ranging in age from Precambrian through Cretaceous, are exposed within less than a mile. The Mission Canyon and Lodgepole limestones of the Madison Group occur upstream.

4. The three forks meet near the Broadwater-Gallatin county line, Montana, about four miles northeast of the present town of Three Forks. Part of the area is within the Missouri Headwaters State Monument. Appleman (LC), 328-32; *Atlas* maps 64, 65; MRC map 83.

5. Clark's route appears as a dotted line on *Atlas* map 65, but his campsite does not. It was on the north side of the Jefferson River, in Jefferson County, Montana, above the mouth a Willow Creek (Lewis and Clark's Philosophy River) and the town of Willow Creek, and about three miles downstream from the present crossing of U.S. Highway 287.

6. Lewis's "gooseberry" is probably Clark's "Mountain Currents" of this day and their words illustrate the confusion of the two terms. From Lewis's ecological and morphological descriptions it is clear that both are the single plant, squaw, or western red, currant. The captains may be viewing color variations or perhaps the yellowish fruited individuals were simply immature. As Lewis points out, it is the same shrub encountered on June 18. It was probably Biddle who drew a red vertical line through this passage about the gooseberry; other lines were also

drawn through passages about the antelopes and geese above.

7. This camp is misdated July 24 on *Atlas* map 64. It is in Broadwater County, immediately above Toston Dam. MRC map 83.

8. "Pholosophy [Philosophy] River" on Atlas map 65; now Willow Creek, in Gallatin County. The mountains are the Tobacco Root range, in Madison County.

9. Probably meaning *bois rouge*, the previously noted red osier, dogwood.

[Lewis] *Friday July 26th 1805.*

Set out early this morning as usual current strong with frequent riffles; employ the cord and seting poles. the oars scarcely ever being used except to pass the river in order to take advantage of the shore and current. at the distance of 3 ¾ m. passed the entrance of a large Creek 15

14

THE MADISONIAN, VIRGINIA CITY, MONTANA, MAY 9, 1913

I attest that this is a true copy of newspaper [JF] held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

LOG DRIVE TO BEGIN

Gilbert Wilcox of Natural Bridge, N.Y., accompanied by Frank Carroll of the same place, arrived in Virginia City the forepart of the week. Messrs. Wilcox and Carroll will have charge of the drive of logs from Lyon to the mill at the upper Varney bridge.

THE MADISONIAN, VIRGINIA CITY, MONTANA, JULY 4, 1913

* * *

WIGWAM NEWS.

* * *

Wm. Wilcox will begin diving logs down the Madison river to the Varney bridge Tuesday. We hope that success will crown his will deserved efforts.

* * *

THE MADISONIAN, VIRGINIA CITY, MONT., JULY 25, 1913

GETS LUMBERJACKS.

William Wilcox, manager of the Madison River Lumber company, was in the county seat Monday on his way to the Madison valley. Mr. Wilcox was returning from Butte, where he went for the purpose of securing help for driving the logs down the Madison river. He secured 25 lumberjacks and other help, and says that the work will now proceed rapidly. He has been experiencing the usual amount of trouble in getting his logs started, but with his crew of experienced men expects to have them at his mill within a short time.

I attest that this is a true copy of newspaper held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

*** "LOOKING TO THE FUTURE" . . .

Magazine by the Honorable Samuel V. Stewart, Governor of Montana

THE MADISONIAN

VIRGINIA CITY, MONTANA, FRIDAY, SEPTEMBER 19, 1913

Lumber Industry Great Resource Of Old Madison

Madison River Lumber Company Taps Virgin Forests

Up to a few months ago it was not supposed to be possible to float logs from the upper Madison down that stream, owing to the turbulent current and rocky bed of the stream. Recently, however, the Madison River Lumber company was organized, with William Wilcox as manager,... No county in the state is more blessed with water power than ours, which will prove a valuable adjunct in putting the products of the forests upon the market.

* * *

Mr. Wilcox has performed a task which for many years has been ridiculed and deemed by many impossible, that of floating 1,000,000 feet of logs down the Madison river, a distance of 55 miles, to the present site of the sawmill. He states that this is the first river in the country that had not a dollar of expenditure before the drive was started, and the logs were landed at their destination without an accident of any nature.

The most skillful of lumberjacks were imported for the arduous drive, some of the best coming from New York state, lumberjacks who had spent the greater portion of their lives shooting the rapids of the St. Lawrence River on the Canadian boarder.

As usual in such cases, Mr. Wilcox was forced to contend with any number of obstacles, such as the suppression of the stealing of the floating logs from the river, the constant changing of crews, and overcoming the difficulties which had arisen between the company and those who had opposed the undertaking from the beginning, but by perseverance, hard work and good management he had the satisfaction of seeing the forest safely anchored at the big dam a short distance below the Varney bridge.

A crew of 25 to 40 has been employed on the work for many months, and when the mill is finished an additional force will be added to the present number and by the time snow falls the big consignment of logs will have been transferred into the finest kind of lumber, which has already been contracted for.

The log drive was a most successful one. Mr. Wilcox is an experienced man in this line, having followed the business for years and from beginning to end there is not a branch of the industry which he does not thoroughly understand. He supervised the entire work and when occasion demanded was in the midst of the big crew up to his waist in water assisting in breaking a jam or piloting the logs through the rapids.

A log boom, 900 feet in length was constructed near the bridge and the floating logs drifting along the swift current followed the boom line to their final destination.

* * *

15

JA 158

A Project of the Center for

Great Plains Studies,

University of Nebraska-Lincoln

Gary E. Moulton, Editor

Thomas W. Dunlay, Assistant Editor

The Journals of

the Lewis & Clark

Expedition

July 28 — November 1, 1805

I attest that this is a true copy of publication held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

University of Nebraska Press
Lincoln and London
[1988]

[p.63]

taken this trip had I have been able to march, from the rageing fury of a tumer on my anckle musle, in the evening Clouded up and a fiew drops of rain Encamped on the Lard Side near a low bluff,[5] the river to day as yesterday. the three hunters Could kill only two antelopes to day, game of every kind Scerce

1. The nature of these "wrightings" is unclear; he may have been bringing his journals up to date or preparing written instructions to Clark in case he did not return.

2. Biddle has it "wearied." Coues (HLC), 2:470.

3. Lewis's camp was in Beaverhead County, Montana, northeast of present Dillon, by his own estimate five miles below the mouth of Blacktail Deer (McNeal's) Creek. *Atlas* map 66. Two "x's" cross out lines at about this point. Not in red and not concerned with natural history the marks are probably not by Biddle, nor is their purpose clear.

4. Peat or turf bogs develop in swampy or waterlogged areas when vegetation growth is rapid enough to cover the previous year's dead vegetation before it can decompose completely. Tertiary clays are common throughout the Beaverhead Valley and are often exposed along the river banks. When these clays wash down onto the floodplain they can color the mud and silt of the bottoms a whitish color. Nevertheless, Lewis's comments on the color of the mud here are unclear. Their high organic content should make them appear black or dark brown.

5. In Madison County, Montana, a little downstream from the Beaverhead County line and the crossing of Montana Highway 41 over the Beaverhead River. *Atlas* map 66.

[Lewis] *Saturday August 10th 1805*

We set out very early this morning and continued our rout through the wide bottom on the Lard side of the river after passing a large creek[1] at about 5 miles we fel in with a plain Indian road which led towards the point that the river entered the mountain we therefore pursued the road I sent Drewyer to the wright to kill a deer which we saw feeding and halted on the river under an immencely high perpendicular clift of rocks[2] where it entered the mountain here we kindled a fire and waited for Drewyer. he arrived in about an hour and a half or at noon with three deer skins and the flesh of one of the best of them, we cooked and eat a haisty meal and departed, returning a shot distance to the Indian road which led us the best way over the mountains, which are not very high but ar ruggid and approach the river closely on both sides just below these mountains I saw several bald Eagles and two large white headed fishinghawks[5] boath these birds were the same common to our country.

from the number of rattle snakes about the Clifts at which we halted we called them the rattle snake clifts. this serpent is the same before described with oval spots of yellowish brown.[4] the river below the mountains is rapid rocky, very crooked, much divided by islands and withal shallow. after it enters the mountains it's bends are not so circuetous and it's general course more direct, but it is equally shallow les divided more rocky and rapid. we continued our rout along the Indian road which led us sometimes over the hills and again in the narrow bottoms of the river till at the distance of fifteen Ms. from the rattle snake Clifts we arrived in a hadsome open and leavel vally where the river divided itself nearly into two equal branches;[5] here I halted and examined those streams and readily discovered from their size that it would be vain to attempt the navigation of either any further. Here also the road forked one leading up the vally of each of these streams. I therefore sent Drewer on one and Shields on the other to examine these roads for a short distance and to return and compare their information with respect to the size and apparent plainness of the roads as I was now determined to pursue that which appeared to have been the most traveled this spring. in the mean time I wrote a note to Capt. Clark informing him of the occurrences which had take place, recommending it to him to halt at this place until my return and informing him of the rout I had taken which from the information of the men on their return seemed to be in favour of the S W or Left hand fork which is reather the smallest. Accordingly I put up my note on a dry willow pole at the forks, and set out up the S.E. fork, after proceeding about 1 ½ miles I discovered that the road became so blind that it could not be that which we had followed to the forks of Jefferson's river, neither could I find the tracks of

the horses which had passed early in the spring along the other; I therefore determined to return and examine the other myself, which I did, and found that the same horses had passed up the West fork which was reather largest, and more in the direction that I wished to pursue; I therefore did not hesitate about changing my rout but determined to take the western road. I now wrote a second note to Capt. C. informing him of this change and sent Drewyer to put it with the other at the forks and waited until he returned. There is scarcely any timber on the river about the R. Snake Clifts, nor is there anything larger than willow brush in sight of these forks. immediately in the level plain between the forks and about ½ a mile distance from them stands a high rocky mountain, the base of which is surrounded by the level plain; it has a singular appearance. the mountains do not appear very high in any direction tho' the tops of some of them are partially covered with snow. this convinces me that we have ascended to a great hight since we have entered the rocky Mountains, yet the ascent has been so gradual along the vallies that it was scarcely perceptable by land. I do not beleive that the world can furnish an example of a river running to the extent which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so navigable as they are. if the Columbia furnishes us such another example, a communication across the continent by water will be practicable and safe. but this I can scarcely hope from a knowledge of its having in it comparatively short course to the ocean the same number of feet to decend which the Missouri and Mississippi have from this point to the Gulph of Mexico.—

The valley of the west fork through which we passed for four miles boar a little to N of West and was about 1 mile wide hemned in on either side by rough mountain and steep Clifts of rock at 4 ½ miles this stream enters a beatifull and extensive plain about ten miles long and from 5 to six in width. this plain is surrounded on all sides by a country of roling or high wavy plains through which several little rivulets extend their wide vallies quite to the Mountains which surround the whole in an apparent Circular manner; forming one of the handsomest coves *[EC: Shoshone]* I ever saw, of about 16 or 18 miles in diameter.[6] just after entering this cove the river bends to the N.W. and runs close under the Stard. hills. here we killed a deer and encamped on the Stard. side[7] and made our fire of dry willow brush, the only fuel which the country produces. there are not more than three or four cottonwood trees in this extensive cove and they are but small. the uplands are covered with prickly pears and twisted or bearded grass and are but poor; some parts of the bottom lands are covered with grass and tolerably fertile; but much the greater proportion is covered with prickly pears sedge twisted grass the pulpy leafed thorn southernwood wild sage & cc and like the uplands is very inferior in point of soil.[8] we traveled by estimate 30 Ms. today, that is 10 to the Rattle snake Clift, 15 to the forks of Jefferson's river and 5 to our camp in the cove. at the apparent extremity of the bottom above us two perpendicular clifts of considerable hight stand on either side of the river and appers [NB: *appears*] at this distance like a gate, it is about 10 M. due West.

Capt Clark set out at sunrise this morning and pursued his rout; found the river not rapid but shallow also very crooked. they were obliged to drag the

canoes over many riffles in the course of the day. they passed the point which the natives call the beaver's head. it is a steep rocky clift of 150 feet high near the Stard. side of the river, opposite to it at the distance of 300 yards is a low clift of about 50 feet which is the extremity of a spur of the mountains about 4 miles distant on Lard. at 4 P.M. they experienced a heavy shower of rain attended with hail thunder and Lightning which continued about an hour. the men defended themselves from the hail by means of the willow bushes but all the party got perfectly wet. after the shower was over they pursued their march and encamped on the stard side.[9] only one deer killed by their hunters today. tho' they took up another by the way which had been killed three days before by Jos. Fields and hung up near the river.

Courses and distances traveled by Capt. Clark

August 10th 1805.

S. 30° W.	2	Clift of rocks on Stard. 150 feet high called by the natives the beaver's head. distance by water 6½ miles, passing 8 bends on the Stard. side and 2 small bayous on Lard.
S. 60° W.	2	to a low bluff on the Lard. Side, distance by water 6½ miles, passing four islands and 18 bends on Stard. side and a low bluff and
Miles	4	several bayous on the same side or Stard.

[Clark] *August 10th Satturday 1805*

Some rain this morning at Sun rise and Cloudy we proceeded on passed a remarkable Clift point on the Stard. Side about 150 feet high, this Clift the Indians Call the *Beavers* head, opposit at 300 yards is a low clift of 50 feet which is a Spur from the Mountain on the Lard. about 4 miles, the river verry Crooked, at 4 oClock a hard rain from the S W accompanied with hail Continued half an hour, all wet, the men Shel-

16

JA 167

HISTORY OF EARLY STEAMBOAT NAVIGATION ON THE MISSOURI RIVER

LIFE AND ADVENTURES OF JOSEPH LA BARGE

PIONEER NAVIGATOR AND INDIAN TRADER FOR FIFTY YEARS IDENTIFIED WITH THE COMMERCE OF THE MISSOURI VALLEY

BY

HIRAM MARTIN CHITTENDEN
Captain Corps of Engineers, U.S.A.
AUTHOR OF "AMERICAN FUR TRADE OF THE FAR WEST," "HISTORY OF THE YELLOWSTONE NATIONAL PARK," ETC.

WITH MAP AND ILLUSTRATIONS

IN TWO VOLUMES
VOL. I.

NEW YORK
FRANCIS P. HARPER
1903

I attest that this is a true copy of publication held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

[p.219]

HEAD OF NAVIGATION REACHED.

[Cap]tain John La Barge,* brother of Joseph La Barge, and pilot of the *Spread Eagle*, was assigned to charge of the *Chippewa* on her adventurous undertaking. Mr. Charles P. Chouteau went along as the Company's representative.

The boat made her way successfully, and without any notable incident, to within fifteen miles of Fort Benton, and discharged her freight at Brulé bottom, where Fort McKenzie stood in former years. Her arrival at this point was on July 17, 1859, forty years and two months after the *Independence* entered the mouth of the river.*

This noteworthy event must be classed as one of the celebrated feats in steamboat navigation. The *Chippewa* had reached a point further from the sea by a continuous water course than any other boat had

* "Captain John La Barge, one of the oldest and best steam boat men on the river, takes command of the *Chippewa*, and if the trip to Fort Benton can be made, he will make it!"-*Sioux City Eagle*, July 23, 1859.

* For a complete record of this event, see letter from Alfred Vaughn, Indian Agent for the Blackfeet-Report Commissioner of Indian Affairs for 1859.

ever been. She was now 3560 miles from, and 2565 feet above, the ocean, and the whole distance had been made by steam on a river unimproved by artificial works.

In 1860 the *Chippewa* and the *Key West* completed the short remaining distance to Fort Benton, and made fast to the bank in front of the old post July 2 of that year. On June 16, 1866, the steamer *Peter Balen* ascended the river to the mouth of Belt Creek, six miles from the Great Falls, and thirty-one miles above Fort Benton. This is believed to be the farthest point reached by steam on the Missouri River.* The feat was accomplished during the June flood and would have been impossible at ordinary stages. Fort Benton has always been considered the head of navigation on the Missouri River.

In 1861 the heroic *Chippewa* made her last trip up the river. Again bound for Fort Benton, she reached the end of her voyage and of her career at a point a little below the mouth of Poplar River, Mont., since known, from this connection, as Disaster Bend. She was loaded with American Fur Company goods and Blackfeet annuities, and had a goodly quantity of alcohol on board. One Sunday evening in the month of May, while supper was being served, the boat was discovered to be on fire. She was immediately run ashore, the passengers were put off, and she was set adrift to avoid the danger from an expected explosion

* The *Tom Stevens* is said to have gone to the mouth of Portage creek, within five miles of the Great Falls the same year, and one authority states that the *Gallatin*, either in 1866 or 1867, went nearer to the Falls than any other boat before or since. The exact point is not stated.

of gunpowder that was in the hold. The boat floated across the river and about a mile downstream, when she blew up, just as the upper works were fairly consumed to the water's edge. The explosion was terrific, and packages of merchandise were found at a great distance from the place. No lives were lost, and the personal effects of the passengers were saved. The fire was caused by some deckhands, who went into the hold with a lighted candle to steal some liquor.

17

JA 172

MONTANA

the magazine of western history

Volume Nine Number Two April 1959

I attest that this is a true copy of a publication held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

[*Table of Contents omitted in printing this appendix*]

[p.2]
[Image Omitted]

White Hopes of the Big Muddy

Grandson of Steamboat's Builder Recounts Exciting Attempts to Navigate Upper River

by Stanley R. Davison

Well, if not yet a steamboat, she was destined to become one, and she really was on the Beaverhead River, where Dr. Asa Lee Davison built her in the summer of 1885.

The frontier doctor had been bitten by the steamboat bug some years earlier, possibly in 1878 when the Helena Weekly Herald carried some stories about plans to navigate the Upper-upper Missouri. The journal reported the formation of the Montana Steam Navigation Company, with the startling news that the company's first boat "will start tomorrow!"

But this vessel was not of the powered variety, only a Helena-built rowboat made to carry an exploring party down to the great falls. This trip was in charge of William F. Wheeler,[1] who kept a journal-and gave the press an account of the voyage. On the strength of this and other adventures on the river, he acquired the honorary title of "Commodore" and the status of an authority on inland navigation, especially that on the Missouri headwaters.

Wheeler told how his party took the boat on a wagon from Helena to Stubbs' Ferry below the mouth of Spokane Creek. By late afternoon they had the craft afloat, and set out to make what distance they could before nightfall. Soon they entered what they called American Canyon, at the point where the Trout Creek bridge now stands. They made twelve miles and camped near the Gates of the Mountains. Next day they reached the mouth of the Dearborn, then early on the following morning shot the Half-breed Rapids, which were to figure largely in river history for a decade. The trip ended with an uneventful arrival at the falls.[2]

This navigation company included among its stockholders and officers such prominent Helena businessmen as Henry M. Parchen and Anton M. Holter. Their plan, was ambitious, involving a rail portage around the falls to provide service from Fort Benton, the previously accepted head of navigation, to Helena landing, near Stubbs'. Even before the boat trip the company appropriated $50,000 to buy two or more

* * *

[p.5]

wheeler, eighteen by seventy-two feet ... with a freight cabin sixteen by forty-eight feet and a passenger cabin eleven by twenty-four. It will be twenty-one feet from water to top of pilot house. The engine is thirty horsepower and will be applied by means of a chain belt and ratchet pulleys."[8] Apparently the intended destination of the boat was kept secret, as the reporter surmised that "the sleepy old Jefferson" would be its home as it would ply between Twin Bridges and Gallatin City.

As soon as the ice was out in the Beaverhead the doctor gave up most of his practice and with the two boys began work on the boat. They built her right in the river; so slight was her draft that they could wade around her in the shallow that served as her construction basin. Their progress was slow, but this did nothing to hold down the rosy optimism so characteristic of the time, which, now took hold of the steamboat project, especially in the press. The Madisonian reporter, writing in mid-April after seeing nothing more than a scale model and a lumber pile, promised himself and staff an excursion on the Fourth of July, saying "your correspondent has already chosen seats for the entire force." But although the builders worked all summer long, when autumn came they had only a hull, and in that stage she froze into the Beaverhead late in 1885.

In the latter part of that winter word got out that perhaps the craft was planned for nobler waters than the meager currents of the Jefferson. In February of

---

[8] *Madisonian*, Apr. 10, 1885.

1886 the Bedford City[9] postmaster, a man with the unlikely name of Isom Preuitt, told the newspaper at Townsend that he had a letter from "parties in Twin Bridges" inquiring about the clearance under the Northern Pacific bridge across the Missouri between Townsend and Bedford. When this became known, it explained a minor mystery in Twin Bridges. All summer onlookers had wondered why the doctor hadn't built any sign of a superstructure, not even a deck-house or shanty of any kind. They saw now that he had been waiting to learn how high she could be and still slide under this obstruction at Townsend. Superstructure, stacks, engines and all would have to wait until she was on the downstream side of the trestle. Anyway, that would be the logical place to install the heavy machinery that would have to come by freight. Now that the story was out, Dr. Davison announced that he would float her down as soon as the ice was clear.

In March the Great Falls *Tribune* announced that there would be service between the Falls and Helena-Townsend

[Image Omitted]

Asa Ellsworth Davison, oldest son of Dr. Asa L. Davison, who carved the model from which the "Fern" was built. He also helped build and navigate the sturdy sternwheeler which eventually was equipped with two 25 horsepower engines.

---

[9] Bedford was on the N.P. across the river from Townsend.

[Image Omitted]

The 54-foot steamboat "Rose of Helena," owned by Judge Nicholas Diger, is shown here. Judge Eiger paid $4,800 for this all-metal steamer which came from Iowa via Northern Pacific Railway. The story of its rivalry with Davison's "Fern" is told in this article.

furnished by two boats, one staying below the Half-breed Rapids and the other above. Soon after, the paper reported that Judge Nicholas Hilger had ordered a steel steamboat from a film in Dubuque and that it was nearly ready for rail shipment to Montana. In early May the Townsend *Tranchant* announced that the Beaverhead boat was ready to start her floating trip to the finishing berth at Townsend, saying that Commodore Wheeler had visited the Davisons' boat and had praised the sturdy cedar craft.

The Townsend editor, Van H. Fisk, was enthusiastic about the boat, a policy he was to follow till the end. He wrote lovingly of the steamer and her prospects, revelled in nautical turns and salty expressions, referred to "Townsend's waterfront," and spared nothing to boost for the project. Not only did he predict success for the joint operation with Hilger's boat—he even printed a schedule of sailings, right down to the day and hour. He wrote:

> . . . the smaller one making three roundtrips weekly from Townsend to Half-breed Island, there to make connections with the larger boat as regularly plying from there to Great Falls. Parties thus can leave Helena on the morning train for Townsend, take the steamer at 10 a.m.

> and arrive at Half-breed Island the same evening, when the transfer will be made and everybody in most comfortable quarters from first to last. . . . The round trip from Helena may thus be made to the Falls in four days, and to Half-breed Island and return in two days, as the boat is expected to make return connections here with the west-bound passenger train. Most excursionists however will take from one to two weeks in making the trip, in order to take in all the sights and pleasures en route. Get ready, everybody, as the steamboats will soon be here.[10]

Confident that the boat had left Twin Bridges, and accurately estimating her progress, Fisk rode the morning train to Toston one Sunday in mid-May to await the floating hull. Sure enough, shortly after noon, "adown the placid waters of the Missouri came floating the Fern, with the familiar countenance of our old-time friend, Dr. A. L. Davison at the helm."[11] In his grandiose style he reported that he "concluded to come home by steamer instead of by railway." The journalist utilized the 3½ hour trip to look over the boat and to discuss with her owner his plans for her completion and use. He learned that she had been named the Fern in honor of the doctor's twenty-one-months-old son. The crew consisted of the owner, sons Ellsworth and Ben, and a nephew. They were controlling her by oars, fore and aft; the Jefferson and Missouri, running high, had given no trouble in

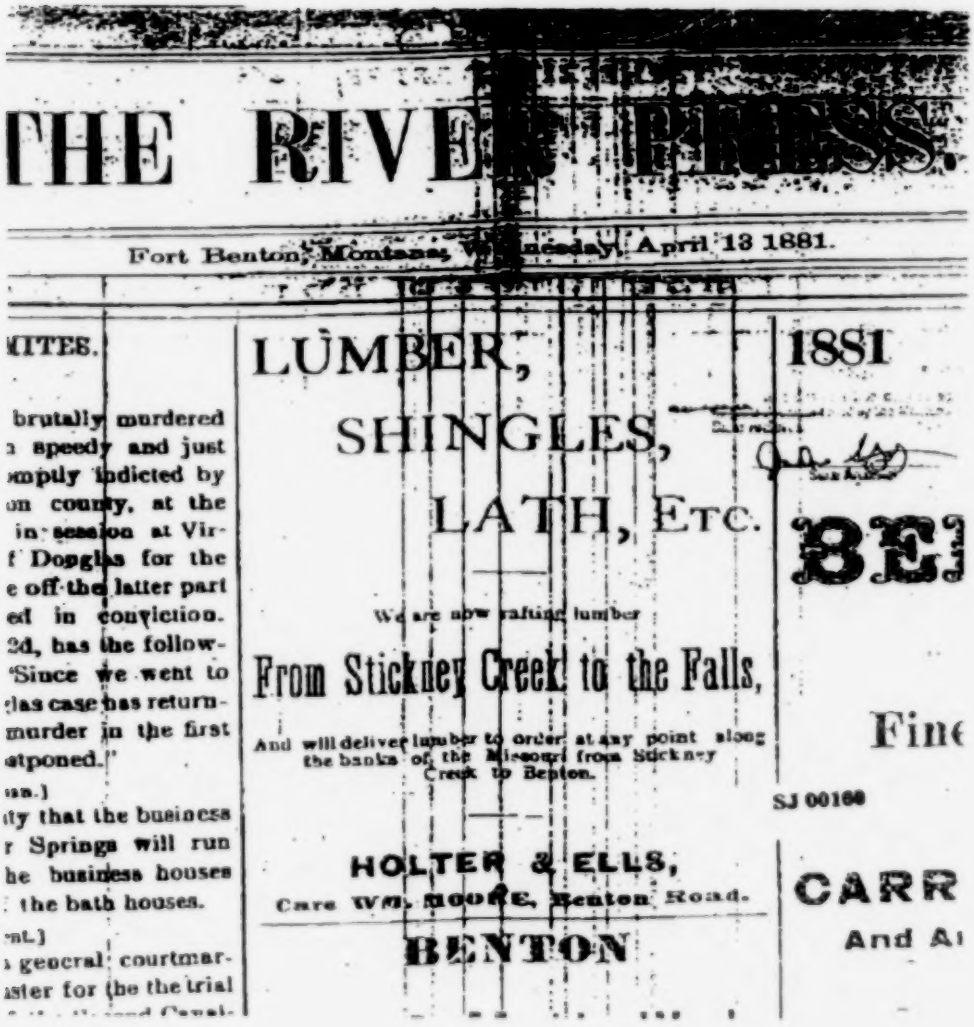
---

[10] Townsend *Tranchant*, May 5, 1886.

[11] The doctor had practiced in the Diamond City area probably Fisk knew him there.

navigation. Now the bank-full river was taking them at about six miles per hour to Townsend, where they moored just above the bridge.

[Exhibit 18, excerpt]



THE RIVE[illegible] PRESS.

Fort Benton, Montana, Wednesday, April 13 1881.

ITES.

brutally murdered
a speedy and just
mptly indicted by
on county, at the
in session at Vir-
f Douglas for the
e off the latter part
ed in conviction.
2d, has the follow-
'Since we went to
las case has return-
murder in the first
stponed."
an.]
ty that the business
r Springs will run
he business houses
the bath houses.
nt.]
a general courtmar-
ster for the the trial

LUMBER,
SHINGLES,
LATH, ETC.

We are now rafting lumber

From Stickney Creek to the Falls,

And will deliver lumber to order at any point along the banks of the Missouri from Stickney Creek to Benton.

HOLTER & ELLS,
Care WM. MOORE, Benton Road.

BENTON

1881

BE

Fine

SJ 00168

CARR

And A

19

* * *

GREAT FALLS TRIBUNE

GREAT FALLS, MONTANA, WEDNESDAY AFTERNOON, NOVEMBER 9, 1887

I attest that this is a true copy of newspaper held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

Excursion.

The steamer Fern will make excursions up the Missouri to the mouth of Sand Coulee or beyond on Sunday next, the 13th instant, leaving the Holter dock at 9 A.M. and 2 P.M. Fare one dollar.

A. L. DAVIDSON, captain.

20

JA 183

CONTRIBUTIONS

TO THE

HISTORICAL SOCIETY OF MONTANA

VOLUME EIGHT
1917

J.S. CANNER AND COMPANY, INC.
Boston, Mass.
1966

[p.270]

FIRST SASH AND DOOR FACTORY IN MONTANA

In 1868, we built a sash and door factory and set in motion the machinery that we had imported the year before. This was the first of its kind in Montana. Many of my friends had warned me against this expenditure. They reasoned that within a short time the gold placer mines would be worked out and we would have to move elsewhere. However, we operated this plant continuously for eleven years up to October, 1879, when it was destroyed by fire. As we had no fire insurance, we suffered quite a loss, but we rebuilt as speedily as we could, and on the fifteenth day after the fire, we had the engine and planer running. Six years later, in 1885, we disposed of the machinery to Getchell & Dunwall, who removed it to their shop in Helena.

Some officers of the Salvation Army had by this time arrived in Helena, so we let them occupy the building for their headquarters. They had probably occupied the building a year or two when it was all destroyed by fire.

STARTED NEW MILLS

By this time we had sold the Ramshorn and also the Jefferson mill, but still continued to start new mills about the territory. Within the next few years we had started mills on the Blackfoot River, near Lincoln, Wolf Creek, Skelly Gulch, Buffalo Creek, Whiteman Creek, Strawberry Creek, Dutchman Creek and Stickney Creek.

Most of these mills produced lumber for the Helena market, but the Stickney Creek mill, which was started in May, 1880, had Fort Benton and surrounding country as its prospective market, and we established a lumber yard on the West bank of the Missouri River below the mouth of Sun River, where we located a section of desert land and made the first payment, but never found time to get the water on it, so we let it go by default. This land extended from Sun River down the Missouri River for two miles and takes in what there is of Great Falls on the northwest side of the river, the concentrating plant, and the smelter.

RAFT GOES OVER THE FALLS

The lumber was hauled about six miles from the mill to the raft landing and then rafted down the river to the Sun River yard, a distance of about seventy miles. In the Spring of 1884, the river was very high and swift, and they were unable to stop the raft at Sun River, so they shoved the horses overboard, and I believe they also saved the wagon. The man swam ashore, but the raft went over the falls and broke up and was lost. The nearest neighbor to this lumber yard was Mr. Robert Vaughn, twelve miles off. People had commenced settling up the country, so a few of us during the Winter of 1865-'66, put in a ferry across the Missouri River to where Great Falls is now, and in February 1886, we moved the lumber across the river to Great Falls and started business there as the Holter Lumber Co. In 1910, reorganized as Holter, Boorman Lumber Co.

On March 23rd, 1887, we incorporated the Holter Lumber Company.

In 1889, with Wm. Thompson, organized Montana Lumber & Manufacturing Co., operating in Western Montana, with main offices in Helena and Butte.

PRICES REALIZED AT SUN RIVER YARD

During the six years the yard had been established at Sun River we had sold materials at prices as per lists following:

Materials	At Sun River.	At Fort Benton
Sheathing, per M	$30.00	$50.00
Common Lumber, per M	35.00	55.00
Flooring, per M	40.00	60.00
Clear Lumber, per M	45.00	65.00
Shingles, per M	6.00	7.50
Lath, per M	9.00	12.00

Heretofore we had sold lumber in the rough only, but we now added a planing mill and other machinery to the Great Falls yard and adopted the following prices:

Sheathing, per M	$30.00
Common Lumber, per MX	40.00
D. and M. Flooring, per M	50.00
Clear Lumber, per M	60.00
Shingles, per M	6.00
Lath, per M	10.00

21

JA 188

THREE YEARS AMONG THE INDIANS AND MEXICANS

By GENERAL THOMAS JAMES
OF MONROE COUNTY, ILLINOIS

Edited, with notes and biographical sketches, by
WALTER B. DOUGLAS

I attest that this is a true copy of an publication held by the Montana State Archives.
/s/ Jodie S. Foley
State Archivist

SAINT LOUIS
MISSOURI HISTORICAL SOCIETY
MCMXVI

[p.66]

* * *

They were attacked by the Blackfeet just beyond the mountains, but escaped by hiding in a thicket, where the Indians were afraid to follow them, and at night they proceeded towards the Big Horn, lying concealed in the day-time. They reached St. Louis[4] safely, and a few years after I heard of Colter's death by jaundice.

We arrived at the Forks of the Missouri on the third day of April, 1810, ten months after leaving St. Louis and two months and one day after quitting my cabin above the Gros Ventre village. We had now reached our place of business, trapping for beaver, and prepared to set to work. Dougherty, Brown, Ware and myself agreed to trap in company on the Missouri between the Forks and the Falls, which lie several hundred miles down the river to the north, from the Forks. We made two canoes by hollowing out the trunks of two trees and on the third of fourth day after our arrival at the Forks we were ready to start on an expedition down the river. The rest of the Americans with a few French, in all eighteen in number, determined to go up the Jefferson river for trapping, and the rest of the company under Col Menard remained to complete the Fort and trading house at the Forks between the Jefferson and Madison rivers. On parting from Cheek, he said in a melancholy tone, "James you are

---

[4] Bradbury says, "This man came to St. Louis in May 1810, in a small canoe, from the head waters of the Missouri, a distance of three thousand miles, which he traversed in thirty days."

MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
JON ELLINGSON
Assistance Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549

COUNSEL FOR STATE OF MONTANA

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

Cause No. CDV 2004-846

[Dated May 15, 2006]

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; AVISTA CORPORATION, a Washington Corporation; and PACIFICORP, an Oregon Corporation,	)
Plaintiffs,	)
v.	)
STATE OF MONTANA	)
Defendant.	)

AFFIDAVIT OF MONTE MASON

STATE OF MONTANA)
:ss.
County of Lewis and Clark)

Monte G. Mason, having first been duly sworn, deposes and says:

1. I am the Minerals Management Bureau Chief for the Montana Department of Natural Resources and Conservation (DNRC).

2. In that capacity I am in charge of leasing the minerals in and under the streambeds of navigable rivers, which the State owns below the low-water mark, as well as islands and abandoned channels formed by avulsion. DNRC's Real Estate Management Bureau issues easements for some non-hydroelectric resource surface uses upon these same lands.

3. In Fiscal Year 2005, the State managed 14,207 leased acres of minerals in and under riverbed and island tracts in Montana.

4. The DNRC has conducted numerous streambed studies to determine and document state ownership of land, in pursuance of its legal duty to manage mineral and other leases of state-owned streambeds in the best interests of the State and the trust beneficiaries.

5. The State of Montana holds title to the beds of navigable waters pursuant to the "equal-footing" doctrine, which granted the State, as sovereign, title to the beds of all waters which were susceptible of use in commerce at statehood. Because this grant occurred

as a matter of law, the State did not receive direct and discrete patents from the United States of America to evidence these conveyances, and the DNRC does not maintain specific ownership records for navigable streambeds not yet under lease.

6. Over twenty years ago, the DNRC (then the Department of State lands) commissioned a series of historical studies of Montana navigable waters, culminating in 1986with the *Montana Navigable River Study* (Study), submitted by Heritage Research Center of Missoula. (True copy of selected pages attached at Ex. A.)

7. The Study compiled historical evidence of navigation for 43 different rivers and creeks running through Montana, including the Clark Fork, the Madison, the Missouri, and the Swan. The Study referenced U.S. Army Corps of Engineers Reports, also in the DNRC's possession, on each of those rivers. The DNRC relies upon the *Montana Navigable River Study*, the Corps of Engineers Reports and Studies, and the evidence contained in them, to determine state ownership of streambeds for leases of trust land.

8. **Clark Fork River.** The Study concludes: "There are recorded instances of the Clark Fork River being navigated in small boats from as high up as Deer Lodge, Montana. Log drives began west of Missoula and ran down the river to the river's mouth at Lake Pend Oreille. Thompson Falls was the historical head of steamboat navigation." (Ex. A at 23.)

9. An earlier *Report on Navigability of the Clark Fork of the Columbia River* was completed by the U.S. Army Corps of Engineers in or around 1975. (True

copy attached at Ex. B.) That report concluded: "Our research has shown that steamboat navigation occurred on the Clark Fork as far upstream as Thompson Falls, Montana, and that other forms of commercial navigation occurred as far upstream as the mouth of the Blackfoot River." (Ex. B at 22.)

10. **Madison River.** The Study concludes: "Commercial navigation has occurred on the Madison River in connection with log drives between the mouth of the West Fork of the Madison (the recorded high point of navigation) and Varney. Hebgen Lake also has been navigated. Without the obstruction caused by Madison Dams 1 and 2 below Ennis[,] [i]t is safe to assume that the Madison could have been navigated from the mouth of the West Fork to its confluence with the Missouri River." (Ex. A at 52-53.)

11. An earlier *Madison River Navigation Study* was completed by the U.S. Army Corps of Engineers in 1974. (True copy attached at Ex. C.) That study concluded: "Historical material documents navigation on only one section of the Madison River. Yet, the potential use of the river for navigation is tied intricately to the obstructions of the Madison Dam, Earthquake fill and Hebgen Dam. This situation warrants a recommendation of navigability for the entire Madison River from its boundary with Yellowstone Park to its confluence with the Missouri River." (Ex. C at 16.)

12. Based on historical documentation, the DNRC concluded that the Madison River was actually commercially navigated from the confluence of its west fork to Varney, Montana. The DNRC had not previously addressed navigability below Varney

because no one had previously questioned the navigability of the Madison River below Varney and the title of the State to that stretch of the River. However, based on the river's susceptibility to use over its entire length, the DNRC has determined that the Madison River is navigable from its boundary with Yellowstone Park to its confluence with the Missouri River, and therefore is subject to trust land leasing.

13. **Missouri River.** The Study concludes: "The Missouri River has been navigated in connection with a variety of activities and by a variety of river crafts from its headwaters at Three Forks to the Montana/North Dakota border. It also has been declared a navigable waterway between these points by the federal government." (Ex. A at 58.)

14. An earlier *Missouri River Navigation Study* was completed by the U.S. Army Corps of Engineers in 1974. (True copy attached at Ex. D.) That study concluded: "Historical evidence supports the contention that the Missouri River is a navigable waterway from Lorna, Montana, to Three Forks, Montana. This section of river was used extensively for commercial purposes between 1860 and 1900." (Ex. D at 22.)

15. **Swan River.** The Study concludes: "Swan River was navigated for a distance of approximately 20 miles from its mouth to Swan Lake. Swan Lake itself was navigated in connection with the same commercial floating of timber." (Ex. A at 70.)

Respectfully submitted this 12th day of May, 2006.

/s/ Monte G. Mason
MONTE G. MASON

SUBSCRIBED AND SWORN to before me this 11th day of May, 2006.

(Notarial Seal)

/s/Wanda J. Walks

NOTARY PUBLIC for the State of Montana
Printed Name: Wanda J. Walks
Residing at Whitehall
My Commission expires: 10/19/09

EXHIBIT A

JA 197

MONTANA NAVIGABLE WATER STUDY

Submitted to:
Montana Department of State Lands
Helena, Montana

Submitted by:
Heritage Research Center
P. O. Box 9316
Missoula, Montana 59801

December 1986

TABLE OF CONTENTS

Introduction 1

Methodology 2

Big Hole River 8

Big Horn River 9

Bitterroot River 11

Blackfoot River 14

Boulder River 16

Bull River 17

Clark Fork River 19

Clark Fork on the Yellowstone 24

Clearwater River 26

Dearborn River 28

Flathead River, North Fork 30

Flathead River, Main Stem 32

Flathead River, Middle Fork 37

Flathead River, South Fork 39

Fortine Creek 41

Gallatin River 42

Graves Creek 43

Jefferson River 45

Kootenai River 46

Little Blackfoot River 48

Little Missouri River 49

Lolo Creek 50

Lower Deer Creek 51

Madison River 52

Marias River 54

Milk River 56

Missouri River 57

Montour Creek 59

Nine Mile Creek 60

Rattlesnake Creek 62

Sage Creek 63

Sheep Creek 64

Smith River 65

Stillwater River 66

Sun River 69

Swan River 70

Ten Mile Creek 71

Teton River 72

Tobacco River 73

Tongue River 74

Whitefish River 75

Yaak River 77

Yellowstone River 79

Appendices

A. Navigability Study KEY WORDS

INTRODUCTION

The following report was prepared. by Heritage Research Center for the Montana Department of State Lands under a professional services agreement dated March 5, 1986 and changes initialed March 18, 1986. The purpose of the contract was to provide the Department of State Lands, where possible, with a determination of commercial navigability and the extent of navigability for the purpose of determining title to streambeds of certain waterways.

Specific provisions of the agreement required that the contractor complete the following two projects:

1. A navigability and reach study focusing upon waterways east of the Continental Divide not reported upon in the 1974-1975 Army Corps of Engineers investigation and upon resources and writings made available since those Corps investigations.

2. A determination of the highest point of recorded navigation and stream segments historically navigated on the following list of 35 streams:

Big Blackfoot River
Big Hole River
Big Horn River
Bitterroot River
Boulder River
Bull River
Clark Fork of Columbia
Clearwater River
Dearborn River
Flathead River –
Madison River
Milk River
Missouri River
Montour Creek
Nine Mile Creek
Rattlesnake Creek
Sheep Creek
Smith River
Stillwater River (West)
Sun River

Including North, South
and Middle Forks
Fortine Creek/River
Graves Creek
Jefferson River
Kootenai River
Little Blackfoot
Little Missouri River
Lolo Creek
Lower Gallatin River
Swan River
Teton River
Tobacco River
Tongue River
Whitefish River
Yaak River
Yellowstone River

METHODOLOGY AND RESEARCH RECOMMENDATIONS

Methodology:

Project #1

> Navigability and reach study for waterways east of the Continental Divide not reported upon in the navigability reports prepared by the U. S. Army Corps of Engineers in 1974-1975, and research into resources and writings made available since those investigations.

Heritage Research Center investigated the possibility of historical navigation on other streams east of the Continental Divide. The research focused upon streams not reported upon in earlier Corps of Engineer investigations, and upon resources/writings made available since those investigations. The study also included pertinent sources not recognized as applicable at the time of the Corps studies in the early 1970's. Gary Williams, principal investigator for the study, participated in researching and writing the

original Corps reports for the waterways east of the Divide and provided insight into the methodology employed under those investigations.

Researchers first constructed a bibliography of local history writings produced for Eastern Montana since 1974. This task was greatly facilitated by Heritage Research Center's bibliography of Montana history on the firm's computer. A comprehensive list of published materials, including local histories, was compiled from the annual listing of Montana related publications in the Pacific Northwest Library Association Quarterly. The computer bibliography, the PNLA bibliography and a previously submitted bibliography of items recommended for further research projects from the Western Montana navigability research projects were combined to form the research bibliography appended to this report. These bibliographical entries were reviewed for instances of navigation and followed up with research into local newspapers whenever some instance of navigation was found.

Oral history collections at the Montana Historical Society and the K. Ross Toole Archives were reviewed for the study. Also, we consulted archival materials at each of those institutions. We consulted cultural resource managers in Eastern Montana in an attempt to identify reports or sites pertaining to navigation. Old photos and interviews also were included in the research. Newspapers were reviewed for special time periods or to confirm instances of commercial navigation identified from other sources. Interviews were conducted with knowledgeable sources identified during the course of the survey.

Material researched for this project were applied to Project #2, whenever they seemed appropriate.

Following the research, we analyzed the information retrieved and prepared reports upon individual waterways. The record of historical navigation was written to include, whenever available, the specific segments of the waterway that were navigated.

Project #2

Determination of highest point of recorded navigation and stream segments historically navigated on 35 streams listed in the Statement of Work.

Included in the research for this project were thirty-five (35) streams identified as navigable by the Department of State Lands. For each of these streams researchers reviewed existing reports and extracted citations of historic navigation. They then consulted the original sources to determine, if possible, the segments of the waterways that were actually floated. Copies of reports in our offices, including those prepared for both districts of the Corps and those prepared by our firm, were used.

In addition to consulting the reports, researchers for Heritage Research Center reviewed the sources cited in "Bibliography of Materials Recommended for Further Research" that we submitted with our previous study on Western Montana waterways. When possible, we supplemented the written record with interviews and available tapes of long-time residents with knowledge of the waterways involved.

The Montana State Historic Preservation Office and the various Forest Service archaeologists were consulted to determine whether cultural remains indicated the use of specific waterways. Requested evidence included interviews, splash dams, etc. (See Appendix of Forest Service Returns.)

Research sources included the extensive holdings of Heritage Research Center, the Mansfield Library and K. Ross Toole Archives, the Montana Historical Society, and the" Kalispell Public Library.

The document contains a brief report on each waterway with a description of navigation as it pertains to specific stream segments. When it was not possible to determine the area of use, a statement to that effect would be made. As with the reports for the first project, we included a discussion of vague references to navigation that might provide clues to additional research, should it be required in the future.

Due to funding limitations, several exclusions were made from the research. County Courthouse records were excluded because of travel and per diem costs, combined with the difficulty of determining in advance how extensive that research might be. certain citations uncovered in the past have made references such as, "They put the logs in at John Does's place on Smith River." Property ownership records likely would indicate where John Doe owned property at the time of the log drives. Thus one could establish the segment of the waterway that was navigated. Such information could bc researched at a later date as it might become necessary for litigation purposes. Also, our researchers could not conduct thorough paper-by-paper research of

local newspapers, because of the costly and time-consuming nature of that type of search. Instead, we read through newspapers when looking for a specific incident at a specific time.

Recommendations for Further Research:

Because the approach to documenting navigable waterways for title purposes has been constrained by lack of funding, efforts have been focused upon generating the most information for the least possible cost. Below are listed additional sources of information that could not be covered in previous investigations. While some were well-known, others were revealed in the course of the present study, notably the water rights records and Montana Fish, Wildlife and Parks classified trapper and outfitter records. The latter may become more useful in view of a recent district court ruling in Alaska pertaining to the Gulkana River. The Big Hole River, for example, lacks historical evidence of commercial navigation associated with logging or similar ventures, yet Fish, Wildlife and Parks officials report that it is subject to heavy commercial outfitter traffic.

Some further avenues of research include:

1. Search of the Department of Natural Resources Computerized water rights files was discussed with Ron Guse, Water Rights Bureau New Appropriations Program Manager and Jim Kindle, Records Section Supervisor. Both agreed that there is some possibility for finding water reserves for navigation purposes. Since the files contain approximately 200,000 claims, the cost of the computer run could not be covered under the existing contract. Our own research

indicated that at least some commercial logging enterprises filed for water rights to preserve in-stream flows for floating logs. An example is Rattlesnake Creek, tributary of the Clark Fork of the Columbia. The Water Rights Bureau records are classified by nature of use and point of diversion as well as other descriptions.

In contacting the DNRC chief Legal Counsel, Don MacIntyre, we learned that that office does not maintain files on navigable waterways since no such determinations are necessary for them to issue permits. The issue of navigability could arise on Federal Energy Regulatory Commission (DNRC) applications, but DNRC's legal offices keep no separate records on navigable status.

2. Under a 1985 law, the Montana Department of Fish, Wildlife and Parks has statutory responsibility for classifying Montana's streams to determine rights and restrictions of recreational access. Defined under the law are two classifications. The following discussion is taken directly from the Fish, Wildlife and Parks brochure titled "Stream Access in Montana".

> "Class I waters are defined as those which are capable of recreational use and have been declared navigable or which are capable of specific kinds of commercial activity, including commercial outfitting with multiperson watercraft. The Department has developed a preliminary list of rivers that meet at least one of the criteria listed in the law for class I rivers (see section (1) (2) of the law). This preliminary list includes the mainstems of the following waters, as described:

Kootenai River Drainage:

- Kootenai River-from Libby Dam to the Idaho border
- Lake Creek-from the Chase cut-off road to its confluence with the Kootenai River
- Yaak River-from Yaak Falls to its confluence with the Kootenai River

Flathead River Drainage:

- South Fork of the Flathead-from Youngs Creek to Hungry Horse Reservoir
- Middle Fork of the Flathead-from Schaffer Creek to its confluence with the mainstem of the Flathead River
- North Fork of the Flathead-from the Canadian border to its confluence with the mainstem of the Flathead River
- Flathead River (mainstem)-to its confluence with the Clark Fork River

Clark Fork of the Columbia River Drainage:

- Clark Fork River-from Warm Spring Creek to the Idaho border
- North Fork of the Blackfoot-from Highway 200 east of Ovando to its confluence with the mainstem of the Blackfoot River
- Blackfoot River-from the Cedar Meadow Fishing Access Site west of Helmville to its confluence with the Clark Fork
- Bitterroot River-from the confluence of the East and West forks to its confluence with the Clark Fork
- Rock Creek-from the confluence of the West Fork to its confluence with the Clark Fork

Missouri River Drainage:

Missouri River-from Three Forks to the North Dakota border

Beaverhead River-from Clark Canyon Dam to its confluence with the Jefferson

Big Hole River-from Fishtrap Fishing Access Site down-stream from Wisdom to its confluence with the Jefferson

Gallatin River-from Taylors Fork to its confluence with the Missouri

Jefferson River-to its confluence with the Missouri

Madison River-from Quake Lake to its confluence with the Missouri

Dearborn River-from the Highway 434 bridge to its confluence with the Missouri

Sun River-from Gibson Dam to its confluence with the Missouri

Smith River-from Camp Baker Fishing Access Site near Ft. Logan to its confluence with the Missouri

Marias River-from Tiber Dam to its confluence with the Missouri

Judith River-from the confluence of Big Spring Creek to its confluence with the Missouri

Yellowstone River Drainage:

Yellowstone River-from Yellowstone National Park to the North Dakota border

Bighorn River-from Yellowtail Dam to its confluence with the Yellowstone

Tongue River-from Tongue River Dam to its confluence with the Yellowstone

Keep in mind that this list is preliminary and that other waters may be added to it in the future

as other criteria listed in the law for determining class I waters are addressed. Also, keep in mind that there may be times during a year when the flow and physical condition of these waters may not permit their use for certain kinds of recreation.

Class II waters are all rivers and streams capable of recreational use that are not class I waters."

Our contacts with attorney Stan Bradshaw at Fish Wildlife, and Parks indicated that the Class I waters had been determined without reference to the Corps reports or other reports of navigable status. Instead, the Department relied entirely upon information pertaining to commercial outfitter and guide navigation on those streams. Pat Graham was involved in compiling the list of navigable streams for the brochure. Much of the information was derived from restricted-access files that would require permission from the department director for use. The value of these particular records in determining navigable segments and navigable status for title purposes appears to be underscored by the Gulkana River case in Alaska.

3. Many historical records could yet be reviewed for actual commercial use of Montana's waterways. Foremost among those would be local newspapers which yielded the greatest amount of information in the original Corps studies. No comprehensive newspaper research has been conducted for Western Montana, and many papers not consulted for the original Corps studies east of the Divide remain.

At some future time, the Department could undertake a comprehensive search of selected' local

newspapers to strengthen available documentation on navigable streams and, possibly, to determine other streams that had commercial use. For Western Montana that approach might involve a comprehensive search of newspapers for such towns as Kalispell, Missoula, Hamilton, Thompson Falls, and Libby from earliest publication dates to approximately 1930 when the last river drives took place. When encountering a particular stream that needs documentation, the first source should be the closest local newspaper.

As stated in earlier reports, much archival research also could be done. Particularly useful would be fur trade records in Canada and Forest Service records in Washington, D. C.

When attempting to document actual stream segments navigated, county land records and government survey notes and plats could prove valuable as noted in the Tongue River discussion.

* * *

Clark Fork River

(Tributary of the Columbia River)

The Clark Fork River has been navigated from Deer Lodge, Montana, to its mouth on Pend Oreille Lake, Idaho. Early instances of navigation on the Clark Fork included at least 2 canoe trips 1809-11) of David Thompson of the British North West company from Salesh or Flathead House near the mouth of Thompson River) to the mouth of the Clark Fork River at Pend Oreille Lake Kullyspell House). [Source: M. Catherine White, ed. David Thompson's Journals

Relating to Montana and Adjacent Regions, 1808-1812 (Missoula: Montana State University Press, 1950), pp. c-cxx and 43-222; Olga Weydemeyer Johnson, Flathead and Kootenay (Glendale, California: Arthur H. Clark Co., 1969) pp. 57-58, 181, 185-186 as cited in U. S. Army Corps of Engineers District, "Report on Navigability of the Clark Fork of the Columbia River, Idaho and Montana", circa 1975 p. 11.]

Another early example of navigation of the Clark Fork River involved the expedition of Governor Issac S. Stevens to survey a railroad route to the Pacific Coast. Dr. George Suckley, who was charged with exploring the Clark Fork River, travelled down the Bitterroot River and from its mouth down the Clark Fork to a Jesuit mission located on the north end of Pend Oreille Lake. They travelled down the Clark Fork in three boats made with bullock hides stretched over frames. [Source: James McClellan Hamilton, From Wilderness to Statehood A History of Montana, (Portland: Binford and Mort, 1957) p. 114, as cited in U. S. Army Corps, "Clark Fork River Navigability Report," p.12.]

In the Spring of 1860, W. W. Delacy, a member of the Mullan Road exploration crew floated two flat-bottomed boats from about 10 miles above the river's confluence with the Flathead River to the Flathead River, which he ascended to the mouth of Plum Creek. [Source: Margaret Hahn, In Retrospect: A History of Mineral County, (Superior, MT:Mineral Publishing Company, 1985) pp. 9-10.]

Much more use was made of the Clark Fork River during the 1860's with the construction of the Mullan Road and the discovery of gold in Western Montana.

The river served to transport passengers and freight in a variety of river craft. Starting in the 1880's logs used primarily for railroad ties and mine structures were floated on the river. Between 1865 and 1870, the Oregon Steam Navigation Company operated a steamboat line between Pend Oreille Lake and Thompson Falls. To take advantage of the traffic traveling between the Upper Missouri and Columbia Rivers at Walla Walla the company built the Mary Moody in 1865, and in 1866 navigated the river to Cabinet Landing, just inside the Montana border. In 1867, the company began navigating the river in the Cabinet from Cabinet Landing to Rock Island Rapids near Noxon) and in the Missoula from there to Thompson Falls, the head of steamboat navigation. These trips continued until 1870. [Sources: Merrill G. Burlingame and K. Ross Toole, A History of Montana, (New York:Lewis Histories Publishing Company, Inc., 1957), Vol. II, p. 70. As cited in U. S. Army Corps of Engineers, "Clark Fork River Navigability Report," p. 13. Other references to steamboat traffic on the Clark Fork during this time include The Montana Almanac, 1959-60, Missoula: Montana State University Press, 1958, p. 252; Rocky Mountain Gazette, August 18, 1866; Helena Herald, May 2, 1867, June 5, 1867, September 12, 1867, February 13, 1868; Deer Lodge Independent, June 19, 1868; E. W. Wright, Lewis & Dryden's Marine History of the Pacific Northwest, first published 1895 by Lewis & Dryden Printing Co. and reprinted 1867 by Superior Publishing Co., Seattle, Washington. Steamboat navigation also is discussed in Evelyn M. Davis, "Steamboats Once Operated on Clark Fork River", which appeared in the Sanders County Ledger, February 6, 1958.]

Other forms of navigation occurred on the Clark Fork River during the 1860's and 1870's. Mail was carried by boat from Deer Lodge to Missoula in 1866. [Source: Missoula Pioneer, July 13, 1872 and New Northwest July 13, 1872, as cited in Audra Browman, "Some Ways in Which the Clark Fork, Bitterroot and Blackfoot Rivers Have Been Used in the Past", 1974, and U. S. Army Corps of Engineers, "Clark Fork Navigability Report," p. 13.] The same year, two men who went upstream to the mouth of the Blackfoot river to build a ferryboat drowned while riding a raft downstream to Missoula [Source: Frank Woody, History of Missoula County and City, 1897, as cited in Browman and U.S. Army Corps of Engineers "Clark Fork River Navigability Report," p. 13.] In 1870, Henry Buck and others constructed three boats and floated from Lincoln on the Blackfoot River to its confluence with the Clark Fork and from there to Frenchtown on the way to mines at Cedar Creek Mines near Superior. They packed their goods from Frenchtown to the mines. [Source: Helena Herald, March 15, 1890 as cited in Browman U. S. Army Corps "Clark Fork River Navigability Report," p. 13.]

Also in 1870, Richard Barry constructed boats for Sam Johns "from Deer Lodge to captain at least as far" as Moose Creek there is a Moose Creek about 5 miles west of Alberton). Sam Johns started the first trip on the Kangaroo in May and the boat made more than one trip, presumably as far as Moose Creek. [Source: New Northwest, May 6, 1870; December 16, 1870, Missoula and Cedar Creek Pioneer, December 8, 1870, as cited in Browman, p. 1.] A March 2, 1871 article in the Missoula Pioneer noted that

> Thomas D. Beeke and J. L. Hodge left Frenchtown on Sunday last in an open boat, and . . . arrived at the mouth of Quartz [creek] about midway between Alberton and Superior) on Tuesday evening without accident. This, in connection with the cruise of the Kangaroo last season, and the uninterrupted transportation of hay and lumber between the mouth of Cedar [Creek] about 1 mile west of Superior) and the Missoula Ferry demonstrates the practicability of navigating the Deer Lodge, Hellgate and Missoula rivers from Deer Lodge City to Pend Oreille. [Source: The Missoula Pioneer, March 2, 1871 as cited in Heritage Research Center, "Report on Western Montana Historical Navigation", prepared for the Montana Department of State Lands, 1984, p. 40.]

Other 1871 newspaper items referred to boats and rafts traveling from Missoula to Superior and to boats carrying hay and lumber from St. Regis to the mines. [Source: New Northwest, March 4, 1870, Missoula Pioneer, February 24, 1871.] In 1872, a surveying party of Northern Pacific Railroad travelled by boat from Missoula to the confluence of the Clark Fork and Flathead Rivers near Paradise, Montana. [Source: Browman, 1974, p. 3.]

In the early 1880's when the Northern Pacific Railroad was constructing its line to the Pacific coast, it contracted with the Eddy Hammond Company to provide timber for ties between the Little Blackfoot and the Idaho line. Mills were constructed at the confluence of the Blackfoot and Clark Fork Rivers and at several other locations on the Clark Fork. [Source: Missoulian, August 19 and 26, 1881 as cited in

Browman, p. 3.] Supplies for the Company were carried down the Flathead River and Clark Fork River by bateaux and up the Clark Fork from Cabinet Landing to Thompson Falls by steamboat. In 1882, lumber was rafted down the Clark Fork, and, during the winter of that year, it was transported on ice between the construction camps. (Missoulian, November 11, 1881, May 19, 1882, June 9 and 30, 1882, July 7, 1882, August 18, 1882, September 8 and 29, 1882 and February 9, 1883 as cited in U. S. Army Corps of Engineers, "Clark Fork River Navigability Report," p. 15.) A February 24, 1882 item in the Missoulian refers to logs being floated down the Missoula and Pend Oreille Rivers to Weeksville. [Source: the Missoulian, February 24, 1882.]

From 1900 to 1925, drives occurred, on the Clark Fork River, originating on Nine Mile Creek, White Pine Creek, Trout Creek, Vermilion River and Bull River. According to the U. S. Army Corps of Engineers Clark Fork Navigability Study, most of the logs that were driven down these tributaries were floated down the Clarks Fork River to the town of Clark Fork in Idaho. From there they were towed on-Pend Oreille Lake to Dover or to the Hope Lumber Company plant at Hope, Idaho. A 1907 item in the Sander County Ledger, (Thompson Falls) stated that:

> the Hope Lumber Company's men arrived here last week to drive the logs out along the river between Eddy and the Idaho line to Hope. The men expect that it will take about four' weeks to complete the drive. [Source: Sanders County Ledgers April 19, 1907 as cited in Heritage Research Center "Report on Western Montana Historical Navigations" prepared for the

Montana Department of State Lands; 1984, p. 46.]

Another entry in the Sanders County Ledger in 1914 mentioned expert loggers breaking up a log jam at Heron, with the intention of driving "the logs down the river to the sorting works at the mouth of the river." (Pend Oreille Lake), [Source: Sanders County Ledger, March 13, 1914, as cited in Heritage Research Center, "Report on Western Montana Historical Navigation", prepared for the Montana Department of State Lands pp. 47-48.] The log drives down the Clark 'Fork from Missoula during these years carried from 10 to 50 million board feet per year. Correspondence with Clarence C. Strong of Missoula and Floyd W. Viche of Mineral County Commissioner's office at Superior, Montana, February - March 1974 as cited in U. S. Army Corps of Engineers, "Clark Fork River Navigability Report."

In 1910 in Steele, Lenham and Maker vs. the Northwest Development Company and Edward Donlan, the U. S. Court determined Clark Fork at the Columbia River is a non-navigable river, and that at the time the Northwest Development Company was owner of both banks of the river as it flows through the whole of Township 21 North, Range 29 West, that the Company was the sole owner of the river bed in that township. [Source: Sanders County Ledger, July 22, 1910 as cited in Heritage Research Center "Report on Western Montana Historic Navigation" prepared for Montana Department of State Lands, 1984, p. 47.]

In 1932 the U. S. Army Corps of Engineers, Seattle District, designated the Clark Fork River between its mouth at Pend Oreille Lake to the Northern Pacific

Railway bridge near the town of Clark Fork a distance of about 4 miles) as a navigable waterway. [Source: U.S. Army Corps of Engineers "Clark Fork Navigability Report;" p. 9.]

The "Report on Navigability of the Clark Fork of the Columbia River" prepared by the U.S. Army Corps of Engineers in about 1975, regarded the Clark Fork as a navigable waterway as far upstream as the mouth of the Blackfoot River. It did not consider the river above the mouth of the Blackfoot as capable of navigation.

The Montana Department of Fish, Wildlife and Parks considers the Clark Fork River a navigable waterway from Warm Springs, about 15 miles South of Deer Lodge) Idaho border.

Summary: There are recorded instances of the Clark Fork River being navigated in small boats from 'as high up as Deer Lodge, Montana. Log drives began west of Missoula and ran down the river to the river's mouth at Lake Pend Oreille. Thompson Falls was the historical head of steamboat navigation.

* * *

Madison River

(Tributary of the Missouri River)

The Madison River has experienced considerable use historically by explorers, trappers, miners, farmers and loggers, and is generally considered to have high potential for navigation. However, recorded entrances of commercial navigation are few.

In 1913, the Madison River Lumber Company cut timber on the Upper Madison at the mouth of the West Fork of the Madison and floated from 700;000 to 1 million board feet of timber from that area to the company's mill at Varney, a distance of 55 miles. [Sources: (Virginia City) Madisonian, May 9;'1913, July 4, 1913, July 25, 1913, August 8; 1913, September 19, 1913; Letter, Floyd W. Wilcox to Alan Newell, September 8, 1974, as cited in Alan Newell and Gary Williams, "Madison River Navigation Study;" prepared for the U.S. Army Corps of Engineers, Omaha District, 1974, pp. 8-10.]

The construction of Madison Dams at Ennis (No. 1 in 1900 and No. 2 in 1906) and the construction of Hebgen Dam below West Yellowstone have limited navigation of the river, although barges were used on Hebgen Lake in 1914 to transport supplies to the site at the dam from West Yellowstone.

The federal government does not consider the Madison River a navigable stream. However, in 1948, the Federal Power Commission required the Montana Power Company to license its power generating facility at Hebgen Dam under authority of section 4(e) of the Federal Water Power Act of 1935 which empowers the federal government with authority over non-navigable streams (in this case, the Madison) whose flow affects the navigable status of navigable streams (in this case, the Missouri River below Fort Benton). [Source: Opinions and decisions of the Federal Power Commission, Vol. 7, January 1, 1948-December 31, 1948 (Washington:1950), as cited in Newell and Williams, P. 13.] Even though the federal government does not consider the Madison River as navigable, recent state court decisions indicate a trend toward

declaring a stream navigable on the basis of its recreational use. Both Hebgen Lake and the Madison River experience heavy recreational use. [Source: Newell and Williams, pp. 11-16.] The Montana Department of Fish, Wildlife and Parks considers the Madison River as a navigable stream from Quaker Lake to its confluence with the Missouri River.

Summary: Commercial navigation has occurred on the Madison River in connection with log drives between the mouth of the West Fork of the Madison (the recorded high, point of navigation) and Varney. Hebgen Lake also has been navigated. Without the obstruction caused by Madison. Dams 1 and 2 below Ennis. It is safe to assume that the Madison could have been navigated from the mouth of the West Fork to its confluence with :the Missouri River.

* * *

Missouri River

The Missouri River is generally considered a navigable stream from the Montana/North Dakota border to its headwaters at Three Forks. There is considerable historical documentation of commercial navigation on the river in Montana. Lewis and Clark navigated this river in pirogues and bateaux to the Great Falls in 1805. (See the numerous editions of "The Journals of Lewis and Clark".) At least one, party descended the Missouri from Three Forks to the existing state line in 1806. Manuel Lisa traveled up the Missouri to the mouth of the Big Horn River in 1807 and returned from it to St. Louis in 1808. His St. Louis Missouri River Fur Company sent an expedition up the Upper Missouri River in 1810. There is a

record of one party of the expedition floating an indeterminate distance from Three Forks toward the Great Falls that year. [Source: Thomas James, Three Years Among the Indians and Mexicans (St. Louis:1966), p. 66, as cited in Alan Newell and Gary Williams, Missouri River Navigation Study Loman, Montana, to Three Forks, Montana, prepared for U. S. Army Corps of Engineers, Omaha District, 1974, pp. 8-9.] The fur trading companies made extensive use of the Missouri River from the time of Manuel Lisa's first trip up the Missouri until the 1860's.

Light-draft steamboat, the "Chippewa", was the first steamboat to travel to Fort Benton, arriving there in 1860. [Source: Hiram Martin Chittenden, History of Early Steamboat Navigation on the Missouri River; Life and Adventures of Joseph La Barge, Vol. 1 (Minneapolis, MN:1962), pp. 219-221, as cited in Alan Newell and Gary Williams "Missouri River Navigation Study, Loma, Montana to Three Forks, Montana;" prepared for the U. S. Army Corps of Engineers, Omaha District, 1974, p. 11.] Between 1860 and 1880, about 400 steamboats arrived at Fort Benton. [Source: Federal Power Commission, Opinion and Decisions of the Federal Power Commission, Vol. VIII, January 1, 1948, December 31, 1948, (Washington D.C.:1950), p. 171, as cited in Newell and Williams, pp. 11-12.]

Commercial navigation of the Missouri above the Great Falls developed about the same time steamboat traffic to Fort Benton was coming to an end. A. M. Holter's Lumber Company rafted sawed timber from its lumber mill on Stickney Creek, which was 70 miles upstream from Great Falls. [Source: Great Falls Tribune, February 18, 1888; A. M. Holter, "Pioneering Lumbering in Montana; Contributions to the

Historical Society of Montana (Vol. VIII, Helena:1917), pp. 2-70, 271; the Fort Benton River Press; April 13, 1881, as cited in Newell and Williams, p. 14.] The Holter Company rafted about 300;000 feet of lumber from its mills on Stickney and Megher Creek to Great Falls in 1885 and floated logs to Great Falls from those creeks until 1891. [source: Holter, "Pioneer Lumbering in Montana", p. 272; the Great Falls Tribune, August 9, 1890, as cited in Newell and Williams.]

William F. Wheeler and a crew of five used a rowboat to float the Missouri from Stubbs Ferry (near Helena) to the Great Falls in 1878 in an effort to determine if its upper reaches were navigable. [Source: Stanley K. Davison, "White Hopes of the Big Muddy;" Montana, The Magazine of Western History (Spring 1959); p. 2; Helena Weekly Herald, September 26, 1878, as cited in Newell and Williams, p. 18.] A large steamboat, the Fern, floated from Twin Bridges on the Beaverhead, down the Beaverhead, Jefferson, and Missouri to Townsend in June 1887. Three Forks, which the Fern passed by on its descent, constitutes the highest point of navigation. [Source: Davison, White, Hopes on the Big Muddy, pp. 5 & 6, as cited in Newell and Williams, p. 19.] Between September 28 and November 7, 1887, the Fern floated from Townsend to Great Falls. [Source: Ibid., and the Great Falls Tribune, November 9, 1887, as quoted in Newell and Williams, p. 19.]

The U.S. Army Corps of Engineers has declared the Missouri River navigable from the Montana/North Dakota State line to Three Forks, Montana. The United States Coast Guard exercises jurisdiction over the Missouri River to a point 263 miles above Fort

Benton, Montana (33 CFR 238 1967). The Federal Power Commission, which licenses dams, considers the Missouri River as a navigable river to Three Forks, Montana. [Source: Federal Power Commission Reports, Vol. VII, January 1948-December 1948, Washington:1950.] The case of Montana Power Company vs. Sutherland 74 (Mont. 587) established the Missouri -as navigable in Lewis and Clark County and the state case of Gibson vs. Kelley (15 Mont 417) established that the Missouri River is navigable in Choteau County at T23North, R7East. (Newell and Williams, pp. 21-22.) The Montana Department of Fish, Wildlife and Parks considers the Missouri River as a Class I navigable stream from Three Forks to the Montana/North Dakota border.

Summary: The Missouri River has been navigated in connection with a variety of activities and by a variety of river crafts from its headwaters at Three Forks to the Montana/North Dakota border. It also has been declared a navigable waterway between these points by the federal government.

* * *

Swan River

(Tributary of Flathead Lake)

The Swan River between Swan Lake and Bigfork on Flathead Lake was used to float about 100 million feet of timber from Swan Lake to Flathead Lake between 1914 and 1919. Logging and the logging drives were supervised by J. E. Craney of the Somers Lumber Company. [Source: Henry Elwood, Kalispell,

Montana, and the Upper Flathead Valley (Kalispell, MT:1980), p. 200.]

In the Swan Lake area, logs were hauled by railroad, and some floated, to the head of Swan Lake where they were decked, rolled into the river, and floated across the lake to a boom on the lower end of Swan Lake. From here, the boom was opened and the logs were floated 20 miles down the Swan River to Flathead Lake at Bigfork. They were again boomed and hauled by tug to the Somers mill. [Source: Martha Craney Wiberg and Edmund B. Craney, "Swan Lake, Montana: 1914-1919"; The Columbia River and Oregon Timberman, September 1918, from the Clarence Strong Papers, pages unnumbered.]

Summary: Swan River was navigated for a distance of approximately 20 miles from its mouth to Swan Lake. Swan Lake itself was navigated in connection with the same commercial floating of timber.

EXHIBIT B

REPORT ON NAVIGABILITY OF THE CLARK FORK OF THE COLUMBIA RIVER, IDAHO AND MONTANA

1. Name of waterbody: Clark Fork of the Columbia River. The Clark Fork is situated within the upper Columbia River basin located in .western Montana and the panhandle of northern Idaho. The Clark Fork rises west of the Continental Divide and flows generally westward across the Montana-Idaho border, emptying into Pend Oreille Lake in northern Idaho. The Clark Fork is about 351 miles long, of which approximately 11 miles are situated in the State of Idaho and 340 miles in the State of Montana. (See Appendix 1 for basin and vicinity maps.)

2. Tributary to: The Clark Fork empties into Pend Oreille Lake, Idaho, the outlet of which flows across the Washington-Idaho line and then northerly across the international boundary to its mouth on the Columbia River. Pend Oreille Lake and its outlet, the Pend Oreille River, are navigable waters of the United States.

3. Physical characteristics:

a. Type: River.

b. Area:

The Clark Fork drains all of Montana west of the Continental Divide except for a small area tributary to the Kootenai River in the northwest corner of the state. The Clark Fork rises in the Silver Bow Mountains near Butte, Montana. It flows generally northward to Garrison, Montana, where it turns to the

northwest and maintains this general course for about 175 miles until it reaches St. Regis, Montana, where it turns abruptly to the northeast. The Clark Fork continues northeasterly for about 26 miles until it is joined by the Flathead River near Paradise, Montana, at which point the Clark Fork resumes its northwesterly course across the Montana-Idaho border and into Pend Oreille Lake. The outlet of Pend Oreille Lake, the Pend Oreille River, flows westward from the lake to the Washington-Idaho line and then northerly to the international boundary. Just north of the boundary, the Pend Oreille River resumes its westward course and empties into the Columbia River.

There are more than 150 streams tributary to the Clark Fork. The three principal tributaries of the Clark Fork are the Flathead, Blackfoot, and Bitterroot rivers. The Flathead River is the largest and most northerly tributary. Flowing south through Flathead Lake, the Flathead River turns westward at Dixon, Montana, and enters the Clark Fork near Paradise, Montana. The Blackfoot River is the uppermost important tributary and flows in a westerly direction to join the Clark Fork near Missoula, Montana. The northwest flowing Bitterroot River joins the Clark Fork just downstream of Missoula, Montana.

The Clark Fork is about 1,050 feet wide at the mouth, narrowing to about 140 feet at Cabinet Gorge near the Idaho-Montana border. Above Cabinet Gorge Dam, the Clark Fork gradually widens to about 500 feet near the city of Thompson Falls. Above Thompson Falls Reservoir, the Clark Fork begins to narrow again and is about 400 feet wide at Superior and about 300 feet wide near Missoula. The Clark Fork continues to narrow above Missoula to its headwaters about 28

miles above Deer Lodge, Montana. The Clark Fork is about 50 feet wide at Deer Lodge.

c. Approximate discharge volumes: Discharges for the Clark Fork are measured at several locations in the States of Idaho and Montana. Data for the three locations specified below were compiled from 1972 water resources data published by the U. S. Department of the Interior, Geological Survey.

(1) At White Horse Rapids, 0.4 miles downstream from Cabinet Gorge Dam, Idaho:

Maximum discharge:	190,000 c.f.s.	(10 June 1972)
Minimum discharge:	762 c.f.s.	(2 Sept 1962)
Average discharge:	22,350 c.f.s.	(44 years of record, 1928-1972)

(2) 2.4 miles southeast of Plains; Montana, 6.0 miles downstream from Flathead River:

Maximum discharge:	134,000 c.f.s.	(5 June 1948)
Minimum discharge:	3,200 c.f.s.	(8 Feb 1936 and 10 Dec 1940)
Average discharge:	20,000 c.f.s.	(62 years of record, 1910-1972)

(3) 1.0 miles downstream from Bitterroot River, 4.5 miles west of Missoula, Montana:

Maximum discharge:	52,800 c.f.s.	(23 May 1964)

Minimum discharge:	388 c.f.s.	(18 Jan 1933)
Average discharge:	5,448 c.f.s.	(43 years of record, 1929-1972)

d. Fall per mile: The Clark Fork falls from approximate elevation 4,500 feet near Deer Lodge, Montana, to 2,062 feet at Pend Oreille Lake, Idaho. Total fall from Deer Lodge to Pend Oreille Lake is 2,438 feet, averaging 7.5 feet per mile.

e. Extent of tidal influence: Not applicable.

f. Water surface elevations:

The normal full pool elevations of reservoir areas on the Clark Fork are as follows:

Project	Normal Full Pool
Cabinet Gorge Dam	2175.0 feet MSL, USGS datum
Noxon Rapids Dam	2331.0 feet MSL, USGS datum
Thompson Falls Dam	2396.0 feet MSL, USGS datum
Milltown Dam	3260.0 feet MSL, USGS datum

g. Description of improvements to navigation not listed in paragraph 5 below: Seattle District has no record of any navigational improvements being made to the Clark Fork other than channel and flood control improvements listed below:

(1) Concrete wall and riprap extensions for bank protection at Missoula completed by the City of Missoula circa 1940.

(2) Sanders County expended $40,000 for groins and riprap from 1930 to 1940 at Plains, Montana.

4. Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:

Four power installations are situated on the Clark Fork as follows:

a. Cabinet Gorge Dam, located about half a mile below the Montana-Idaho state line, completed by the Washington Water Power Company in 1953.

b. Noxon Rapids Dam, located about 20 miles above Cabinet Gorge Dam completed by Washington Water Power Company in 1960.

c. Thompson Falls Dam, located at Thompson Falls about 38 miles above Noxon Rapids Dam. Present installation completed by the Montana Power Company in 1916.

d. Milltown Dam, located at the mouth of the Blackfoot River, originally constructed by W. A. Clark in 1907. It is now operated by the Montana Power Company.

None of the above dams has locks for through navigation.

In addition to the four power installations cited above, 75 bridges cross the Clark Fork from its mouth in Pend Oreille Lake to its headwaters near Butte, Montana. Types of bridges and quantity of each are as follows:

Type	Qty
Farm bridge	1
Foot bridge	4
Street bridge	8
Highway bridge	10
County road bridge	15
Railroad bridge	37

5. Authorized projects:

a. Nature, condition and location of any improvement made under projects authorized by Congress: A project adopted 17 May 1950 provided for flood protective works to prevent flood damage within the city limits of Missoula. The work consisted of levees, floodgate structure, floodwall, and extension of an existing State highway levee. The project was completed in 1966.

b. Description of projects authorized but not constructed: Not applicable.

c. List of known survey documents or reports describing the waterbody:

(1) Preliminary examination report contained in Annual Report of the Chief of Engineers for 1891, Part 5 pp. 3250-3251.

(2) House of Representatives Doc. No. 103, 73rd Congress, 1st Session, 1932, "Columbia River and Minor' Tributaries."

(3) House of Representatives.Doc. No. 531, 8lst Congress, 2nd Session, 1950, "Columbia River and Tributaries, Northwestern United States."

(4) House of Representatives DOC: No. 403, 87th Congress, 2nd Session, 1963, "Columbia River and Tributaries."

6. Previous Corps of Engineers determinations on navigability:

In 1932 the Clark Fork was designated a navigable waterway of the United States from its mouth in Pend Oreille Lake, Idaho, to the Northern Pacific Railway bridge near the town of Clark Fork, a distance of 4 miles. This designation was made based upon a report of navigability of the Clark Fork above Pend Oreille Lake prepared by the Seattle District in 1932. A copy of the report and indorsements thereto is attached as Appendix 2.

Head of navigation was established at the Northern Pacific Railway bridge as it was considered the practical head of navigation for tugs and light-draft boats. The report did indicate, however, that between 1900 and 1929 logs were floated down the Clark Fork during the spring high water to. sawmills on Pend Oreille Lake. Approximately 5 million board feet of timber were floated during the last drive in 1929. The report also indicated that logs floated on the Clark Fork had been floated from as far upstream as Dixon, Montana, on the Flathead River. The logs were splashed over Thompson Falls Dam, originally constructed circa 1912 at Thompson Falls Rapids, about 69 miles above Pend Oreille Lake. No bridges were obstructive to the log drives. (Refer to paragraphs 4 and 7 of the 1932 report, Appendix 2.)

7. Past or present interstate commerce:

a. Past:

The Clark Fork report of 1932 (Appendix 2) historically documented navigation on the Clark Fork

from the mouth at Pend Oreille Lake upstream to Paradise, Montana. Navigation consisted .of small boats on the first 4 miles of the river and the floating of logs originating on the Flathead River down the Clark Fork to Pend Oreille Lake.

Additional research done by the Seattle District in conjunction with the preparation of this report revealed that steamboat navigation on the Clark Fork occurred as far upstream as Thompson Falls, and that other forms of commercial navigation regularly occurred as far upstream as the mouth of the Blackfoot River. A summary of our findings relating to the development of waterborne transportation on the Clark Fork follows.

Prior to settlement of Montana by white men, Indians were using dugout canoes on several of the region's waterways, including the Clark Fork. Some independent fur trappers and traders carried furs on the river, one of whom was David Thompson of the North West Company. During 1808-1809, Thompson established fur posts near the mouth of the Clark Fork at Pend Oreille Lake (Kullyspell House) and near the mouth of the Thompson River (Saleesh or Flathead House). Following establishment of these posts, Thompson traded with the Flathead Indians whose camp was located upstream near the mouth of the Flathead River. On at least two occasions after trading with the Flatheads, Thompson canoed from their camp to Pend Oreille Lake, portaging at Thompson Falls and Rock Island Rapids. (Reference M. Catherine White, el. David Thompson's Journals Relating to Montana and Adjacent Regions, 1808-1812 (Missoula: Montana State University Press, 1950), pp. c-cxx and 43-222; Olga Weydemeyer Johnson.

Flathead and Kootenay. (Glendale, California: Arthur H. Clark Co., 1969), pp. 57-58, 181, 185-186.)

In 1853, Governor Isaac I. Stevens conducted an expedition to explore and survey a railroad route from the headwaters of the Mississippi River to the Pacific Coast. Dr. George Suckley, surgeon and naturalist for the expedition, was given the task of navigating the Clark Fork and recording the geographical features of the stream, its valley, and its resources, as well as learning the customs, habits, and manner of life of the local Indians. On 15 October 1853, Dr. Suckley and three others left Fort Owen* on the Bitterroot River in a boat constructed of three bullock hides stretched over a frame. Dr. Suckley and his group traveled down the Bitterroot and Clark Fork, eventually arriving at a Jesuit mission located on the upper end of Pend Oreille Lake. From there they continued overland to Fort Colville, where they transferred to boats and journeyed down the Columbia River to the Pacific Coast. (Refer to Hamilton, James McClellan. From Wilderness to Statehood, A History of Montana, Portland: Binfords & Mort, 1957, p. 114.)

Following Governor Stevens' expedition, the Mullan Road was constructed through the area between 1858 and 1860.** Completion of the Mullan Road facilitated

---

* Fort Owen, established in 1850 and situated just north of Stevensville, was once the major trading center for Indians and whites throughout the Clark Fork watershed. Fort Owen was originally St. Mary's Mission, established by Father Peter J. DeSmet in September 1841.

** The Mullan Road provided the principal northern route for travel between the Missouri and Columbia rivers until the

heavy immigration to Montana beginning in 1862 when rich gold deposits were found in the western mountain gulches. People entering the region made immediate and varied use of the area's waterways. Flour mills and several small sawmills were run by water power; passengers and freight were transported by steamers and a variety of smaller boats; mail and hay were transported in small boats; ore was moved by barges; and railroad ties and logs were floated on many of the streams.

Between the 1860's and 1870's, flour mills were in operation on the Clark Fork at Frenchtown and Missoula. Small sawmills, which sprung up wherever gold camps carne into existence, were located on the Clark Fork at Missoula, and near Superior and Frenchtown. Several other flour mills and sawmills were located on creeks tributary to the Clark Fork. (Refer to Burlingame, Ralph and K. Ross Toole. A History of Montana, Vol. II, New York: Lewis Historical Publishing Company, Inc., 1957, p. 4; correspondence from Ludvig G. Browrnan, Missoula County Commissioner, 21 February 1974.)

Steamboats were put into service on the Clark Fork in 1866, evidenced as follows:

> "The Oregon Steam Navigation Company attempted to extend its business from the lower Columbia in 1865 by building the MARY MOODY on Lake Pend d'Oreille, and sending it in 1866 to the Cabinet Landing, just inside the present state boundary. In 1867 two other

---

completion of the Northern Pacific Railway through Montana in 1883.

> boats were added which ran in relay, the CABINET running from Cabinet Landing to Rock Island Rapids, and the MISSOULA taking the passengers and freight on to Thompson Falls, the upper limit of navigation. These boats operated until 1870. . . ."
>
> (A History of Montana, Vol. II, p. 70)

Additional references to the above-quoted steamboat operations are contained in The Montana Almanac, 1959-60, Missoula: Montana State University Press, 1958, p. 252; Rocky Mountain Gazette, 18 August 1866; Helena Herald, 2 May 1867, 5 June 1867, 12 September 1867, 13 February 1868; Deer Lodge Independent, 19 June 1868; E. W. Wright. Lewis & Dryden's Marine History of the Pacific Northwest (first published, 1895 by Lewis & Dryden Printing Co. and reprinted 1967 by Superior Publishing Co., Seattle, Washington).

Though Thompson Falls was the upper limit for steamboat navigation on the Clark Fork, other forms of navigation were conducted above this point between the 1860's and 1870's as follows:

- Mail was carried by boat from Deer Lodge to Missoula on one occasion in 1866. (Missoula Pioneer, 13 July 1872; New Northwest, 13 July 1872)

- In 1866 two men went upriver to cut wood for a ferryboat and traveled downriver by raft from the mouth of the Blackfoot River to Missoula. (History of Missoula County and City by Frank Woody, 1987)

- In 1870, Henry Buck and others built three boats and floated from Lincoln on the Blackfoot River

to Frenchtown, and packed the rest of the way to the Cedar Creek mines near Superior. (Helena Herald, 15 March 1870)

- Other parties heading for the mining areas near Superior traveled by boat or raft from Missoula circa 1870. Boats also carried hay and lumber from St. Regis to Superior. (New Northwest, 4 March 1870; Missoula Pioneer, 24 February and 2 March 1871)

- In 1872 a surveying party of Northern Pacific Railway engineers went by boat from Missoula to the junction of the Clark Fork and Flathead rivers. (Missoula Pioneer, 13 July 1872)

Mining and the rapid settlement of the Montana plains area had created a market for heavy timbers in the 1860's, but in the 1870's small sawmills in Montana fell on hard times as the mills were closely associated with the gold camps and gold was no longer drawing people to new camps. In the 1880's, however, the lumber business was not only revived but put on a completely new basis for the following reasons:

(1) The Utah Northern and Northern Pacific railroads were built into the state, creating a sudden demand for building lumber and ties.

(2) Placer mining was replaced by hard rock or quartz mining, which created an additional demand for mine timbers and building lumber.

One merchandising firm which took early advantage of the railroads' requirements for millions of ties and vast quantities of timber for bridges and buildings was Eddy, Hammond and Company. This

company was contracted by the Northern Pacific Railway to furnish all kinds of supplies, including timber, ties, and tunnel timbers, for use between the Little Blackfoot River and the Idaho line. A sawmill was started at the mouth of the Blackfoot River in 1881, and soon afterwards Eddy, Hammond and Company bought or built a number of additional sawmills up and down the Clark Fork.

During construction of the Pacific Northern Railway, supplies provided by Eddy, Hammond and Company were carried down the Flathead River and the Clark Fork by batteaux and carried up the Clark Fork by steamboat from Cabinet Landing to Thompson Falls. Lumber was rafted -down the Clark Fork in 1882 and, for a brief time during the winter of this same year, teams drove on ice between the construction camps. (Refer to A History of Montana, Vol. II, p. 5; The Missoulian, 11 November 1881, 19 May 1882, 9 and 30 June 1882, 7 July 1882, 18 August 1882, 8 and 29 September 1882, 9 February 1883.)

By 1890, large sawmills had been established by various companies at Libby, Eureka, Troy, Missoula, Bonner, Hamilton, 'and elsewhere to meet the burgeoning lumber demands of mining and railroad interests. The following data from A History of Montana, Vol. II, illustrates the extent of lumber requirements for the Anaconda Copper Mining Company situated near Butte:

> "As early as 1884, sawmills west of the divide were supplying the 4-year-old Anaconda Copper Company alone with 300,000 cords of wood for smelter fuel. At the going rate of $5.00 per cord, this represented a million and a half

> dollars...for smelter fuel alone. By 1888 the Anaconda Company alone was using 40,000 feet of timber per day in the mines, exclusive of the smelter, and the company's lumber contracts totaled well over a million dollars a year."
> (p. 5)

By 1898, there was a marked tendency for large mining interests to acquire the ownership of sawmills and timberland. The Anaconda Company set up its own lumber department and began buying vast timber acreages from the Northern Pacific Railway as well as from private concerns. Early purchases by Anaconda included the Eddy, Hammond and Company sawmill at Bonner and 90,000 acres of timberland situated mainly in the Blackfoot valley, and an additional 700,000 acres of timberland from the Northern Pacific Railway. Almost the entire lumber demand of the Butte mining district was supplied by the area around Missoula, and large log drives were conducted on both the Bitterroot and Blackfoot rivers. (Refer to A History of Montana, Vol. II, pp: 6-8; U. S. Department of the Interior, Bureau of Reclamation, Reconnaissance Report, "Clark Fork Basin, Montana", Boise, Idaho, June 1959, pp. 114 and 123; correspondence with Clarence C. Strong of Missoula, a retired U. S. Forest Service employee who has done considerable research on logging and lumbering in Western Montana, March 1974.)

Log drives were also conducted on the Clark Fork below Missoula from about 1900 to 1925. Drives originated on Ninemile Creek, Flathead River, White Pine Creek, Trout Creek, Vermilion River and Bull River. Nearly all the logs driven down these tributaries went on into Idaho via the Clark Fork and

were boomed in the vicinity of the town of Clark Fork, Idaho, for towing on Pend Oreille Lake to a large sawmill at Dover or to the Hope Lumber Company plant at Hope, Idaho. The total quantity of logs floated on the Clark Fork below Missoula varied from 10 to 50 million board feet per year. (Reference correspondence from Clarence C. Strong of Missoula, and Floyd W. Viche of Mineral County Commissioners' office at Superior, Montana, February-March 1974.)

By letter dated 20 February 1974, Montana State Department of Natural Resources and Conservation indicated that "the Clark Fork River ... especially from Missoula downstream, has been used for the purpose of transporting logs and holding timber in and near local lumber operations."

Ore was also moved on the Clark Fork as follows: Beginning about 1890, ore from the Iron Mountain mine, located 3½ miles north of Superior, was hauled by wagon to the Clark Fork, loaded on barges, floated to Paradise, and then railed to Helena. From Helena, some of the ore was further railed to the East Coast, loaded on ships, and transported as far distant as Belgium. Ore was moved in this manner until about 1908. (Reference Report to National Mining Congress of 1892, on mines of Montana, by J. A. McKnight; correspondence with Floyd W. Viche, February 1974.)

Several sources other than those already cited in this report were researched to determine the historical aspects of navigation on the Clark Fork. These additional sources further substantiated the findings reported above.

b. Present

The Clark Fork is used extensively by recreationists downstream of Missoula for-floating in rubber rafts and small boats. Fishing and scenic trips are conducted by licensed guides. The reservoir areas behind Cabinet Gorge Dam, Noxon Rapids Dam, and Thompson Falls Dam are particularly popular for fishing and recreational boating.

The U. S. Forest Service office at Missoula, Montana, indicates that there has been a considerable increase in recreational boating on the Clark Fork during the past 5 years and that this trend is expected to continue.

8. Potential use for interstate commerce, if applicable:

The Seattle District has no data indicating that commercial navigation on the Clark Fork will reoccur in the foreseeable future. The Clark Fork does, however, have the capacity to accommodate some forms of commercial navigation on portions of the waterway as far upstream as the mouth of the Blackfoot River, evidenced by past and present usage documented in paragraph 7 of this report. The Clark Fork does not have the capacity to accommodate commercial navigation above the Blackfoot River.

9. Nature of jurisdiction known to have been exercised by Federal or State agencies, if any:

The Corps of Engineers has exercised jurisdiction over the Clark Fork under the River and Harbor Act of 3 March 1899 since 1932 when the waterway was designated a navigable waterway of the United States.

Head of navigation was established at the Northern Pacific Railway bridge about 4 miles above the mouth.

The United States Coast Guard has made no formal determination with respect to navigability of the Clark Fork and the Seattle District has no knowledge of ether Federal agencies exercising jurisdiction over the river.

By letter dated 13 March 1974 Idaho Department of Public Lands advised that "the State of Idaho considers the Clark Fork of the Columbia navigable downstream from the state line to its mouth including the meandered delta channels which naturally exist. The State's jurisdiction includes that portion of the river between the natural and ordinary high water lines as such existed on July 3, 1890."

The State of Montana has taken no position on the navigability of the Clark Fork.

10. State or Federal court decisions relating to navigability of the waterbody, if any: There are no known Federal or State court decisions relating to the navigability of the Clark Fork.

11. Remarks:

In 1932 the Clark Fork was designated a navigable waterway of the United States in accordance with criteria for navigability as defined at that time. Head of navigation was established at the Northern Pacific Railway bridge situated near the town of Clark Fork, Idaho, about 4 miles above the mouth. This designation was made based on the finding that the Northern Pacific Railway bridge was considered the

practical head of navigation for tugs and light draft vessels. (Refer to paragraph 12 of the 1932 report, Appendix 2.)

Our research has shown that steamboat navigation occurred on the Clark Fork as far upstream as Thompson Falls, Montana, and that other forms of commercial navigation occurred as far upstream as the mouth of the Blackfoot River. In general, furs, logs, railroad ties, passengers, freight, and ore were moved on various sections of the Clark Fork below the Blackfoot River between the mid-1860's and 1925. On one occasion in 1866, mail was transported by boat from Deer Lodge to Missoula. Our research further showed that extensive recreational boating is presently conducted on the Clark Fork downstream of the Blackfoot River.

EXHIBIT C

MADISON RIVER NAVIGATION STUDY

Manuscript Prepared by:

Alan Newell

&

Gary Williams

Presented to:

U.S. Army Corps of Engineers

Omaha District

Contract No. DACW45-74-C-0138

October 25, 1974

PREFACE

The following report summarizes the physical, historical, and legal condition of the Madison River in southwestern Montana, as it pertains to commercial navigation. The wish to acknowledge the assistance of a number of state and federal agencies. in the preparation of this manuscript: the Montana Water Resources Board, the Montana Fish and Game Department, United States Department of the Interior (Geological Survey), Department of Agriculture (Forest Service)., the Montana State Historical Society, the University of Montana Library and Archives, and Montana State University's Library and Archives. Special thanks goes to Chester Hagedorn, Beaverhead National Forest, and William Schowe, Sheridan, Montana, whose assistance was immeasurable.

1. Name and Description of Waterbody:

Madison River. The Madison River forms in Yellowstone National Park at the juncture of the Gibbon and Firehole rivers. It flows a distance of one hundred and forty (140) miles from that point to Three Forks, Montana, where it joins with the Gallatin and Jefferson rivers to form the Missouri River. The course of the river lies generally in a westerly direction from Yellowstone Park to Cliff Lake, then north to Three Forks.

The river basin comprises five distinct natural subdivisions, draining approximately 2,500 square miles. The headwater region, composed of high plateaus and mountains, lies in Yellowstone National Park and is outside the purview of this report. The upper canyon section of the Madison lies in a gorge

walled with massive rock. [Hebgen Dam is situated in this section of river.] The middle valley section is a basin with a width of between eight (8) and ten (10) miles, bordered on the west by the Jefferson Mountains, and on the east by the Madison Range. The lower canyon section is a narrow, rock-walled gorge similar to the upper canyon. Finally, the Madison River terminates in a low, wide plain which is almost level. The river at this point falls much less radically than upstream and has the appearance of being almost sluggish.

2. Tributary to:

   Missouri River

3. Physical Characteristics:

   a. Type: River.

   b. Length: One hundred and forty (140) miles.

   c. Approximate discharge volumes (below Ennis Lake and McAllister, Montana, 1938-1972):

      Maximum: 9,550 c.f.s.

      Minimum: 210 c.f.s.

      Mean: 1,726 c.f.s. (34 year record)

      (see Appendix A)

   d. Fall per mile:

      29 feet per mile in the upper canyon

16 feet per mile in the lower canyon

e. Obstructions to navigation: Three Forks to West Yellowstone

Bridges	23
Power Lines . .	16
Dams	2 (Madison Dam and Hebgen Dam)

Old bridge pilings at Ennis Earthquake Lake land fill

Numerous shallows, rapids and boulders appear on the Madison River after the spring run-off. These physical obstructions increase and become more dramatic as one travels, upstream. They are especially marked in the narrow canyon of the Upper Madison at the entrance to Earthquake Lake.

(see Appendix B)

4. Authorized Projects:

a. Improvements for navigation: There have been no improvements specifically designed for navigation -on the Madison River. However, the Corps of Engineers has made emergency repairs for flood control on the Madison River. Two hundred, forty-seven thousand dollars ($247,000.00) was spent in-1950 for flood control on the Madison near Three Forks. The 1959

Earthquake on the upper Madison required the Corps to expend $1,715,000 for emergency flood control. These two projects could conceivably effect potential navigation on the Madison River.[1]

b. Projects authorized but not constructed: No projects for navigation are currently authorized on the Madison River. (Refer to Appendix B for a list of projects which could affect navigation on the Madison.)

c. Surveys: The only survey of the Madison River specifically mentioning navigation is the examination of 1932 by the Corps of Engineers. U.S. Congress. House. Jefferson, Madison, and Gallatin Rivers, Montana. House Doc. no 193, 72nd Congress, 1st sess., Washington; D. C.: 1932. This report concluded that the primary use of water in the Madison River should be for irrigation. It proposed no projects.

The following is a listing of early explorations and surveys tangentially associated with the Madison River.

DeLacy, Walter W. "A Trip up the South Snake River in 1863," Contributions to the Historical Society of Montana. Vol. I. Helena, Montana: 1902.

Hayden, F.V. -Preliminary Report of the United States Geological Survey of Montana. Fifth

[1] Corps of Engineers. WATER RESOURCES DEVELOPMENT IN MONTANA, (Washington: 1961), pp. 18-20.

Annual Report. Department of. Interior. Washington, D.C.: 1872.

_____. Sixth Annual Report of the United States Geological Survey of the Territories. Department of Interior. Washington, D.C.: 1873.

Jones, William A. Report Upon Reconnaissance of Northwestern Wyoming, Including Yellowstone National Park, Made In Summer of 1873. War Department. Washington, D.C.: 1874.

Raynolds, W.F. Report on the Exploration of the Yellowstone and Missouri Rivers In 1859-1860. 40th. Cong., 2nd sess., Senate Ex. Doc. 77, Vol. 2. Washington, D.C.: 1868.

U. S. Department of the Interior. Bureau of Reclamation. Missouri River Basin. Senate Doc. 191, 78th Cong., 2d sess. Washington, D.D.: 1944.

U. S. Department of, the Interior. Bureau of Reclamation. Reconnaissance Report on Madison River Basin. Sub Basin Report 8. Great Falls, Montana: 1942.

5. Past and Present Commerce:

The Madison River Valley has had a relatively short, but productive historical career. The valley served the development of Montana as a thoroughfare for trappers and explorers during the nineteenth century and as the cradle of mineral and agricultural development in the state. The primary role of the

Madison River in this scenario was one of providing water for power and irrigation. however, while the river principally offered sustenance for early miners and cattlemen in the area, it did serve briefly as a vehicle for transporting logs from the upper end of the valley to a sawmill near Ennis, Montana. The history of this navigation of the Madison River intertwines with the history of the economic development of southwestern Montana.

The first white men to venture into the region of the Madison Valley traveled with the expedition of Lewis and Clark. Meriwether Lewis and William Clark reached the Three Forks of the Missouri on July 25, 1805. At this juncture, they examined the three courses of travel available to them, finally deciding on the most westerly, the Jefferson River.

> a fine morning--we proceeded on a few miles to the three forks of the Missouri--those three forks, are nearly of a Size, the North fork appears to have the most water and must be Considered as the one best calculated for us to assend (sic). Middle fork is quit (sic) as large about 90 yds wide. The South fork is about 70 yds wide and falls in about 400 yards below the midle (sic) fork--those forks appear to be verry (sic) rapid and contain some timber in their bottoms which is verry extencive (sic).[1]

The expedition of Lewis and Clark, in its effort to find a continuous waterway to the Pacific, failed to discover the richness of the Madison Valley. However, reports

---

[1] Bernard DeVoto, THE JOURNALS OF LEWIS AND CLARK, p. 165 (Boston: 1953).

of the journey soon reached restless Americans in the East, anxious for the opportunity to make their fortunes in this virgin territory.

Early interest in the Madison River stemmed from its reputation as a choice beaver stream. No conclusive evidence of navigation on the Madison River by fur trappers-it available. However, it is certain that the valley was trapped during the early nineteenth century, and that the river served as a guide for British and American trappers traveling into the Snake River country.

The Missouri Fur Company operated by Manuel Lisa located a trading post at the Three Forks of the Missouri in 1810. While the country proved rich in furs, the hostility of the Blackfeet soon drove the traders out of the area. In the fall of 1810, Andrew Henry retreated up the Madison Valley to the headwaters of the Snake River where-he established Henry's Fort.[2] Finan MacDonald, an employee of the Hudson Bay Company, experienced similar problems with the Blackfeet while traveling through the Madison Valley to the Great Falls of the Missouri in 1823.[3] Finally, the infamous Peter Skene Ogden of the Hudson Bay Company used the Madison River as

---

[2] There is disagreement over the route of Andrew Henry after his abandonment of the Three Forks post. It is not definite whether he traveled up the Gallatin Valley or the Madison Valley. However, the strongest possibility is for the Madison route. See Paul. C. Phillips, THE FUR TRADE, vol. II (Norman: 1961), p. 264.

[3] William H. Goetzmann, EXPLORATION AND EMPIRE: THE EXPLORER AND THE SCIENTIST IN THE WINNING OF THE AMERICAN WEST (New York: 1966), p. 89.

guide in his hasty retreat from the Great Salt Lake in 1825.

Many trappers knew the dangers of this forbidding region. However, the abundance of beaver was a compelling attraction. These riches lured the experienced trader Joshua.Pilcher, who inherited the Missouri Fur Company from Manuel Lisa in 1821. In 1823, Pilcher attempted to capture the trade of the Madison Valley by sending Michael E. Immel and Robert Jones to the Three Forks. While the pair successfully trapped the Three Forks area, their deaths at the hands of the Blackfeet farther east on the Yellowstone River, drove the Missouri Fur Company from the region. The formidability of the Blackfeet, coupled with the development of the rendezvous system and the shifting of fur trade activity to the central Rocky Mountains, effectively curtailed any further exploitation of the Madison River Basin until the mid-nineteenth century.[4]

The Blackfeet Treaty of 1855 forced these fierce warriors to allow white intrusion of their lands and opened the way for permanent settlement in-the Madison Valley. The discovery of gold in Alder Gulch followed the treaty, preluded the establishment of the first town in the area and created a market for the agricultural produce soon to flourish in the valley.

Granville Stuart, an early pioneer to Montana, led an expedition in 1863 from Bannack City (in southwestern Montana), along the banks of the Yellowstone River in search of new gold deposits. The expedition consisted of two parties, which were

---

[4] Phillips, THE FUR TRADE, p. 395-402.

directed by Stuart to meet at the mouth of the Beaverhead River and to proceed together to the Yellowstone. The parties failed to meet on the appointed day, and Stuart decided to travel to the Yellowstone with only the first group. The second party, after realizing that it had missed the Stuart group, also left for the Yellowstone; but, after a skirmish with Crow Indians, decided to return to Bannack city. They crossed the Gallatin Valley, ascended the Madison River along its banks, crossed the Tobacco mountains, and entered the Ruby Valley, where they unexpectedly found gold at Alder Gulch. The fortuitous miners, unable to keep the discovery a secret following their return to Bannack City, initiated the beginnings of local government in Alder Gulch in an effort to bring order to the chaos of a new mining boom. This activity in Alder Gulch soon resulted in the establishment of Virginia City in 1863. By 1864, this mining town boasted of over 6,000 residents. Virginia City became the capital of Montana Territory in 1864 and remained so until 1875.[5]

The mineral wealth of Madison county attracted settlers to the area, and produced the first signs of prosperity. However, it was the agricultural development of the valley which supported the numerous mining camps and lent stability to the patterns of settlement in this region. Miners often found the physical exertion of mining not compensitory with the rewards. Thus, many, after a brief sojourn in the gold fields, turned their capitalistic proclivities towards more stable endeavors, such as stock-raising

---

[5] Merril G. Burlingame, "The Mining Frontier in Montana", MONTANA'S PAST, edited by Michael Malone and Richard Roeder (Missoula: 1973), pp. 92-92.

and farming. Stock-raising in the Madison Valley developed to such an extent in the 1860's and 1870's, that it soon rivalled mining in terms of importance.[6]

The Madison River and its tributaries figured prominently in the development of the economy of the valley; the principal use of most basin Water being directed towards irrigation. However, the Madison River proper was not the main source of this water.

> Irrigation is the largest water use in the Madison River Basin. However, the main flow of the Madison is not the principal source of water supply. The tributary streams are furnishing irrigation water for 26,330 of the 43,010 acres of irrigated land.[7]

The Madison River's prime function historically was in the area of power development. Madison Dam. no. 1 and 2 at Ennis, Montana, constructed, in 1900 and 1906 respectively, and -Hebgen Dam below West Yellowstone, Montana, constructed in 1915, regulated the water flow of the Missouri River power generating system. (The Montana Power Company continues to operate these facilities for this purpose.)[8] The construction of these dams-presented substantial

---

[6] Burlingame, "The Mining Frontier in Montana", pp. 113-115, and HISTORY OF MADISON COUNTY, 2 vols., Typescript, Montana Historical Society, Helena.

[7] Montana Department of Natural Resources and Conservation, THE MADISON: RIVER BASIN: A RESOURCE REVIEW (Helena: 1970), pp. 39 and 40.

[8] Montana Department of Natural Resources and Conservation, THE MADISON RIVER BASIN, p. 5.

burden on the river's potential use for navigation, while offering an opportunity for that particular activity. Barges navigated the reservoir in 1914 hauling supplies from West Yellowstone to the Hebgen Dam site.[9] Moreover, the Madison fulfilled additional requirements for residents of the Valley. The benefits incurred from this use lay in the areas of recreation and logging.

William Wilcox, an individual experienced in the logging industry in New York, began planning a logging operation on the Upper Madison River in 1912. Wilcox and Madison National Forest rangers surveyed the West Fork of the Madison during the summer and the contract for timber was let that fall.[10] Wilcox's plan involved cutting the timber near Lyon ranger station and floating the logs down the river to a sawmill under construction at Varney, Montana (about ten miles south of Ennis). The enterprising easterner hoped to tap the almost virgin forests of the Upper Madison, supplying mining timbers to the Butte mines and saw lumber to the residents of the Madison Valley.[11] Wilcox proceeded to incorporate the Madison River Lumber Company in October, 1912, listing himself as one of the three principal directors.[12]

---

[9] Interview with William Schowe, retired Ranger Beaverhead National Forest. Held in Sheridan, Montana, August 22, 1974.

[10] (Virginia City) MADISONIAN, August 2, 1912; October 4, 1912.

[11] (Virginia City) MADISONIAN, March 21, 1913; September 19, 1913.

[12] (Virginia City) MADISONIAN, October 4, 1912.

Timber cutting began on the Upper Madison during the winter of 1912 and 1913 and plans formed in the spring to drive the logs down to the Varney mill. Wilcox-imported a number of experienced Canadian and eastern lumberjacks to help in this massive undertaking, among them his son Gilbert who helped conduct the drive.[13] Yet, the construction of the 900 foot log boom across the Madison and the large mill pond and sawmill required more laborers than could be imported. Thus, lumberjacks from the surrounding area, largely Butte, were hired during the summer of 1913.[14]

The log drive commenced belatedly in July of 1913, after the river had fallen substantially. Perhaps due to this situation and the size of the drive (probably between seven hundred thousand and one million board feet) the drive took two months to reach the Varney mill, fifty-five miles downstream.[15] Wilcox considered the drive a complete success, having sent most of the logs to the millpond at Varney. Obviously some problems with shallows evidenced during the course of the drive. Indeed, for years after this summer of 1913, numerous logs were found along side the banks of the Madison River.[16] However, the size of the drive, coupled with the restricted water flow

---

[13] (Virginia City) MADISONIAN, May 9, 1913; September 19, 1913.

[14] (Virginia. City) MADISONIAN, July 25, 1913.

[15] The Virginia City Madisonian issued repeated accounts of the progress of the log drive during the summer of 1913. See issues for July 4, 1913, August 8, 1913 and September 19, 1913.

[16] Interview with William Schowe.

produced by the construction of Hebgen Dam helped explain any difficulty in driving the logs. (Refer to Appendix A.) This situation involving the dam prevented further log driving on the Madison after 1913.

> As for the log drive: It was, or I would say, successful in that they got all the logs down to the mill pond, but they did not try a second drive, as most of the timber left was above the Hebgin (sic) Dam, and the power company practically refused to put the logs over the Dam. There would not have been much of a problem of driving the logs if the Power Company had not shut the water off at the Dam too soon, but I suppose that was one way of getting the lumber company out of their hair.[17]

The logging operations of the Madison River Lumber Company did provide the residents of the Madison valley with a considerable amount of sawed timber. Wilcox continued to advertise the sale of lumber from his mill a Varney throughout the fall and winter of 1913 and 1914. He claimed to be able to produce approximately 25,000 board feet per day and as late as June of 1914, the company was still removing logs from the river.[18] However, with the removal of most of the timber from Lyon, and the inaccessibility of the remaining timber above Hebgen

---

[17] Letter, Floyd W. Wilcox to Alan Newell, September 8, 1974.

[18] (Virginia City) MADISONIAN, November 14, 1913; June 26, 1914.

Dam, the lumber company was forced into indebtness. It ceased operations around 1916.[19]

[IMAGE OMITTED]

Above; Log shingling process on Madison River. Below: Logs after shingling. (U.S.D.A., Forest Service photos courtesy of Montana State Historical Society)

[IMAGE OMITTED]

[IMAGE OMITTED]

These two photos show barges plying Ennis Lake around the turn of the century. The lake was created by the construction of Madison Dam, and these vessels carried materials from supply points to the site the dam. Madison dam was completed in 1900.

(photos courtesy of the Montana Historical Soceity.)

[IMAGE OMITTED]

[IMAGE OMITTED]

Part of the 900 foot log boom across the Madison River constructed during the summer of 1913 by the Madison River Lumber Company. (U.S.D.A., Forest Service photos courtsy of Montana State Historical Society)

---

[19] (Virginia City) MADISONIAN, June 2, 1916. Letter, Floyd W. Wilcox to Alan Newell.

[IMAGE OMITTED]

[IMAGE OMITTED]

Logs as the current brought them in, Madison River log drive, summer of 1913. (U.S.D.A., Forest Service photo, courtesy of Montana State Historical Society).

The Madison River historically and presently also is noted for its recreational qualities. The Montana Department of Fish and Game classifies the river a "blue ribbon" trout stream and it is reknowned throughout the United States for its abundance of fish.[20] This situation places increasing demand on the resources of the Madison River. It also provides the opportunity for the development of a major industry in the Madison Valley.[21]

Twenty-two guides use the river continuously providing float trips and fishing trips for residents and

---

[20] U.S. Department of Interior, Fish and Wildlife Service, "Progress Report Stream Fishery Investigations for Summer, 1950, Madison River, Montana." MISSOURI RIVER BASIN STUDIES (Billings: 1951) and Montana Department of Natural Resources and Conservation. THE MADISON RIVER BASIN pp. 46-47.

[21] Historically, the Madison River Valley was used chiefly by residents. However, in recent years, increasing numbers of out-of-state residents have looked to Madison valley as either a summer retreat or an investment for retirement. This has resulted in at least one major complex of subdivisions; Shining Mountains Development Project. This condition could result in a serious strain on the resources of the Madison River. See Montana Department of Natural Resources and Conservation, THE MADISON RIVER BASIN, pp, 48-49.

tourists to Montana. (Refer to Appendix C.) Historically this type of river use has been narrowly viewed as commerce. However, it is clear that the livelihood of a number of Montananas relies on the recreational use of the Madison River. There are state legal decisions which evidence the increasing judicial awareness of the importance of this industry. (Refer to section 8 on legal opinions.)

The historic and present use of the Madison River demonstrates the river's importance to residents of the valley. The river has been used most often as either a source of irrigation or power. The primacy of these uses during the twentieth century has restricted development for navigation. However, the Madison's relatively short and productive career as a waterway for timber driving supports the belief that the substantial potential as a navigable river. The Madison River retains its character of navigability by supporting a lively recreation industry.

6. Potential Use for Commerce:

The Madison River, in its natural condition, supports a flourishing recreation industry. The Montana Department of Natural Resources predicts that this industry will "show a strong increase' in the next few years.[1] No improvements to the river would be necessary for the continued growth of this industry.

It would be possible, if enough water was available from Hebgen Dam, for a resurgence of log driving on

---

[1] THE MADISON RIVER BASIN: RESOURCE REVIEW, Montana Department of Natural Resources and Conservation (Helena: 1970), p. 21.

the Madison River. However, it is unlikely that this will occur. Development of the industry would undoubtedly result in conflict with the use of the Madison as a control on the Missouri River generating stations. Additionally, the driving of logs would require a substantial number of laborers and would demand that the logs be "handled" more often than the current method of transport. These factors make the cost of river-driving timber prohibitive.[2]

7. Nature of Jurisdiction Exercised by Federal Agencies:

The historical view of the Madison River:purports that it is a non-navigable river. Thus, the river has not been regulated for interstate commerce by any federal agency. However, the Federal Power Commission does exercise jurisdiction over the Madison River by authority of the 1935 Federal Water Power Act.

The Federal Power Commission in 1948 decided that, pursuant to the judicial precedent of exercising authority over a non-navigable stream affecting a navigable stream (United States v. Rio Grande Dam and Irrigation Co., 174 U,S. 690) the Madison River lay within the purview of Section 4(e) of the 1935 Act. The FPC concluded that the Madison was an integral part of the Montana Power Company's Missouri generating system, and that its flow affected the ability to navigate the Missouri below Fort Benton.

---

[2] Interview with Chester Hagedorn, ranger, Beaverhead National Forest and House Doc. 193, JEFFERSON, MADISON AND GALLATIN RIVERS, MONTANA, (Washington: 1932).

> Moreover, if the total storage of Hebgen were to be released with maximum rapidity, and upon arrival of the wave caused thereby, successive similar releases were made at each downstream reservoir, it is obvious that a tremendous increase in flow at Benton would result. Conversely, it would be possible to fill the empty reservoirs in such a manner as to expose the bed of the Missouri at and below Benton for a considerable time. Such a potential ability to affect navigable capacity is sufficient to bring the reservoirs within the purview of Section 4(e) and 4(g).[1]

The Commission thereby required the Montana Power Company to license its facility on the Madison River.

The Corps of Engineers has directed flood control operations on the Madison River. However, it is presently considered a non-navigable river.

8. State and Federal Decisions:

The United States Court of Appeals, District of Columbia Circuit, inferred the navigable status of the Madison River in a 1950 case; Montana Power Company vs. Federal Power Commission (185 F2d 491). The court ruled that Hebgen Dam was subject to FPC regulation on the grounds that it occupied public land, and not because it was situated on a navigable river. The appeals court considered the Madison a

---

[1] Opinions and decisions of the Federal Power Commission, vol. 7, January 1, 1948 - December 31, 1948 (Washington: 1950).

non-navigable river.[1] The historical evidence presented in this report obviously was not available to court. Despite this negative ruling, there have been a number of state court decisions relating to navigability which could affect the status of the Madison River. It is not within the purview of this report to develop a legal history of navigability; however, a few comments regarding a recent Montana decision should be offered.

The classification of navigability historically relied on the commercial use of a particular waterway. Examples of such commerce often have been viewed rather narrowly (i.e. boats,barges, canoes, etc.). Despite this judicial trend, the twentieth century has witnessed a change in the interpretation of commerce. The change reflected an awareness of the importance of recreational use of waterways.[2] (See Smart vs. Aroostock Lumber Col. 103 Me. 37, 68 Atl. 547, 1907). A recent decision by a Montana district court evidenced this expanded interpretation.

The decision in the case of The Montana Wilderness Association vs. The Board of health and Environmental Sciences of the State of Montana (Montana District Court, 1st Judicial District, July 2, 1974, no. 37154) concluded that the West Gallatin River in Montana was a navigable river, having supported log drives from 1904-1907. The Gallatin thereby met the traditional test of navigability. However, the Montana court also considered the fact that the Gallatin River was used extensively for recreational purposes. Citing the decisions in People

---

[1] Federal Reporter, 2d. Series, 1950, P. 496.

[2] Smart vs. Aroostock Climber Co 103 Me. 37, 68 At. 527, 1907.

vs. Mack (19 Cal. App. 3rd. 1040), Southern Idaho Fish and Game Association vs. Picabo Livestock Co. (5th Jud. Dist., Idaho, June 15, 1972, 2E.L.R. 20472), and State vs. Bunkowski (503 p. 2d, 1231), the court inferred that recreational use of a river as a valid test of navigability.

> From the proof here-offered, there is no question in my mind but that this stream has been navigable for years and has been used for boating in connection with just the pleasure of seeing the area, and for fishing, trapping, gaming, and fowling, those various attributes for which the river is 'natural'.[3]

Thus, a river which supports a lively recreation industry might also meet legal navigability standards.

This decision could have a direct affect on the status of the Madison River. The Madison supports the same type of recreational operations as does the West Gallatin. Furthermore, evidence of early log driving on the Madison places the river in a similar historical position.

9. Recommendation:

Historical evidence supports the contention that the Madison River is navigable from the mouth of the West Fork to Varney (approximately 55 miles). The location of a sawmill at Varney was understandable, as the existence of Madison Dams 1 and 2 obstructed access to the river below Ennis. It seems reasonable to

---

[3] Southern Idaho Fish and Game vs. Picabo Livestock Co. 5th Jud. Distr., Idaho, 2 E.L.R. no. 20472.

assume that, without this obstruction, the Madison could have been navigated to its juncture with the Missouri at Three Forks, Montana.

Hebgen Lake also must be considered a. navigable waterbody. The lake was used in 1914 by barges transporting supplies from West Yellowstone to the damsite. Furthermore, Hebgen Lake supports a rather large recreational industry, providing fishing-for valley residents and out-of-state tourists.

The section of river below Earthquake Lake to the entrance of the West Fork (approximately 10 miles) has a nebulous status in terms of navigability. There is no historical evidence of navigation on this stretch of the river. Additionally, the restricted flow of water, especially at the approach to the canyon, indicates that the river suffers from the existence of the Earthquake Lake land fill and Hebgen Dam. However, the navigable character of the river above and below this portion justifies a recommendation of navigability for the entire Madison.

Historical material documents navigation on only one section of the Madison River. Yet, the potential use of the river for navigation is tied intricately to the obstructions of the Madison Dam, Earthquake fill and Hebgen Dam. This situation warrants a recommendation of navigability for the entire Madison River from its boundary with Yellowstone Park to its confluence with the Missouri River.

[IMAGE OMITTED]

APPENDIX A

MADISON RIVER BASIN

* * *

[CHART and TEXT OMITTED, 1 page]

APPENDIX A

MADISON RIVER BASIN

* * *

[CHARTS and TEXT OMITTED, 2 pages]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

* * *

[CHART OMITTED]

APPENDIX B

MADISON RIVER--BRIDGES

* * *

[CHART OMITTED]

MADISON RIVER--POTENTIAL PROJECTS

* * *

[CHART OMITTED]

APPENDIX C

OUTFITTERS AND GUIDES ON THE MADISON RIVER

Daniel Bailey, 209 W. Park St., Livingston, Montana

Pat Barnes, Box 296, West Yellowstone, Montana

Barry Felse, 108 E. Story, Bozeman, Montana

Johnny G. France, Ennis, Montana

Charles Frei, Box 545, Cameron, Montana

Willard Godfrey, Island Park Sporting Goods, Ashton, Idaho

Raymond J. Hurley, Box 271, Livingston, Montana

Francis C. Johnson, 1957 Harrison Ave., Butte, Montana

Selden M. Jones, Colonial Motel, Box 111, W. Yellowstone, Montana

J. L. LaValley, 121 E. Callender, Livingston, Montana

Bud Lilly, Box 387, W. Yellowstone, Montana

David Lueck, Ennis, Montana

Chester Marion, 213 1/2 W. Park, Livingston, Montana

Edward Maynard, Ennis, Montana

Jack McGowan, Ennis, Montana

Richard P. McGuire, Ennis, Montana

Jordan McPhetres, Box 631, Ennis, Montana

Tom W. Morgan, Box 614, Ennis, Montana

Richard Parks, Box 196, Gardiner, Montana

Tony Schoonen, Box 2, Ramsay, Montana

John Scully, Box 331, Ennis, Montana

John A. Ward, Box 405, Sheridan, Montana

APPENDIX D

Paradise, California
September 8, 1974

Mr. Allen Newell
Newell and Williams
P. O. Box 2921
Missoula, Montana 59801

Dear Sir:

I guess I have put off writing to you almost too long.

My Father was the promoter of the Madison River Lumber Company. He furnished the sawmill machinery and a man by the name of Thomas Hodkins furnished the money. He was a banker from Chicago and had an interest in a tract of land near Varney Bridge, about ten miles South of the town of Ennis. I believe they had about 18,000 acres, and he wanted to get the lumber to build the place up.

I don't know how Father got in contact with him - anyway, they selected a place just below Varney Bridge for the millsite. The river divided just below the bridge, and they used the West side channel for the log pond. I had the contract to cut the timber and put it on the bank of the river at Lyon Station. I don't know how much timber or logs was cut and placed on the river bank as I sold out to a man from Idaho, and

he went broke - disappeared, and the Company took over and finished the job there at Lyons.

As for the log drive: It was, or I would say, successful in that they got all the logs down to the mill pound, but they did not try a second drive, as most of the timber left was above the Hebgin Dam, and the power company practically refused to put the logs over the Dam. There would not have been much of a problem of driving the logs if the Power Company had not shut the water off at the Dam too soon, but I suppose that was one way of getting the lumber company out of their hair. Anyway, there was never another drive, as the lumber company went broke.

I don't think there was any more timber around the Lyon Ranger Station. There was quite a lot of logs cut on West Branch of the Madison River, also. Also - some timber was cut up on a small creek, just below the Hebgin Dam. I don't recall the name of the creek.

I don't know how much timber was cut altogether, but there must have been several hundred thousand - probably less than half a million feet. I don't remember when the company finished cutting the logs into lumber, but when they finished that batch, they folded up, as it did not provide enough money to carry on. As a matter of act, they were in debt to the Elling Bank in Virginia City. I don't know what became of the Mill.

I still have quite a few pictures of the Mill, log pond and logs, and also the log boom that turned the logs into the pond. I was the cook for the crew of log drivers. I had a helper and we moved every day - to be just a little ahead of the crew, so I had a good insight

to what it took to get the logs through. The crew spent most of the time folding in the rear. Logs jambing against rocks was not too much of a problem.

Respectfully,

Floyd W. Wilcox
5486 Scottwood Road
Paradise, Calif. 93969

P.S.: Large rocks in the river was no more of a problem than you would encounter on any stream. You always have log jams on most log drives.

APPENDIX E

SELECTED BIBLIOGRAPHY

Bartlett, Richard A. GREAT SURVEYS OF THE AMERICAN WEST. Norman: 1962

Burlingame, Merrill G. GALLATIN CENTURY AT PROGRESS. Bozeman: 1964.

_____. THE MONTANA FRONTIER. Helena: 1942.

_____, and Toole, K.R. HISTORY OF MONTANA, 3 vols. New York: 1957.

Chittenden, Hiram M. THE AMERICAN FUR TRADE OF THE FAR WEST, 2 vols. New York: 1936.

_____. THE YELLOWSTONE NATIONAL PARK, edited by Richard A. Bartlett. Norman: 1971.

Cline, Gloria G. PETER SKENE OGDEN AND THE HUDSON'S BAY COMPANY. Norman: 1974.

CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA, 10 VOLS.; INDEXED. Helena: 1876-1940.

Cook, Charles W. THE VALLEY OF THE UPPER YELLOWSTONE. An exploration of the headwaters of the Yellowstone River in the year 1869, as recorded by Charles W. Cook, Daniel E.

Folson, and William Peterson. Edited by Aubrey Haines. Normal: 1965.

Coues, Elliott. HISTORY OF THE EXPEDITION UNDER THE COMMAND OF LEWIS AND CLARK, 4 vols. New York: 1893.

DeLacy, Walter W. "A Trip Up the South Snake River in 1863," CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA, col. I. Helena: 1902.

DeVoto, Bernard, ed. THE JOURNALS OF LEWIS AND CLARK. Boston: 1953.

Gallaher, William H. "Ho! For the Gold Mines of Montana, Up the Missouri in 1865, the Journal of William H. Gallaher," edited by James E. Moss. MISSOURI HISTORICAL REVIEW, vol. 57. Missouri: 1963.

Gass, Patrick. JOURNAL OF THE LEWIS AND CLARK EXPEDITION, edited by Earle R. Forrest. Minneapolis: 1958.

Goetzmann, William. EXPLORATION AND EMPIRE: THE EXPLORER AND THE SCIENTIST IN THE WINNING THE AMERICAN WEST. New York: 1966.

Grant, Bruce. AMERICAN FORTS: YESTERDAY AND TODAY. New York: 1965.

Hamilton, James M. HISTORY OF MONTANA FROM WILDERNESS TO STATEHOOD, edited by Merrill G. Burlingame. Portland, Oregon: 1970:

Hasse, Adelaide R. REPORTS OF EXPLORATIONS PRINTED IN THE DOCUMENTS OF THE UNITED STATES GOVERNMENT. Washington: 1899.

Jones, William A. REPORT UPON RECONNAISSANCE OF NORTHWESTERN WYOMING; INCLUDING YELLOWSTONE NATIONAL PARK, MADE IN SUMMER OF 1873. Washington: 1874.

Leeson, Michael. HISTORY OF MONTANA 1739-1885. Chicago: 1885.

Ludlow, William. REPORT OF RECONNAISSANCE FROM CARROLL, MONTANA TERRITORY, ON THE UPPER MISSOURI TO THE YELLOWSTONE NATIONAL PARK, AND RETURN, MADE IN THE SUMMER OF 1875. Washington: 1876.

Madison County Federated Woman's Club. HISTORY OF MADISON COUNTY, 20 vols. Typescript in the collections of the Montana Historical Society, Helena: n.d.

Malone, Michael and Roeder, Richard. MONTANA'S PAST: SELECTED ESSAYS. Missoula, Montana: 1973.

Montana Department of Natural Resources and Conservation. THE MADISON RIVER BASIN: A RESOURCE REVIEW. Helena, Montana: 1970.

Ogden, Peter Skene. JOURNAL OF SNAKE EXPEDITION/ 1826-1829, edited by T. C. Elliott. Oregon Historical Society Quarterly, vol. XI, 1910.

Phillips, Paul C. THE FUR TRADE. 2 vols. Norman, Oklahoma: 1961.

Raynolds, W.F. REPORT ON THE EXPLORATION OF THE YELLOWSTONE AND MISSOURI RIVERS IN 1859-1860. 40th cong., 2nd. sess. Senate Ex. Doc. 77 vol. 2.

Stuart, Granville. FORTY YEARS ON THE FRONTIER, edited by Paul C. Phillips. Glendale, California: 1967.

Taber, Thomas T. SHORT LINES OF THE TREASURE STATE: THE HISTORY OF THE INDEPENDENTLY OPERATED RAILROADS OF MONTANA. Typescript in the collections of the Montana State Historical Society. Helena, Montana: 1960.

U.S. Bureau of Reclamation. MISSOURI RIVER BASIN. Senate Doc. 191, 78th Congress, 2nd. session. Washington: 1944.

U.S. Congress. House. JEFFERSON, MADISON, AND GALLATIN RIVERS; MONTANA (THREE FORKS BASIN). House Doc. 193, 72nd Congress, 1st Session. Washington 1932.

U.S. Department of Defense. U:S. Army Corps Of Engineers. WATER RESOURCES DEVELOPMENT BY CORPS OF ENGINEERS IN MONTANA. Washington:. 1961.

U.S. Department of the Interior. Fish and Wildlife Service. MISSOURI RIVER BASIN STUDIES. Progress Report: Stream Fishery Investigation for Summer 1950, Madison River, Montana. Billings, Montana: 1951.

U.S. Department of the Interior. Geological Survey. COMPILATION OF RECORDS OF SURFACE WATERS. OF THE UNITED STATES THROUGH SEPTEMBER 1950. Part 6-A Missouri River Basin Above Souix City, Iowa. Water Supply Paper 1309. Washington: 1959.

U.S. Department of the Interior. Geological Survey. CONTRIBUTIONS TO THE HYDROLOGY OF THE UNITED STATES: 1925. "Water Power and Irrigation, in the Madison River Basin, Montana," by John F. Deed and Walter N. White. Water-Supply Paper 560. Washington: 1925.

U.S. Department of the Interior. Geological Survey. PRELIMINARY REPORT OF THE UNITED STATES GEOLOGICAL SURVEY OF MONTANA AND PORTIONS OF ADJACENT TERRITORIES, 1871, BY F. V. HAYDEN. Washington: 1872.

U. S. Department of the Interior. Geological Survey. SIXTH ANNUAL REPORT OF THE UNITED STATES GEOLOGICAL SURVEY OF THE TERRITORIES, EMBRACING PORTIONS OF MONTANA, IDAHO, WYOMING, AND UTAH; BEING A REPORT OF PROGRESS OF THE EXPLORATIONS FOR THE YEAR 1872, BY F.V. HAYDEN. Washington: 1873.

Work, John. JOURNAL OF JOHN WORK, 1825, edited by T.C. Elliott. The Washington Historical Quarterly, vol. V, no. 2, April, 1914.

Newspapers

MADISONIANI (Virginia City) 1873-1877, 1911-1914.

TRIBUNE (Great Falls) August 17, 1913.

JA 284

November 7, 1974

TO: Ralph Miller

FROM: Alan Newell

RE: Addendum to Madison River Navigation Study.

I was in Helena this week researching navigation on the tributaries to the upper Missouri. I found two items of importance to the Madison River study while sifting through some Montana Power material.

The first letter reveals two things. First of all, it further documents the conflict between Wilcox's Madison River Lumber Company and the Hebgen Dam company. It would be difficult to determine the accuracy of the complaint or of the material presented by the power company. I suspect that Montana Power would be reticent in allowing anyone to examine their old records. However, the fact that manager Hebgen felt compelled to defend the Hebgen installation, evidences the problem between the two competing uses of the Madison River.

The letter also documents the attempt by Wilcox to float logs during the spring of 1974. I had suspected that he had removed logs that had been left from the previous year's cutting, but had found no evidence of this. Unfortunately, the letter does not state whether or not the logs reached Varney. However, this is probably one of the few pieces of evidence of this 1914 attempt.

The second memo from E.W.Kramer, district engineer with the Forest Service in Missoula, discusses the problems with log driving over Hebgen Dam. While no conclusions are reached by the parties concerned, I think that Max Hebgen reticence about such activity is obvious.

I am sending four copies of the six xeroxed pages. I think they should be included in the Madison River report's appendices. The citation for this material is as follows; Federal Power Commission vs. Montana Power; papers,records,exhibits,etc. ,Docket no.IT-5840. folder no. 12. Montana State Historical Society, Archives. Helena, Montana.

Sincerely,

/s/Alan Newell
Alan Newell

DE

November 7, 1912.

Memorandum to L:

On October 24 I left Missoula with Mr. Merrill, the Chief Engineer. We visited the Hebgen dam under construction by the Montana Reservoir & Irrigation Company, the Madison River Power plant on the Madison River near Ennis, Montana, the Canyon Ferry, the Hauser Lake and the Rainbow Ralls plants on the Missouri River.

We also had a conference in Butte and in Helena with Mr. Max Hebgen, General Manager of the various power companies operating the plants on the Madison and Missouri Rivers, and with Mr. Con Kelly, leading Counsel of these companies. While at the Hebgen reservoir we considered the feasibility of taking logs over or through the dam. On account of the dam being an earth dam with a concrete core and on account of the varying levels of the water, Mr. Merrill and I both concurred in the opinion that it would be out of the question to provide a gate through or around the dam which would allow for the passage of logs. The variation in the water level in the reservoir will be something in the neighborhood of 80 feet. We came to the conclusion that the only practical method of handling logs at the dam would be by means of some kind of endless chain heist on the up-stream side which would catch the logs by means of dogs and raise them up an incline to the top of the dam and turn them loose on the down-stream side into a long chute, carrying them by this method into a pool below the dam. When in Butte we took this matter up with

Messrs. Hebgen and Kelly. Mr. Merrill informed them that he thought the Company should install an apparatus necessary to take the logs over the dam and operate it for the reason that they were obstructing the natural means of getting logs out of the watershed. Mr. Merrill stated that should they take out a water-power permit, one of the conditions of the permit would be that they should install and maintain the necessary apparatus. Mr. Hebgen seemed willing to do this but stated that it would be necessary for him to get a report from his engineers on the cost. We also brought up the matter of getting logs through in the coming spring of 1913. The dam is complete to an elevation of about 30 feet above the water, with a flume through the dam at an elevation of about 15 feet above the water to provide for the flood waters during the coming spring. There is a tunnel around the dam on the south side of the stream which is carrying the entire flow of the stream at present. It is designed to take care of all the water lot out of the reservoir when the reservoir is completed. It is possible that the flood in the coming spring may not be great enough to allow any water to run through the over-flow which is provided. In other words, the tunnel make take care of it all. No means has been provided to get logs by the dam. Mr. Hebgen stated that while it might be possible to drive logs by the dam during the coming spring, he would not be responsible for any damage which might be done. He stated that he believed the parties doing the driving should take this responsibility.

The question of charge for the use of the reservoir for water-power purposes was considered with these gentlemen. They finally agreed to file an application for the use of the reservoir for water-power

purposes with the understanding that the charge should be based on the amount that the reservoir would increase the available power at the Madison River power plant on the Madison River, and at the Canyon Ferry, the Hauser Lake, the Black Eagle Falls, and the Rainbow Falls power plants on the Missouri River. Mr. Merrill stated that their application should be filed in the regular form so far as the reservoir was concerned but that the data in regard to the other plants need only be sufficient for use to compute the amount of horse-power that could be developed by the natural flow and by the additional flow from storage. On account of the great amount of data that would be necessary it was agreed that I should go to Butte at the time the Company was ready to make the application and go over the application there before it was filed in Missoula, in order to make sure that all the data required was prepared. The arrangement is now to have Mr. Hebgen notify me at the time they are ready.

/s/EWKramer
District Engineer.

THE MONTANA POWER CO.
M. HEBGEN, GENERAL MANAGER
BUTTE, MONTANA.

ADDRESS ALL COMMUNICATIONS
TO THE COMPANY

June 8, 1914.

Mr. F. A. Silcox,
District Forester,
Missoula,
Montana.

Dear Sir :–

Under date of May 19th, I wrote you calling attention to the fact that Mr. Wilcox, who is doing some logging on the Upper Madison, would be very liable to get his logs in late, and calling your attention to this fact, as no doubt he would charge the Montana Reservoir & Irrigation Company with his difficulties should he not be able to obtain sufficient water to drive his logs.

Yesterday, Mr. Wilcox called up claiming that the Montana Reservoir & Irrigation Company had practically shut off all the water in the river, and that his logs were lying dry at a point in the Madison River just below Hippeys'.

As no doubt he will make a complaint to the Forest Department, we wish to give you the facts. What we anticipated has happened:

Previous to May 20th, Mr. Wilcox was putting in the river what logs he had on the West Madison;

subsequent to May 20th, those on the river bank below Hutchings' were put into the river. About May 29th and 30th, those few logs which were left over in the Upper Madison Canyon from the previous year were put into the river.

The river flow this year has been very much lower than last. The maximum at Hubgen Dam was about 4,200 second feet and occurred May 23rd and 24th. This is 30 less than last year's maximum, and about seven days earlier. The maximum last year was approximately 5,500 second feet, and occurred on the 3rd, 4th and 5th of June. Since that time the river has been falling very rapidly and reached a total flow at the Upper Madison yesterday of 2,700 second feet. The flow at Hippeys' to-day is approximately 3,000 second feet.

The river, of course, is fed below the Upper Madison Dam by Cabin Creek, Beaver Creek and the West Fork, as well as several other smaller streams. Our estimate at Hippeys' is estimated as the total flow at the Madison which is above 5,000 second feet, and we know from previous comparisons that at least 60% of the water at the Lower Madison comes from above the West Fork.

The operations of the Montana Reservoir & Irrigation Company in the matter of storing has been very consistent, and we have been especially careful to not fluctuate the flow of the river. The average storage per day has been at the rate of 1,000 to 1,400 second feet of the total flow. This has represented, until the last few days, very much less than half of the river flow at the dam site.

Mr. Wilcox's troubles are entirely due to the fact that he again got his logs into the river on a falling stream.

We want to give you this information as no doubt Mr. Wilcox will make representations to you regarding this matter, and we want to assure you that we are always ready to co-operate, and have really sacrificed storage which we might have obtained to help out Mr. Wilcox.

Yours very truly,

/s/M. Hebgen
General Manager

MH-LS.

L (S)

Madison - Uses
Montana Reservoir & Irrigation Co.,
9-18-06

June 9, 1914.

Mr. Max Hebgen,
Gen. Mgr., Montana Power Co.,
Butte, Montana.

Dear Sir:

Your letter of June 8 is received.

I am very glad indeed to receive the information which you have furnished. Nothing has yet been heard from Mr. Wilcox on this subject.

Very truly yours,

D. T. Muson
Assistant District Forester.

Copy sent Supr. and S.

EXHIBIT D

MISSOURI RIVER NAVIGATION STUDY

(LOMA, MONTANA, to THREE FORKS, MONTANA)

Manuscript Prepared-by:

Alan Newell

&

Gary Williams

Presented to:

U.S. Army Corps of Engineers
Omaha District

Contract No. DACW45-74-C-0138

August 12, 1974

PREFACE

The following report summarizes the physical, historical, and legal condition of the Missouri River from Loma, Montana, to Three Forks, Montana, as it pertains to commercial navigation. The authors wish to acknowledge the assistance of a number of state and federal agencies in the preparation of this manuscript: the Montana Water Resources Board, the Montana Fish and Game Department, United States Department of the Interior (Geological Survey), the Department of Agriculture (Forest Service), the Montana State Historical Society, University of Montana's Library and Archives, Montana State University's Library and Archives, Great Falls TRIBUNE, Dillon EXAMINER, and the Fort Benton RIVER PRESS. Their assistance has been greatly appreciated.

1. Name of Waterbody: Missouri River (above Loma, Montana).

2. Tributary to Mississippi River: The Missouri River forms at the confluence of the Gallatin, Jefferson, and Madison Rivers at Three Forks in southwestern Montana. The river flows in a northeastward direction to approximately thirty (30) miles beyond Fort Benton, Montana, and then in an easterly and southeasterly direction to its juncture with the Mississippi River, approximately seventeen.(17) miles above St. Louis, Missouri. The course of the Missouri River from Three Forks lies through mountain valleys and deep canyons. Approximately twenty (20) miles north of Helena, Montana, it enters a gorge called the "Gates of the Mountains," emerging into rolling prairie about thirty-five (35) miles south of Great Falls, Montana. Thirty-

five (35) miles above Fort Benton, the Missouri pours over the great falls-and follows a course through a deep canyon past Fort Benton to the mouth of the Marias River. Below the Marias, the river flows through less abrupt slopes and bluffs, eventually widening at its confluence with the Yellowstone River.

3. Physical Characteristics:

a. Type: River.

b. Length: Three Forks to juncture with Mississippi, 2,475 miles.

c. Approximate discarge volumes:

Maximum: 900,000 c.f.s.

Minimum: 96,300 c.f.s.

Mean: 12,500 c.f.s.

d. Fall per mile:

Loma to Fort Benton (20 miles upstream): 1.75 feet per mile

Fort Benton to Belt Creek (32 miles upstream): 5 feet per mile

Belt Creek to Sun River (17 miles upstream)--Great Falls section: 520 feet per mile

Sun River to Cascade (55 miles upstream): 0.5 feet per mile

Cascade to Stubbs Ferry (74 Miles upstream): 3.8 feet per mile

Stubbs Ferry to Three Fork5 (85 miles upstream): 4.6 feet per mile

e. There are numerous obstructions to navigation on the Missouri River above Loma, Montana. These include power lines, dams, highway and railway bridges, and ferry guide wires. The following is a numerical assessment of obstructions between geographic points. Please see Appendix A for a complete description.

Ferries: Loma Ferry at Loma, Montana

Fort Benton Ferry approximately two miles above Fort Benton

Power Lines:

Loma, Montana, to Great Falls, Montana 5

Great Falls, Montana to Cascade, Montana 10

Cascade, Montana, to Townsend, Montana 21

Townsend, Montana, to Three Forks, Montana 8

Dams: Fort Benton to Three Forks 10

Bridges:

Loma, Montana, to Great Falls, Montana 2

Great Falls, Montana, to Cascade, Montana 7

Cascade, Montana, to Townsend, Montana 14

Townsend, Montana, to Three Forks, Montana 3

Additional Obstructions: Irrigation pipe line at Toston, Montana.

Abandoned guide wire for ferry at Cascade, Montana.

4. Authorized Projects:

a. Improvements to navigation: Improvements specifically designed for aiding navigation on the Upper Missouri River began in 1876; $20,000 being appropriated for that purpose. This activity continued intermittently until 1912.

The bulk of the work on the Upper Missouri consisted of, the construction of wing dams for channel regulation, the removal of snags, and bank improvements at Fort Benton. The alteration of rapids and shoals on the "rocky river" between Carroll and Fort Benton received heavy emphasis. However, some open river

work between Stubbs Ferry and Cascade, and channel regulation between Cascade and Great Falls occured in the period prior to 1912. In 1881, rocks were removed and wing dams constructed at the two worst rapids above Cascade. The River and Harbor Act of 1894, authorized navigation improvements on the Missouri between Fort Benton and Stubbs Ferry. Accordingly, between 1895 and 1898, nineteen (19) wing dams were. constructed on this stretch of the river. Despite these efforts, interest in navigation waned, and no further improvements were made above Fort Benton after 1899.[1]

Concern for improvement of the Upper Missouri lessened after 1912. A Corps of Engineers' report for 1911 recommended that while improvements should be made, the extent of navigation did not warrant large expenditures of money.

> No permanent and effective improvement with a view to through navigation can be expected to result except from continuous and systematic improvement, the cost of which would be very great, and in the opinion of the board will not be justified at least until the tributary country has become more densely populated and a large and valuable commerce created along its banks demanding through navigation, and the river has been

[1] ANNUAL REPORT OF THE CHIEF OF ENGINEERS, part II (Washington: 1915), pp. 1894-1897.

effectively improved for the same character of navigation below Sioux City.[2]

The Corps report offered as an alternative to river improvements solely, for navigation, a combination of expenditures for navigation and flood control. The Missouri River Navigation and Erosion Control Project of 1912 evidenced this .hanging emphasis. The projected authorized expenditures of between $75,000 and $150,000 annually for the removal of snags and bank protection. Expenditures were made intermittently through the 1930's, eventually totalling $3,768,000.[3]

b. Surveys of Upper Missouri River. Pertaining to Navigation:

U.S. Congress. ANNUAL REPORT OF THE CHIEF OF ENGINEERS, Ex. Doc. #1, part 2, 40th Cong., 3d sess., 1868.

Roberts, Thomas. REPORT OF A RECONNAISSANCE OF THE MISSOURI RIVER IN 1872 .(n.p.: 1875).

---

[2] U.S. Congress. House.. PRELIMINARY EXAMINATION OF THE MISSOURI RIVER FROM SIOUX CITY, IOWA, TO FORT BENTON, MONTANA. House Doc. #91, 62d Congress, 1st sess., 1911, p. 7.

[3] [illegible] Pamphlet, "The Corps of Engineers in Montana," (Omaha: 1950), p. 16.

U.S. Congress. REPORT OF THE CHIEF OF ENGINEERS, vol. II, part 2, Ex. Doc. #1., 48th Cong., 1st sess., 1883.

U.S. Congress. REPORT OF CHIEF OF ENGINEERS, Appendix AAA, part 6, 1891.

U.S. Congress. ANNUAL REPORT OF THE CHIEF OF ENGINEERS, vol. II, part I-VI, Ex. Doc. #1, 52d. Cong., 1st sess., 1891.

U.S. Congress. ANNUAL REPORT OF THE CHIEF OF ENGINEERS, vol. II, part 3, Ex. Doc. #1, part 2, 53d Cong., 3d sess., 1894.

U.S. Congress. House. EXAMINATION OF MISSOURI RIVER FROM SIOUX CITY, IOWA, TO FORT BENTON, MONTANA, vol. VIII, 62d Cong., 1st sess., H. Doc. #91, 1911.

U.S. Congress. MISSOURI RIVER. H. Doc. #238, 73d Cong., 2d sess., 1935.

U.S. Bureau of Reclamation. MISSOURI RIVER BASIN (n.p.: 1944).

U.S. Congress. MISSOURI RIVER BASIN, H. Doc. #475, 28th Cong., 2d sess., 1944.

Missouri Basin Inter-Agency Committee. COMPREHENSIVE FRAMEWORK STUDY MISSOURI RIVER BASIN. 7-vols. (Washington: 1969).

[IMAGE OMITTED]

Above, Rainbow Falls of the Missouri; a natural obstruction. Below, Rainbow Dam; a man-made obstruction.

[IMAGE OMITTED]

5. Past and Present Interstate Commerce:

The Missouri River fascinated explorers, voyageurs, and engages of many nations during the seventeenth and eighteenth centuries. This great waterway, rising in the Red Rock Lakes of Montana and flowing 2,868 miles to its juncture with the Mississippi River, promoted exploration and exploitation of an inland empire rich in furs and minerals. The discovery of the Missouri also supported, the expectation of finding a navigable passage to the western sea. French, Spanish, British, and American entrepreneurs ascended the "Big Muddy" not only to reap the harvest of natural abundance, but to reveal the long sought "passage to India."[1] The result of this activity placed an early and profound importance on the navigability of the Missouri River. As a navigable waterway from the Mississippi to the Three Forks in Montana, distance of 2,475 miles, the river supported the development and passage of various Montana frontiers.

---

[1] The belief in a water passage from the east to the west, across the United States has been a consistent theme in American history. Americans in the early 19th century believed that this waterway would allow the young republic to capture the commercial richness of the Far East. See Henry Nash Smith, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (Cambridge(Mass: 1973) for a full treatment of this idea.

The commercial importance of the Missouri River appeared a remote possibility upon its discovery in 1673 by Louis Jolliet and Father Jacques Marquette. The water's rapidity astounded the two Frenchmen, who recognized the difficulty one would have ascending it. However, following this, discovery, the French undauntedly extended a system of forts throughout the Missouri country, St. Louis being located in 1700. Their primary aim during the eighteenth century was to exploit the Missouri's resouces, to search for the elusive gold mines of Coronado, and to block Spanish efforts to extend eastward from New Mexico.[2]

The explorations of Pierre La Verendyre and his sons, Louis and Francois, during the 1730's and 40's demonstrated another objective of French policy. Pierre Verendrye expected the establishment of fur posts in the Lake of the Woods area to serve as outposts in his search for the western sea. His sons furthered this end with their exploration of the Upper Missouri in 1742. French influence in America, despite the lack of Crown support, extended to the mouth of the Platte River at the time of the cession of the Missouri country to Spain in 1763.[3]

The defensive policy of New Spain hampered a continuation of efforts to develop the commercial potentials of the Missouri country. Spain's primary mission during the eighteenth century was to protect its colonial enterprises in the south from plains

---

[2] A. P. Nasatir, BEFORE LEWIS AND CLARK: DOCUMENTS ILLUSTRATING THE HISTORY OF THE MISSOURI, 1785-1804 (2 vols.; St. Louis: 1952), p. 8.

[3] IBID., p. 32.

Indians.[4] However, British invasions into the Upper Missouri country during the 1790's, convinced the Spanish authorities that they must initiate explorations up the Missouri River.[5] The organization of the Missouri Company in 1793 was the most conspicuous attempt to meet this. British challenge. The Company also revived interest in the prevasive interest in a water route to the Pacific.[6]

Concern for this western passage and for commercial enterprises continued after the purchase of the Louisiana territory by the United States in 1803. President Thomas Jefferson's instructions to Meriwether Lewis and William Clark upon the commencement of their historic expedition in 1804, evidenced American interest in the navigability of the Missouri River.

> The object of your mission is to explore the Missouri River, and such principal streams of it, as, by its course and communication with the waters of the Pacific Ocean, whether the Oregan (sic), Colorado, or any other river, may offer the most direct and practicable water-

---

[4] For a discussion of this defensive Spanish policy see Walter Prescott Webb, THE GREAT PLAINS (New York: 1972), pp. 85-138.

[5] David Thompson, a trader for the British North West traveled to the Mandan villages on the Missouri River in 1797. BEFORE LEWIS AND CLARK, p. 95.

[6] IBID., p. 91.

> communication across the continent, for the purpose of commerce.[7]

Jefferson also expressed concern for the British monopoly of the, fur trade in the West and hoped to "break the British monopoly on the northern plains."[8]

Lewis and Clark left the Mandan villages (present day Bismarck, North Dakota) in 1805; ascended the Missouri in pirogues and bateauxs to the Great Falls; portaged around the falls and continued to the Three Forks of the Missouri. Lewis determined at this juncture that the Jefferson River was the true source of the Missouri and followed this route to "the Forks of the Jefferson."[9] The party then traveled overland to the source of the Columbia and by boat to the Pacific Ocean. On the return trip (1806), the explorers separated on the Bitteroot River; Clark preceding overland to the Jefferson and the Yellowstone; Lewis following the Blackfoot River over the mountains to the Great Falls. Lewis explored the Marias River, eventually joining a detachment Clark had sent down

---

[7] Thomas Jefferson, "Memoir of. Meriwether Lewis," HISTORY OF THE EXPEDITION UNDER THE COMMAND OF LEWIS AND CLARK, edited by Elliot Coues (vol. I; New York: 1893), p. xxvi.

[8] Paul F. Sharp, WHOOP-UP COUNTRY: THE CANADIAN-AMERICAN WEST, 1865-1885 (Norman, Okla.: 1973) , p. 30.

[9] The Jefferson River ends at Twin Bridges, Montana. The main fork of the river then becomes the Beaverhead River. However, Lewis and Clark continued to call this the Jefferson Fork. Thus, where the Beaverhead ends (Dillon, Montana), Lewis considered this the Forks of the Jefferson. See THE JOURNALS OF LEWIS AND CLARK, edited by Bernard DeVoto (Boston: 1953), pp. 178 & 183.

the Jefferson and Missouri with the cached boats from the previous year's journey. On August 12, 1806, the Lewis party reunited with Clark at the confluence of the Yellowstone and Missouri rivers.[10] The expedition failed to discover a continuous waterway leading to the Pacific Ocean. However, Lewis' comment on the navigability of the Missouri River was prophetic.

> I do not beleive, (sic) that the world can furnish an example of a river runing (sic) to the extent which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so navigable as they are.[11]

The commercial aspirations of the Lewis and Clark Expedition immediately bore fruit in the fur trading adventures of Manuel Lisa.

Lisa left St. Louis in the spring of 1807 in keelboats bound for the Upper Missouri. He had the good fortune, at the mouth of the Platte River, to meet John Colter, a member of the Lewis and Clark Expedition who had returned in 1806 to trap in the Missouri Country. Lisa persuaded Colter to join his company and to ascend the Missouri once again. The intrepid Spaniard established a fort at the mouth of the Big Horn River, and, in 1808, returned to St. Louis where he formed the St. Louis Missouri Fur Company. The Company, under the direction of Lisa and Pierre Menard, began a momentous trip up the Missouri in the spring of 1810. The trading expedition separated at Lisa's fort on the Big Horn; one group remaining to

---

[10] IBID., p. 452.

[11] IBID., p. 184.

trade in that area, and another group to trap in the Blackfeet country of the Three Forks. Thomas James, a member of this group, later recorded his trapping experiences at the Three Forks post.

> We had now reached our place of business, trapping for beaver, and prepared to set to work. Dougherty, Brown, Ware-and myself agreed to trap in company on the Missouri between the Forks and the Falls, which lie several hundred miles down the river to the north, from the Forks. We made two canoes by hollowing out the trunks of two trees and on the third or fourth day after our arrival at the Forks we were ready to start on an expedition down the river.[12]

James proceeded an indefinite number of miles down the Missouri from Three Forks, never reaching the Great Falls, despite his mistake in mileage.

The Missouri Fur Company venture of 1810 secured large profits. However, the hostility of Blackfeet Indians forced the traders at the Three Forks to abandon their post during the fall.[13] The Missouri Fur Company remained in operation until its dissolution between 1828-1830. Some trapping activity in the Three Forks area continued, but no further

---

[12] Thomas James, THREE YEARS AMONG THE INDIANS AND MEXICANS (St. Louis: 1916), p. 66.

[13] Hiram Martin Chittenden, THE AMERICAN FUR TRADE OF THE FAR WEST (New York: 1936), pp. 139-144.

instances of navigation on the Upper Missouri occured.[14]

Fur trade activity on the Upper Missouri, after the dissolution of the Missouri Fur Company, remained for many years within the purview of the American Fur Company. The Company received incorporation from the New York Legislature in 1808; from that date until 1834, it was under the directorship of John Jacob Astor. Astor confined his operations for many years to Astoria, his post on- the Pacific Coast. However; war with Britain in 1813 forced him to surrender the post to the numerically superior Northwest Company. The American Fur Company recovered from this loss and, in 1816, began operation in the Great Lakes region. The Company immediately tormented consolidating opposition companies. Astor's retirement in 1834 split the Company into two operations; one operated exclusively in the Great Lakes area, the other on the Upper Missouri. The Upper Missouri Outfit soon assumed the common usage of the American Fur Company. This operation Conducted a profitable business under the aegis of St. Louis "House of Chouteau" until 1864.

The establishment of fur trading posts on the upper Missouri was a crucial factor in the success of the American Fur Company. The sagacious Kenneth McKenzie established Fort Union at the mouth of the Yellowstone River in 1829. McKenzie dared to open trade with the fierce Blackfeet in by sending James Kipp to build a fort on the Marias River. David A. Mitchell, American Fur Company, abandoned this first fort (Fort Piegan) in 1832, and located Fort McKenzie

---

[14] IBID., vol. I, pp. 147-48.

six miles upriver from the mouth of the Marias. Difficulties between the volatile Blackfeet and capricious company employees caused the destruction of Fort McKenzie in 1844. However, Alexander Culbertson re-established good relations with the Indians in 1845 by constructing Fort Lewis. But the difficulty of access to the fort by the Blackfeet caused its removal downriver in 1847. This last fort to be constructed was Fort Benton.[15]

McKenzie initiated another novelty in the fur business during the 1830's. The primary means of supplying the trading posts on the Upper Missouri prior to 1832 was by mackinaws and keelboats, while bullboats, pirogues and canoes were used to carry smaller loads. Mackinaws and keelboats usually carried sails and, when winds were favorable, provided a cheap, effective means of transportation. However, the customary means of propulsion on the Missouri depended on the use of the cordelle and pole. (Cordelling referred to lines attached to boats and pulled by the crew on shore.) McKenzie hoped to modernize this system of navigation with the use of steamboats. The ascent of the WESTERN ENGINEER to Council Bluffs in 1819, provided a precedent for this change. The YELLOWSTONE, following an abortive trip to Fort Tecomseh in 1831, ascended the Missouri to Fort Union in 1832.[16]

The use of steamboats on the Upper Missouri revolutionized the fur trade. Steamers left St. Louis in

---

[15] For a good discussion of the activities of the American Fur Company see John E. Sunder, THE FUR TRADE ON THE UPPER MISSOURI, 1840-1865 (Norman, 1965), pp. 60-64.

[16] Chittenden, THE AMERICAN FUR TRADE, vol., p. 338.

April after the ice "break-up" on the river, and landed trade goods at Fort Union. Furs, moving by mackinaws and keelboats downriver from upriver forts, would then to St, Louis, while supplies would ascend the river by the same means.[17]

American Fur Company steamboats carried passengers as trade goods. In 1853; the steamer ROBERT CAMPBELL carried members of the Issac Stevens Expedition to Fort Union. Part of the company continued upriver by keelboat to Fort Benton, while Stevens Surveyed a route along the Missouri for a transcontinental railroad. This expedition was particularly notable for the resultant treaty of 1855 with the Blackfeet Indians. The treaty was an important step in expanding the trade of the Upper Missouri and in initiating steamboat travel to Fort Benton.[18]

The first steamboat to travel the Missouri River to Fort Benton was the light draft CHIPPEWA which arrived in Fort Benton proper in 1860.[19] This momentous journey aided in opening Montana to settlement and creating the flourishing community of Fort Benton, the "Chicago of the Plains." Steamboats arrived at Fort Benton each June during the high water season, and were on their way back to St. Louis

---

[17] William E. Lass, A HISTORY OF STEAMBOATING ON THE UPPER MISSOURI (Lincoln, Neb.: 1963), pp. 8 and 9.

[18] IBID., pp. 13 and 14, and Fort Benton River Press (no date).

[19] Hiram Martin Chittenden HISTORY OF EARLY STEAMBOAT NAVIGATION ON THE MISSOURI RIVER: LIFE AND ADVENTURES OF JOSEPH LA BARGE (vol. I; Minneapolis: 1962), pp. 219-221.

by the first of July. After that date, until the "freeze-up," mackinaws would ply the river to the East. Approximately 200 mackinaws carrying 1,200 passengers left Fort Benton each autumn.[20] Steamboats transported millions of dollars worth of freight and hundreds of passengers during the height of navigation on the Missouri. Approximately 400 steamboat

[IMAGE OMITTED]

Steamboat traffic to Fort Benton reached its height between the years 1860 and 1888. The navigation season for steamers was relatively short; the round trip only being possible between the months of April and June. The picture above is the FORT BENTON, one of the larger steamboats to ply the Upper Missouri. Below is the EXPANSION, a comparatively small steamer.
(Photos courtesy of the Montana Historical Society, Helena)

[IMAGE OMITTED]

[IMAGE OMITTED]

The town of Fort Benton flourished as a result of the steamboat traffic on the upper Missouri. The town was the supply point for Montana throughout the period of declining fur trade activity and rising mineral exploitation. Fort

[20] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 52 and 53.

Benton soon became known as the "Chicago of the Plains."
Above: Fort Benton waterfront in 1878.
Below: Fort Benton levee in 1879.
(*Photos courtesy of Montana Historical Society, Helena*)

[IMAGE OMITTED]

arrivals were recorded at Fort Benton between 1860 and 1888.[21] [see Appendix B and C]

Montana in the 1860's appeared to be the "cutting edge" for expansion on the frontier. The discovery of gold at Gold Creek, Grasshopper Creek, Confederate and Alder Gulches in the early sixties, the construction of the Mullan Military Road from Fort Benton to Fort Walla-Walla, and the extension of steamboat travel to Fort Benton combined to insure rapid development of this promising territory. Fort Benton reaped the harvest of this rapid expansion.

A number of transportation lines organized during this period with interests in the trade at Fort Benton. The Montana and Idaho Transportation Line, the St. Louis and Omaha Packet Line, and the ever present American Fur Company, were the major companies competing in the 1860's for the opportunity to carry Montana's gold to the East. In 1863, approximately eight million dollars in gold floated down the Missouri

---

[21] Federal Power Commission, OPINIONS AND DECISIONS OF THE FEDERAL POWER COMMISSION, vol. VII, January 1, 1948 - December 31, 1948. (Washington: 1950), p: 171.

in steamers bound for St. Louis and New York.[22] Five-sixths of Montana's wealth reportedly left the region via the Missouri River in 1860's.[23]

A primary means of travel to the East during the early mining period in Montana was by horse or wagon to Fort Benton and then by steamer or mackinaw downriver. However, some miners and settlers, anxious to reach the States, did hazard the swifter Upper Missouri above Great Falls. Kennedy and Co. operated a line of mackinaws that carried passengers to Fort Benton with portage around the Great Falls. As many as eighteen mackinaws left French Bar (15 miles north of Helena) bound for Fort Benton in 1867.[24]

The completion of the transcontinental railroad in 1869, and the change from rather simple placer mining to more sophisticated quartz mining altered the patterns of trade at Fort Benton. Mine operators continued to ship equipment via steamboats to Montana. However, the short season, compared to that of overland travel from the Union Pacific railhead at Corrine, Utah, convinced Montana's entrepreneurs that expensive machinery and supplies should be transported by railroad and wagon. Thus, most of the freight carried on the Missouri River during the 1870's

---

[22] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 32-33, 42-44.

[23] IBID., p. 39.

[24] Hubert Howe Bancroft, THE WORKS OF HUBERT HOWE BANCROFT: HISTORY OF WASHINGTON, IDAHO, AND MONTANA 1845-1889 (San Francisco: 1890), ftn. p. 732.

consisted of military supplies and Indian annuities.[25] This activity continued and expanded between 1873 and 1888, the last steamboating era on the Upper Missouri. Freight shipments originated from the Northern Pacific railhead at Bismarck, North Dakota, traveling via steamboat up river to Fort Benton. This commerce was international in character, supplies being shipped over the Whoop-up Trail to Fort Macleod in Canada.[26]

The continued growth of commerce on the north-central Montana plains created a demand for building supplies and fuels. The supply of lumber and cement for Fort Benton and, after 1884, the city of Great Falls, constantly fell short of demand. To fill this increasing need, a number of lumber companies began operations along the Missouri River above Fort Benton in the 1870's and 1880's. The pioneer logging companies of A. M. Holter and Brothers and Ira Myers and Company rafted sawed lumber of floated uncut logs down the Missouri from mills above Great Falls, Montana.

A. M. Holter of Helena established a lumber company in 1863 which served the Helena area.[27] The

---

[25] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 113-136.

[26] For an extensive treatment of this Canadian-American trade see Sharp, WHOOP-UP COUNTRY, passim. Also, Lass, STEAMBOATING ON THE UPPER MISSOURI, pp.87 and 130, and U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, Appendix V, 48th Cong., 1st sess., 1883, vol. II, part 2, p. 1361.

[27] Helena WEEKLY HERALD, May 12, 1887.

enterprising Montanan expanded his operations in 1881 by constructing a lumber yard at the mouth of the Sun River, opposite the future city of Great Falls.[28] The Company rafted sawed lumber from their mill on Stickney Creek (70 miles upriver from Great Falls) to the Sun river yard and then transported it by wagon to Fort Benton.[29] The firm moved to Great Falls in 1884 and established a yard and planing mill in that infant city. The Company rafted more than 300,000 feet of lumber down the Missouri during 1885 from its mill on Stickney and Wegner creeks.[30] The Halter Lumber Co. floated logs to Great Falls until about 1891 when most of the timber along Stickney and Wegner creeks was cut. Logs were then shipped by rail to the yards at Great Falls.[31]

A staunch competitor of the Holter Lumber Co. was Ira Myers and Co. Myers located in Great Falls in 1884, constructing a mill and lumber yard. The firm began operations in the Belt Mountains south-east of Great Falls, cutting timber and floating the logs down the Smith and Missouri rivers to the boom at Great Falls.[32] The extensive operations of the Myers and Holter companies often created problems for the two

---

[28] Great Falls TRIBUNE, February 18, 1888.

[29] IBID., also see A. M. Holter, "Pioneer Lumbering in Montana," CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA (vol. VIII, Helena: 1917), pp. 270 and 271, and the Fort Benton RIVER PRESS, April-13, 1881.

[30] Great Falls TRIBUNE, April 3, 1886 and May 14, 1887.

[31] Holter, "Pioneer Lumbering in Montana," p. 272; and Great Falls TRIBUNE, August 9, 1890.

[32] Great Falls TRIBUNE, February 18, 1888 and June 5, 1886.

firms. The Holter boom at the mount of the Sun River broke in August 1890, sending logs downriver to be caught in the boom of Ira Myers.[33] A log jam in May , 1893, almost destroyed a bridge across the Missouri at Great Falls, creating problems for the citizenery.[34]

Lumber was an important commodity on the northern plains. However, the flourishing communities along the Missouri required additional supplies. Two barges run by the firm of Davis and Co. left the Townsend shipyards on September 28, 1887, bound for Great Falls with cement.[35] W. L. Martin and Co. experimented in the 1890's with shipping hay in a steamboat on the Missouri above Great Falls.[36] Transport of this nature on the Missouri raised the hopes of leading residents of Great Falls, Helena, and Townsend that the river from Three Forks to Great Falls could be improved for continuous navigation.

The first congressional appropriations specifically for the improvement of navigation on the Upper Missouri to Fort Benton occured in 1876. One million, three hundred and eighty-three thousand dollars ($1,383,000) was spent by Congress between 1876 and 1900.[37] The construction of wing dams, the removal of boulders, and dredging consumed most of this

---

[33] Great Falls TRIBUNE, August 9, 1890 and August 16, 1890.

[34] Great Falls. TRIBUNE, May 17, 1893.

[35] Townsend TRANCHANT, May 17, 1893.

[36] Great Falls TRIBUNE, May 4, 1893.

[37] Lass, STEAMBOATING ON THE UPPER MISSOURI, pp. 176 and 178.

budget.[38] Budget allocations for the newly created Missouri River Commission in 1885, contained $15,000 for a survey of the Missouri River from Great Falls to Three Forks. However, the Commission recommended that since Fort Benton was the practical head of navigation, this money-should be re-allocated for improvements below

[IMAGE OMITTED]

Above is the A. M. Holter lumber mill on Stickney Creek. From this point, Holter rafted lumber down the Missouri to the city of Great Falls. (circa 1880)

[IMAGE OMITTED]

Stubbs Ferry, Montana. This was a land mark for navigation on the Missouri between Three Forks and Great Falls.
(Photos courtesy of Montana Historical Society, Helena)

[IMAGE OMITTED]

The drawing above represents the aspirations of a group of visionary Montanans. They located Gallatin City in 1863, hoping to establish steamboat trade to the Three Forks. The plan failed and the town of Bozeman soon replaced Gallatin City as the commercial center of the Gallatin Valley.

---

[38] U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, vol. II, part 1, 52d Cong., 2d sess., 1892-1893, p. 263.

(from J. L. Campbell's IDAHO: SIX MONTHS IN THE OPEN, courtesy of Montana Historical Society, Helena)
Below is an aerial view of the Three Forks of the Missouri River.
(Montana Highway Dept. photo, courtesy of Montana Historical Society, Helena)

[IMAGE OMITTED]

Great Falls.[39] The conclusions of the Missouri River Commission concerning the navigability of the river above Great Falls met stiff opposition from civil and military engineers, and from entrepreneurs located in the Missouri River basin.

A party of enterprising individuals located Gallatin City at the Three Forks of the Missouri in 1863. The pioneers envisioned a metropolis rising on the eastern slope of the Rocky Mountains and thriving from a prosperous steamboat line running between Three Forks and the falls of the Missouri.[40] However, the first realistic attempt to consider the demands of navigation on the Missouri above the falls fell to the aegis of Thomas Roberts, a civil engineer in the employ of the Northern Pacific Railroad.

Roberts surveyed the Missouri River from Gallatin City to the Great Falls during July and August, 1872. His mission involved a determination of the upper river's suitability for steamboat navigation. Roberts

---

[39] U.S. Congress, House, REPORT OF THE MISSOURI RIVER COMMISSION, Ex. Doc. #1, vol. II, part 4, 49th Cong., 1st sess., 1885, p. 2994.

[40] Kalispell TIMES, October 23, 1941.

reported that the only serious obstruction to navigation was Half-Breed Rapids.[41] The fledgling engineer optimistically asserted that the Missouri from the Three Forks to the Great Falls could be navigated by steamboats, and that a narrow gauge railroad around the falls would provide effective service not only to Fort Benton, but to the proposed main line of the Northern Pacific at Three Forks.

> I regard the immediate business prospect of this little railroad and steamer line as of secondary consequence. The fact that boats can run to the Three Forks, to the crossing of the main line of the Northern Pacific Railroad is important. "Thousands of square miles of territory in the Crow Creek, Main Missouri, Prickly Pear, Dearborn, Sun, and Teton Valleys would be immediately enhanced in value by the prospect of such a connection, while it would for some time, if not altogether, obviate the necessity of a branch from the main line to Helena.[42]

Roberts considered the water flow of this portion of the Missouri to be sufficient for navigation and predicted that if boats began running on the river, citizens of the area would begin to make supplementary improvements.[43]

Captain Edward Maguire of the U.S. Army Corps of Engineers echoed Thomas Roberts conclusions

---

[41] Thomas Roberts, REPORT OF A RECONNAISSANCE OF THE MISSOURI RIVER IN 1872 (Washington: 1875), p. 48.

[42] IBID., 52.

[43] IBID., 50

following an extensive survey of the Missouri River from Stubbs Ferry (12 miles from Helena) to the mouth of the Sun River in 1880. Maguire claimed that, while no steamboat had ever plyed that portion of the river, it would be possible for one to do so. Maguire failed to survey the river from Stubbs Ferry to Three Forks (73 miles) but concluded that it was certainly as navigable as the portion which he did travel.[44] Minor improvements on this section of the river followed the report of Captain Maguire. However, it was not until 1890, that the Missouri River Commission finally made its own survey of the river from Stubbs Ferry to the Sun River. Captain Charles F. Powell confirmed Maguire's conclusion after the 1890 examination as to the navigability for light-draft boats and he recommended that improvements be made on that section of the Missouri River.[45]

The surveys of the Missouri River above Great Falls boasted prospects for full development of that waterway. The surveys coincided with continued attempts by Montanans to establish regular transportation service on the "Big Muddy." Various schemes to place steamboats on the far reaches of the Missouri materialized during the 1870's and 1880's. Some of these plans succeeded.

William F. Wheeler, a former marshal for Montana Territory, built a row-boat in 1878 for the purpose of

---

[44] U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. Army, Ex Doc. #1, vol. II, part 2, Appendix V, 48th Cong., 1st sess., 1883, p. 1340.

[45] U.S. Congress, House, REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY, Ex. Doc. #1, vol. II, part 3, 52d Cong., 2d sess., 1892-1893, p. 1905.

exploring the upper portions of the river. The intrepid captain and a crew of five launched their craft from Stubbs Ferry on September 12, 1878. The group, known as the Montana Steam Navigation Company, plyed the river for nine days after which they attested to its navigability.[46] That same year (1878), the Montana Steam Navigation Company merged with its rival, the Upper Missouri Navigation Company, forming the Montana Navigation Company.[47] The new firm fixed its capital at $100,000. Completion of the Northern Pacific Railway through Helena in 1883 dampened the aspirations of steamboaters in central Montana. However, a couple of irreconcilable navigators continued to further develop the Upper Missouri. "Admiral Wheeler" continued his fearless voyages by commanding two excursions down the Missouri in 1883 and 1884.[48] Yet steamboat travel on the river remained within the purview of two pioneer boaters; Judge Nicholas Hilger and Dr. Asa Davison.

Judge Hilger purchased a small, shallow draft steamboat in Iowa in 1886. The ROSE OF HELENA was shipped to Townsend by rail in May of that year and floated down to Hilger's ranch at the Gates of the Mountains. A year later, May, 1887, Hilger launched the ROSE on the Missouri and proceeded downriver to Great Falls. The downstream voyage was uneventful, but the return over Half-Breed Rapids proved

---

[46] Stanley R. Davison, "White Hopes of the Big Muddy," MONTANA, THE MAGAZINE OF WESTERN-HISTORY (Spring, 1959), p. 2; Helena WEEKLY HERALD, September 12 and 19, 1878.

[47] Davison, "White Hopes of the Big Muddy," p. 3.

[48] Fort Benton RIVER PRESS, July 11, 1883 and June 11, 1884.

hazardous. The under-powered ROSE barely ascended the obstacle. Judge Hilger concluded that regular service between Three Forks and Great Falls would be impossible for the ROSE. However, he hoped that Asa Davison's steamer, the FERN, could operate in conjunction with the ROSE in providing transport to Great Falls.[49]

The FERN was a much larger steamboat than the ROSE. Davison built the boat during 1886, just north of Twin Bridges, Montana, on the banks of the Beaverhead River. He floated the steamer down the Beaverhead, Jefferson and Missouri to Townsend in June, 1886.[50] Davison launched the FERN from Townsend on September 28, 1887, bound for Great Falls. The staunch vessel arrived at Great Falls on November 7, after a difficult trip down the river. The experience convinced Davison that he should withdraw from the steamboat business. He sold the FERN in 1887, and returned to his medical practice in Dillon.[51]

The FERN and a number of other boats (MINNIE, FRANCES, and SWAN) operated on the Upper Missouri from Great Falls to Half-Breed Rapids during the late 1880's and early 1890's. In 1891, the FERN hauled 4,500 cords of wood, 79 tons of wool, 250 tons of bay, 5 tons of vegetables, and some 500 passengers.[52] Yet, Hilger's hope for steamboat traffic from Three

---

[49] Davison, "White Hopes of the Big Muddy," p. 11; Great Falls TRIBUNE, April 10, 1886.

[50] Davison, "White Hopes of the Big Muddy," pp. 5 and 6.

[51] IBID., and Great Falls TRIBUNE, November 9, 1887.

[52] Davison "White Hopes of the Big Muddy," p. 15.

Forks to Great Falls never materialized. Eventually both the FERN and the ROSE OF HELENA were lost on the Upper Missouri.

Steamboat traffic on the Missouri River to Fort Benton and above Great Falls declined radically after 1888. The construction of the Northern Pacific Railroad across Montana in 1883, the Montana Central Railroad from Helena to Great Falls in 1886, and the Great Northern Railway across the "High Line," reduced, the importance of river navigation in Montana. Issac P. Baker and the Benton Transportation Co. continued to operate on the Upper Missouri. 1924.[53] However, few steamboats ascended the river as far as Fort Benton. Aspirations for a rejuvenation of the steamboat trade rose in 1908, when the steamer OK navigated the river to Fort Benton. However, the craft was beached by the flood of that year and later burned.[54] Practically speaking, after 1888, Great Falls and not Fort Benton was the commercial center of northcentral Montana.

The Missouri River played an important role in the settlement and commercial development of the western United States. Traffic on the river, from Loma, Montana, to Three Forks, Montana, whether by canoe or steamer, figured prominently in the expansion of fur trading, freighting, mining, and lumbering. The "Big Muddy" never satisfied the aspirations of those who sought a continuous water passage from the Mississippi to the Pacific Ocean. Yet, it did fulfill Thomas Jefferson's hopes for the

---

[53] Lass, STEAMBOATING ON THE UPPER MISSOURI, p. 153.

[54] Kalispell TIMES, June 7, 1938.

western frontier by revealing and transporting the resources of this vast land.

[IMAGE OMITTED]

Above

The ROSE OF HELENA, above, represented the hope of Judge Hilger for continuous navigation on the Missouri between Great Falls and Three Forks. However, the Judge's friends considered it more a pleasure boat than a prototype for commercial carriers.
A. E. Davison had great plans for his steamboat FERN, pictured below. Although he successfully navigated the Missouri from Twin Bridges to Great Falls, Davison admitted that the strength of the river's current, coupled with the short navigation season and the expanding railways, precluded continuous traffic on the river.
(Photos courtesy of Montana Historical Society, Helena)

[IMAGE OMITTED]

[IMAGE OMITTED]

The Steamer O. K. Coming Through the Draw Bridge, Fort Benton, Mont.

The year 1888 marked the end of extensive use of the upper Missouri as the transportation route to the Northwest. However, hopes of a revival of the commercial importance of Fort Benton continued. The trip of the steamer OK

in 1908, to Fort Benton was part of this dream. However, the high water of that same year washed away the "swing bridge." The Corps of Engineers issued a variance to the town of Fort Benton to place a new bridge across the river without provision for allowing steamboats through it. Thus, the new bridge marked the head of practical navigation on the Missouri. (The top photo courtesy of Fort Benton River Press; below, Montana Highway Dept. photo, courtesy of the Montana Historical Society, Helena)

[IMAGE OMITTED]

6. Potential Use for Interstate Commerce either in the Present or Improved Condition: The period of extensive navigation on the Upper Missouri River ended in the late 1880's. The river since that time has witnessed only sporadic incidents of commercial traffic; while the development of rail, highway, and air transport has proved a more effective means of transport. The construction of dams without locks downriver from Fort Benton has effectively curtailed any potential use? of this section of river for interstate commerce.

The Upper Missouri, after 1890, has been used more for recreation, power, and irrigation than for commerce. The numbers of pleasure boats plying the river from Great Falls to Canyon Ferry, and the proposals for irrigation and flood control projects, evidences the assumption that this situation will continue (see Appendix A). Future development of the

Upper Missouri River will center on recreation and agriculture, not on navigation and commerce.[1]

7. Possible Future Development of Navigation: Future navigation on the Upper Missouri River will depend on the continued expansion of recreation in the area. The commencement of boat tours, such as exist at the "Gates of the Mountains," could be one area of development. The river could conceivably be used for the transport of agricultural products between Cascade and Great Falls. However, the existence of inexpensive and efficient highway transport precludes this possibility.

8. Federal Agencies Exercising Jurisdiction: The United States Coast Guard exercises jurisdiction over the Missouri River to a point 263 miles above Fort Benton, Montana (33 CFR 2.38-1, 1967). The Federal Power Commission, for the purpose of licensing dams, considers the Missouri River to be navigable as far as Three Forks, Montana (FEDERAL POWER COMMISSION REPORTS, vol. VII, Jan. 1948 - Dec. 1948, Washington: 1950).

9. State and Federal Decisions: There has been one federal decision clearly establishing the navigability of the Missouri River to Three Forks, Montana. This was the case of Montana Power Company vs. Federal Power Commission (185 F2d 491). In addition, there have been two state decisions which affect the navigable status of the Upper Missouri. The case of Herrin vs. Sutherland established that the Missouri was navigable in Lewis and Clark county (74 Mont.

---

[1] Missouri Basin Inter-Agency Committee, COMPREHENSIVE FRAMEWORK STUDY, vol. , (Washington: 1969), pp. 166-173.

587). A more limited decision was rendered in the case of Gibson vs. Kelly which established that the Missouri River as navigable in Chouteau county at T 23 North, R 7 East (15 Mont. 417).

10. Recommendation: Historical evidence supports the contention that the Missouri River is a navigable waterway from Loma, Montana, to Three Forks, Montana. This section of river was used extensively for commercial purposes between 1860 and 1900. The presence of numerous dams on the Missouri above Fort Benton coupled with the obvious advantages of rail and highway transport restricts the future use of this section of river for commerce. However, the fact that the Upper Missouri was so heavily used for commerce in the past directs that it be classified a navigable river.

MISSOURI RIVER BASIN

[IMAGE OMITTED]

Appendix A

UPPER MISSOURI RIVER: POTENTIAL PROJECTS*

[CHART OMITTED, 1 page]

*from Montana Water Resources Board

MISSOURI RIVER--BRIDGES*

[CHART OMITTED, 2 pages]

*from Montana Department of Highways

EXPLANATION OF BRIDGE LIST COLUMNS

[CHART OMITTED, 4 pages]

UPPER MISSOURI: DAMS *

[CHART OMITTED, 1 page]

*from Montana Water Resources Board

APPENDIX B

Steamboat Arrivals at Fort Benton, Montana, and Vicinity.

[TEXT OMITTED, 9 pages]

* * *

Appendix C

STEAMBOAT & CARGO ARRIVALS AT FORT BENTON *

[CHARTS and TEXT OMITTED, 2 pages]

* * *

*from Lass, STEAMBOATING ON THE MISSOURI

Appendix D

SELECTED BIBLIOGRAPHY

Athearn, Robert G. FORTS OF THE UPPER MISSOURI. Englewoods Cliffs, N.J.: 1967.

Balthasar, Henry Meyer. HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860. Washington: 1917.

Bell, W. S. OLD FORT BENTON. Helena: 1909.

Brackenridge, H. M. JOURNAL OF A VOYAGE UP THE MISSOURI RIVER PERFORMED IN 1811. Vol. VI of EARLY WESTERN TRAVES. Edited by Reuben Gold Thwaites. Cleveland: 1904.

Brower, J. V. THE MISSOURI RIVER AND ITS UTMOST SOURCE. St. Paul: 1897.

Burlingame, Merril G. THE MONTANA FRONTIER. Helena: 1942.

Burpee, Lawrence J. THE SEARCH FOR THE WESTERN SEA: THE STORY OF THE EXPLORATION OF NORTHWESTERN AMERICA. Toronto: 1908.

Chittenden, Hiram Martin. THE AMERICAN FUR TRADE OF THE FAR WEST. 2 vols. New York: 1936.

--------. HISTORY OF EARLY STEAMBOAT NAVIGATION ON THE MISSOURI RIVER: LIFE

AND ADVENTURES OF JOSEPH LA BARGE, Minneapolis 1962.

CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA. 10 vols. Helena: 1876-1940.

Coues, Elliot, ed. HISTORY OF THE EXPEDITION UNDER THE COMMAND OF LEWIS AND CLARK. 4 vols. New York: 1893.

Davidson, Gordon Charles. THE NORTHWEST COMPANY. Berkeley: 1918.

DeVoto, Bernard. ACROSS THE WIDE MISSOURI. Boston: 1947.

--------. THE JOURNALS OF LEWIS AND CLARK. Boston: 1953.

Diekhans, Anne M. A HISTORY OF FORT-SHAW, MONTANA, FROM:1867 TO 1892. Unpublished M.A. thesis,

Dodds, Gordon B. HIRAM MARTIN CHITTENDEN: HIS PUBLIC CAREER. Lexington, KY: 1973.

Dunbar, Elizabeth. THREE FORKS, THE GATEWAY. Pamphlet in the collections of the Montana Historical Society, Helena: 1926.

Ewen, William H. DAYS OF THE STEAMBOATS. New York: 1967.

Gibson; Paris. THE FOUNDING OF GREAT. FALLS. Pamphlet in the collections of the Montana Historical Society. Helena: n.d.

Greenfield, Charles D. HISTORY OF EARLY LEWIS AND CLARK COUNTY. Typescript in the collections of the Montana Historical Society, Helena: 1958.

Haines, Aubrey. THE VALLEY OF THE UPPER YELLOWSTONE.

Hamilton, James McClellan. HISTORY OF MONTANA: FROM WILDERNESS TO STATEHOOD. Portland: 1957.

Harber, Nora E. OUR FORT BENTON. Fort Benton, Mont: 1937.

Harris, Burton. JOHN COLTER: HIS YEARS IN THE ROCKIES. New York: 1952.

Harris, Edward. UP THE MISSOURI WITH AUDUBON: THE JOURNAL OF EDWARD HARRIS. Edited by Francis McDermott. Norman, Okla: 1951.

Hasse, Adelaide R. REPORTS OF EXPLORATIONS PRINTED IN THE DOCUMENTS OF THE UNITED STATES GOVERNMENT. Washington: 1899.

Healy, John J. FRONTIER SKETCHES. Unpublished manuscript in the Montana State Library, Bozeman: n.d.

Hilger, David. EARLY HISTORY OF NORTHERN MONTANA AND CHOUTEAU COUNTY. Typescript in the collections of the Montana Historical Society, Helena: 1928.

Hunter, Louis C. STEAMBOATS ON THE WESTERN RIVERS: AN ECONOMIC AND TECHNOLOGICAL HISTORY. Cambridge: 1949.

Irving, Washington. ASTORIA: OR ANECDOTES OF AN ENTERPRISE BEYOND THE ROCKY MOUNTAINS. Edited by Edgeley W. Todd. Norman,. Okla: 1964.

James, Thomas. THREE YEARS AMONG THE INDIANS AND MEXICANS. St. Louis: 1916.

Larpenteur, Charles. FORTY YEARS A FUR TRADER ON THE UPPER MISSOURI, 1833-1872. Edited by Elliot Coues. Minneapolis: 1962.

Lass, William E. A HISTORY OF STEAMBOATING ON THE UPPER MISSOURI. Lincoln, Neb: 1962.

Meisel, Max. A BIBLIOGRAPHY OF AMERICAN NATURAL HISTORY: THE PIONEER CENTURY, 1769-1865. 3 vols. New York: 1924-1929.

Missouri Basin Inter-Agency Committee. COMPREHENSIVE FRAMEWORK STUDY MISSOURI RIVER BASIN. .7 vols. Washington: 1969.

Morrison, John H. A HISTORY OF AMERICAN STEAM NAVIGATION. New York: 1903.

Nasatir, A. P. BEFORE LEWIS AND CLARK: DOCUMENTS ILLUSTRATING THE HISTORY OF THE MISSOURI 1785-1804. 2 vols. St. Louis: 1952.

Nichols, R E. STEAMBOAT NAVIGATION ON THE MISSOURI RIVER.

Oglesby, Richard. MANUEL LISA AND THE OPENING OF THE MISSOURI FUR TRADE. Norman, Okla: 1963.

Phillips, Paul C. THE FUR TRADE. 2 vols. Norman, Okla: 1961.

Rich, E. E. THE HISTORY OF THE HUDSON BAY COMPANY, 1670-1870. 2 vols. London: 1959:

Roberts, Thomas. REPORT OF A RECONNAISSANCE OF THE MISSOURI RIVER IN 1872. Washington: 1875.

Sharp, Paul F. WHOOP-UP COUNTRY: THE CANADIAN-AMERICAN WEST, 1965-1885. Minneapolis: 1955.

Stevens, Issac T. REPORT OF THE EXPLORATIONS FOR A ROUTE FOR A PACIFIC RAILROAD NEAR THE FORTY-SEVENTH AND FORTY-NINTH PARALLELS OF NORTH LATITUDE FROM ST. PAUL TO PUGET SOUND. Vols. I-XII of EXPLORATIONS FOR A RAILROAD FROM THE MISSISSIPPI RIVER TO THE PACIFIC OCEAN, 1853-1855. Washington: 1855.

Stuart, Granville. FORTY YEARS ON THE FRONTIER AS SEEN IN THE JOURNALS AND REMINISCENCES OF GRANVILLE STUART. Edited by Paul C. Phillips. Glendale, Calif: 1967.

Sunder, John E. THE FUR TRADE ON THE UPPER MISSOURI, 1840-1865. Norman, Okla: 1965.

U.S. Congress. House. ANNUAL REPORTS OF THE CHIEF OF ENGINEERS, U.S. ARMY. 1868-1916 inclusive.

U.S. Congress. House. ANNUAL REPORTS OF THE MISSOURI RIVER COMMISSION. 1885-1891 inclusive.

U.S. Congress. House. EXAMINATION OF THE MISSOURI RIVER FROM SIOUX CITY, IOWA, TO FORT BENTON, MONTANA. Vol. VIII. House Doc. 91, 62d Congress, 1st session, 1911.

U.S. Congress. House. INDEX TO THE REPORTS OF THE CHIEF OF ENGINEERS, U.S. ARMY, 1866-4912. 2 vols. House Doc. 70, 63d Congress, 2d session, 1915.

U.S. Congress. House. MISSOURI RIVER. House Doc. 238, 73d Congress, 2d session, 1935.

U.S. Congress. House. MISSOURI RIVER, House Doc. 308, 73d Congress, 2d session, 1935.

U.S. Congress. Senate. RIVER AND HARBOR BILL. Senate Report 1210, 62d Congress, 3rd session, 1913.

U.S. Geological Survey. INDEX TO RIVER SURVEYS MADE BY THE UNITED STATES GEOLOGICAL SURVEY AND OTHER AGENCIES, REVISED. TO JULY 1, 1947. Water Supply Paper 995.- Washington: 1948.

U.S. Geological Survey. PROFILE SURVEYS OF THE MISSOURI RIVER FROM GREAT FALLS TO THREE FORKS, MONTANA. Water Supply Paper 367. Washington: 1914.

Vandiver, Clarence. THE FUR TRADE AND EARLY WESTERN EXPLORATION. Cleveland: 1929.

Vinton, Stallo. JOHN COLTER: DISCOVERER OF YELLOWSTONE PARK. New York: 1926.

Wagner, Henry R. and Camp, Charles L. THE PLAINS AND THE ROCKIES: A BIBLIOGRAPHY OF ORIGINAL NARRATIVES OF TRAVEL AND ADVENTURE, 1800-1865. Columbus, Ohio: 1953.

Weisel, George F. MEN AND TRADE ON THE NORTHWEST FRONTIER AS SHOWN BY THE FORT OWEN LEDGER. Missoula, Mont: 1955.

Periodicals and Articles

Bemis, Samuel F. "Captain John Mulland and the Engineers' Frontier." PACIFIC NORTHWEST QUARTERLY. XIV. 1923.

Bradley, James H. "Affairs at Fort Benton From 1831-1869." CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA. Vol. III. Helena: 1900.

--------. "Miscellaneous Events at Fort Benton." CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA. Vol. VIII. Helena: 1917.

Chittenden, Hiram M. "The Ancient Town of Fort Benton." MAGAZINE OF AMERICAN HISTORY, XXIV. 1890.

Chouteau, Charles P. "Early Navigation of the Upper Missouri." CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA. Vol. VII. Helena: 1910.

Davison, Stanley R. "White Hopes of the Big Muddy." MONTANA: THE MAGAZINE OF WESTERN HISTORY. IX. 1959.

Holter, A. M: "Pioneer Lumbering in Montana." CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA. VIII. Helena: 1917.

Johnson, Dorothy M. "Slow Boat to Benton." MONTANA: THE MAGAZINE OF WESTERN HISTORY. XI. 1961.

Koch, Peter. "Sketch of-Bozeman, Gallatin Valley, and Bozeman Pass; Written in 1884." CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA. II. Helena: 1896.

Lass, William E. "Steamboating on the Missouri: Its Significance on the Northern Great Plains." JOURNAL OF THE WEST. VI. 1967.

Oviatt, Alton B. "Steamboat Triffic on the Upper Missouri River, 1959-1869" PACIFIC NORTHWEST QUARTERLY. XL. 1949.

Point, Nicholas. "Journey in a Barge on the Missouri from the Fort of the Blackfeet to that of the Assiniboines." MID-AMERICA. XIII, No. 3. 1931.

Roberts, Thomas P. "The Upper Missouri River." CONTRIBUTIONS TO THE HISTORICAL SOCIETY OF MONTANA. I., Helena: 1902.

Trexler, H. A. "Missouri-Montana Highways: The Missouri River Route." MISSOURI HISTORICAL REVIEW. XII. 1917-1918.

Weisel, George F. "A Journey to Benton." MONTANA: THE MAGAZINE OF WESTERN HISTORY. I. 1951.

Winther, Oscar O. "Sidelights on the Stevens Railway Survey." PACIFIC NORTHWEST QUARTERLY. XXXVI., 1946.

Newspapers

GAZETTE (Billings). May, 1968.

TIMES (Kalispell). June, 1938; October, 1941.

TRANCHANT (Townsend). 1886-1887.

WEEKLY HERALD (Helena). 1888-1890.

TRIBUNE (Great Falls). 1885-1900.

Manuscripts

Phillips Papers, University of Montana Archives.

APPENDIX E

MISSOURI RIVER MAIN STEM

06090800 Missouri River at Fort Benton, Mont.

[IMAGES and TEXT OMITTED, 5 pages]

* * *

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON. D.C. 2094

[SEAL] Reply to Attention of: 25 OCT 1974

Determination, of Navigability
Missouri River above Fort Benton, Montana

1. The Omaha District, with the concurrence of the Missouri River - Division, has submitted a report pursuant to ER 1165-2-302 (33 CFR 209.260) in which it recommends that the Missouri River above Fort Benton, Montana to Three Forks, Montana be declared a navigable waterway of the United States.

2. The Missouri River is 2,475 miles in length, forming at the confluence of the Gallatin, Jefferson and Madison Rivers at Three Forks. It then flows 30 miles beyond Fort Benton, Montana and then in an easterly and southeasterly direction to its juncture with the Mississippi River, approximately 17 miles above St. Louis, Missouri. Improvements to navigation began in 1876 and continued intermittently until 1912. However, no further improvements were made above Fort Benton after 1899.

3. Historically, the use of the Missouri River as far upstream as Three Forks began in 1810 with the start of the Missouri Fur Company. Later, in the 1860's, logs were rafted down the Missouri River from mills above Great Falls, Montana. Several lumber mills flourished in that area using portions of the Missouri to transport the logs downstream. Other forms of interstate commerce existed in the Great Falls area of the

Missouri River. Several steamboats traversed sections of the river between Great Falls and Fort Benton carrying textiles, produce and passengers. Much of the commercial use of the river ended in the late 1880's due to the increased use of railroads which could carry goods cheaper and faster. Commercial traffic continued to decrease with the development of modern highways and rail and air transportation systems until today when the river is only sporadically used for commerce. The degree of navigation along the Upper Missouri will depend on the continued expansion of recreation in the area.

4. Accordingly, on the basis of its past use for interstate commerce, I hereby determine that the Upper Missouri River between Fort Benton, Montana and Three Forks, Montana is a navigable water of the United States for the purposes of the exercise of regulatory jurisdiction of the Corps of Engineers. This determination is based on the holding in Economy Light and Power Co. v. United States, 256 U.S. 113, 123 (1921), which held that a waterbody retains its character as "navigable in law" when it has been used for interstate commerce in the past even though it is not presently used for commerce.

FOR THE CHIEF OF ENGINEERS:

/s/ E. Manning Seltzer
E. MANNING SELTZER
General Counsel

RECORD
AND
BRIEFS

No. 10-218

AUG 31 2011

In the Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Montana

JOINT APPENDIX, Vol. 2 of 3

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS, LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M St. NW, Ste. 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

STEPHEN C. BULLOCK
ATTORNEY GENERAL
Office of the
Attorney General
215 North Sanders
Helena, MT 59620-1401
Counsel for Respondent

ASHLEY C. PARRISH
PAUL A. MEZZINA
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
Counsel for Petitioner

August 31, 2011

Additional counsel on inside cover

Petition for Writ of Certiorari filed August 12, 2010
Petition for Writ of Certiorari granted June 20, 2011

Library of Congress
Law Library

ANTHONY JOHNSTONE
Solicitor
MONTANA DEPARTMENT
OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Additional counsel
for Respondent

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St., Ste. 1500
Billings, MT 59101
(406) 252-2166

Additional counsel
for Petitioner

TABLE OF CONTENTS

VOLUME 1

PPL Montana, LLC v. State of Montana,
No. DV-25-2004-0000846-DK,
Lewis & Clark County District Court,
Relevant Docket Entries ..... JA 1

PPL Montana, LLC v. State of Montana,
No. DA 08-0506, Montana Supreme Court,
Relevant Docket Entries ..... JA 42

Affidavit of B. McFarland (no exhibits)
May 11, 2011 (Dkt. # 85) ..... JA 45

Affidavit of J. Foley
May 10, 2006 (Dkt. # 86) ..... JA 50

Exhibit 1,
M. Burlingame & K. Toole,
A History of Montana, Vol. II
Excerpted materials ..... JA 55

Exhibit 2,
M. White,
David Thompson's Journals Relating to Montana and Adjacent Regions, 1808–1812 (1950)
Excerpted materials ..... JA 59

Exhibit 3,
M. E. Hahn,
In Retrospect:
A History of Mineral County
Excerpted materials ..... JA 92

Exhibit 4,
J. Hamilton,
From Wilderness to Statehood
A History of Montana 1805–1900
Excerpted materials ..... JA 98

Exhibit 5,
O. Johnson,
Flathead and Kootenay:
The Rivers, the Tribers, and the
Region's Traders (1969)
Excerpted materials ..... JA 102

Exhibit 6,
The Montana Almanac
(1959–1960 ed.)
Excerpted materials ..... JA 110

Exhibit 7,
Rocky Mountain Gazette
Excerpted materials
from August 18, 1866 publication . JA 115

Exhibit 8,
The Helena Herald,
Excerpted materials from
May 2, 1867, June 5, 1867,
September 12, 1867, and
February 13, 1868 publications ... JA 117

Exhibit 9,
Sanders County Ledger,
Excerpted materials from
February 6, 1958, April 19, 1907,
July 22, 1910, and
March 13, 1914 publications . . . . . JA 123

Exhibit 10,
The Missoula Pioneer,
Excerpted materials from
March 2, 1871, and July 13, 1872
publications . . . . . JA 130

Exhibit 11,
Missoula and Cedar Creek Pioneer,
Excerpted materials from
December 8, 1870 publication . . . . . JA 134

Exhibit 12,
Unnamed newspapers,
Excerpted materials from
June 9, 1882, June 30, 1882,
July 7, 1882, August 18, 1882,
September 8, 1882, and
February 24, 1883 publications . . . JA 136

Exhibit 13,
The Journals of the Lewis & Clark Expedition, Vol. 4, April 7–
July 27, 1805 (Moulton, ed.)
Excerpted materials . . . . . JA 144

Exhibit 14,
The Madisonian, Virginia City, Montana, Excerpted materials from May 9, 1913, July 4, 1913, July 25, 1913, and September 19, 1913 publications ..... JA 150

Exhibit 15,
The Journals of the Lewis & Clark Expedition, July 28–November 1, 1805 (Moulton, ed.)
Excerpted materials ..... JA 157

Exhibit 16,
Hiram M. Chittenden, *History of Early Steamboat Navigation on the Missouri River* (New York 1903)
Excerpted materials ..... JA 166

Exhibit 17,
Montana: the Magazine of Western History (April 1959)
Excerpted materials ..... JA 171

Exhibit 18,
The River Press,
Excerpted materials from April 13, 1881 publication ..... JA 179

Exhibit 19,
Great Falls Tribune,
Excerpted materials from November 9, 1887 publication .... JA 180

Exhibit 20,
Contributions to the Historical Society of Montana, Vol. 8 (1917)
Excerpted materials ..... JA 182

Exhibit 21,
General Thomas James,
Three Years Among the Indians and Mexicans (Douglas, ed. 1916)
Excerpted materials ..... JA 187

Affidavit of M. Mason Affidavit
May 15, 2006 (Dkt. # 87) ..... JA 190

Exhibit A,
Montana Navigable Water Study
(December 1986) ..... JA 196

Exhibit B,
Report on the Navigability of the Clark Fork of the Columbia River, Idaho and Montana ..... JA 225

Exhibit C,
Madison River Navigation Study
(October 25, 1974) ..... JA 245

Exhibit D,
Missouri River Navigation Study
(August 12, 1974) ..... JA 293

VOLUME 2

Affidavit of R. Blair Strong
October 4, 2006 (Dkt. # 156) . . . . . JA 347

Exhibit 4,
Report of Navigability of the Clark Fork River Above Pend Oreille Lake, Idaho and Montana, April 15, 1932;

Letter from Montana Department of State Lands to Corps of Engineers, re navigability of Clark Fork River, September 9, 1932 . . . . . JA 352

Exhibit 5,
Letter from Corps of Engineers to Montana Board of Land Commissioners regarding navigability of Clark Fork River, September 20, 1932 . . . . . JA 362

Exhibit 6,
Letter from War Department, Office of the Chief of Engineers to the Division Engineer, Pacific Division, San Fran., California, February 9, 1933 Excerpted materials . . . . . JA 364

Affidavit of D. Emmons
November 1, 2006 (Dkt. # 169) . . . . . JA 367

Exhibit A,
Curriculum Vitae . . . . . JA 383

Exhibit F
Letter from Historical Research Associates to Montana Resource Development Bureau, February 14, 1986 . . . . . JA 393

Exhibit H,
The Journal of the Lewis & Clark Expedition, Vol. 4, April 7–July 27, 1805 (Moulton, ed.)
Excerpted materials . . . . . JA 396

Exhibit I,
Elevation map of Missouri River prepared by Captain W. Clark . . . . JA 436

Exhibit J
The Journals of the Lewis & Clark Expedition, Vol. 5, July 28–November 1, 1805 (Moulton, ed.),
Excerpted materials . . . . . JA 438

Exhibit K
War Department memorandum, dated November 2, 1896, enclosing United States Engineers Office report regarding maintenance of dam, Black Eagle Falls, Missouri River, October 24, 1896 . . . . . JA 470

Exhibit L
War Department, Report of the Chief of Engineers, for fiscal year ended June 30, 1898
Excerpted materials . . . . . JA 473

Exhibit M
Report from the Chief of Engineers on the Jefferson, Madison, and Gallatin Rivers, Montana, December 16, 1931
Excerpted materials ..... JA 478

Exhibit N
Executive Documents of the House of Representatives for the First Session of the Fifty-Second Congress 1891-1892, Excerpt: Report of Chief of the Engineers, U.S. Army, March 21, 1891 ..... JA 562

Exhibit O
Letter from U.S. Corps. of Engineers to M.O. Leighton, Consulting Engineer, November 22, 1940 ..... JA 567

Affidavit of S. Schumm
October 23, 2006 (Dkt. # 170) ..... JA 570

Exhibit A,
Curriculum Vitae ..... JA 583

Exhibit C,
Charts Comparing Pre- and Post-Dam Discharge on Madison River below Ennis Lake ..... JA 625

Exhibit D,
Historical Map of Area that Today Includes Ennis Lake
Excerpted material ..... JA 628

Supplemental Affidavit of J. Foley
November 1, 2006 (Dkt. # 175) ..... JA 629

Exhibit,
David Thompson's Journals Relating to Montana and Adjacent Regions, 1808–1812 ..... JA 632

Exhibit C to PPL Montana's Reply Brief in Support of Motion in Limine, October 8, 2007 (Dkt. # 336) — Report of the Commissioner of State Land and Investments for fiscal years beginning July 1, 1930 and ending June 30, 1932 Excerpted materials ..... JA 650

VOLUME 3

Report of S. Schumm — Navigability of Three Rivers (Madison, Missouri, and Clark Fork), June 15, 2007 (Dkt. # 420) .. JA 656

Fig. 1 (p. 1.3)
Channel classification based on pattern and type of sediment load ..... JA 665

Fig. 2 (p. 1.4)
Types of anastomosing rivers ..... JA 668

Fig. 7 (p. 2.6)
Madison River: View of Flume, March 10, 1905 ..... JA 674

Fig. 8 (p. 2.7)
Madison River: Power House Site, September 23, 1905 . . . . . JA 675

Fig. 13 (p. 2.14)
Pre- and post-dam mean monthly discharge (Madison) . . . . . JA 684

Chart (p. 3.1–3.2)
Listing obstructions and features upstream from the Fort Benton bridge . . . . . JA 686

Fig. 16 (p. 3.3)
Missouri River System profile . . . . JA 690

Fig. 17 (p. 3.4)
Missouri River in T11N, R2W upstream of Trout Creek, GLO map, 1870 . . . . . JA 691

Fig. 20 (p. 3.7)
Ryan Dam at Great Falls, 2007 . . . JA 694

Fig. 21 (p. 3.8)
Clark's map of Great Falls reach . . JA 695

Fig. 22 (p. 3.9)
Rainbow Falls, 1908 . . . . . JA 696

Fig. 23 (p. 3.10)
Great Falls, 1908 . . . . . JA 697

Fig. 24 (p. 3.11)
Black Eagle Falls, 1883 . . . . . JA 698

Fig. 25 (p. 3.12)
Crooked Falls, circa 1900 ..... JA 699

Fig. 27 (p. 3.18)
Pre- and post-dam mean
monthly discharge (Missouri) ..... JA 710

Fig. 31 (p. 4.3)
Thompson Falls, view looking
north, showing Powerhouse location,
circa 1912 ..... JA 715

Fig. 32 (p. 4.4)
Thompson Falls, Montana,
January 11, 1914 ..... JA 716

Chart (p. 4.5)
List of impediments to
navigation between St. Regis
and Thompson Falls ..... JA 717

Exhibit D
Location Maps ..... JA 723

Report of D. Emmons — Navigation Report:
A Study of the Historic Uses of the Missouri,
Madison, and Clark Fork Rivers in Montana
June 2007 (Dkt. # 420) ..... JA 729

note 12,
The Journals of the Lewis & Clark
Expedition, Vol. 4, April 7–
July 27, 1805 (Moulton, ed.)
Excerpted materials ..... JA 824

note 13,
The Journals of the Lewis & Clark Expedition, Vol. 4, April 7–July 27, 1805 (Moulton, ed.)
Excerpted materials ..... JA 827

note 15,
The Journals of the Lewis & Clark Expedition, Vol. 4, July 28–August 19, 1805 (Moulton, ed.)
Excerpted materials ..... JA 831

note 16,
The Journals of the Lewis & Clark Expedition, The Journals of Joseph Whitehouse, May 14, 1804–April 2, 1806
Excerpted materials ..... JA 836

note 31,
Acts, Resolutions and Memorials of the Territory of Montana, First Legislative Assembly, December 12, 1864
Excerpted materials ..... JA 842

note 33,
Samuel Barker, *Examination of Missouri River from Hauser Lake to Cascade with Respect to Navigability*, September 6, 1916
Excerpted materials ..... JA 845

Sheet No. 9 —
Map of Missouri River ..... JA 859

Photograph (No. 12)
Bear Tooth Rapids, mile 104 . . . JA 860

Photograph (No. 25)
Lower Half Breed Rapids . . . . . JA 861

Reports from the War Department
Excerpted materials from notes 20, 21, 26, 28, 37, 38, 41, 42, 43, 45, and 46 . . . . . JA 862

Report on the Construction of a Military Road from Fort Walla-Walla to Fort Benton (1863) . . . JA 862

Report of a Reconnaissance from Carroll, Montana Territory on the Upper Missouri to the Yellowstone National Park and Return Made in the Summer of 1875 (1876) . . JA 868

Report of the Chief of Engineers: Examination of the Missouri River above the Mouth of the Yellowstone (1875) . . . . . JA 871

Report of Chief Engineers: Special Report on Improvement of the Missouri River Above the Mouth of the Yellowstone (1878) . . . . . JA 874

Report of the Chief of Engineers, U.S. Army (1880) . . . . . JA 876

H.R. Ex. Doc. No. 1, 47th Cong.,
Report of the Secretary of War,
Appendix T: Improvement of the
Missouri River Above the Mouth
of the Yellowstone (1882) . . . . . JA 879

H.R. Ex. Doc. No. 1, 48th Cong.,
Report of the Secretary of War,
Appendix V: Improvement of the
Missouri River from Sioux City,
Iowa to Fort Benton, Montana
(1883) . . . . . JA 883

H.R. Ex. Doc. No. 1, 40th Cong.,
Report of the Secretary of War,
Appendix XX: Report of the Chief
of Engineers, U.S. Army (1885) . JA 890

H.R. Ex. Doc. No. 1, 40th Cong.,
Report of the Secretary of War,
Appendix XX: Reports of the
Missouri Rivers Commission
(1885) . . . . . JA 893

H.R. Ex. Doc. No. 1, 52d Cong.,
Report of the Secretary of War,
Improvement of Missouri River
Above Sioux City, Iowa, and of
Yellowstone River, Montana and
North Dakota (1891) . . . . . JA 898

H.R. Ex. Doc. No. 1, 52d Cong., Annual Report of the Chief of Engineers, Preliminary Examination of Missouri River, Montana, between Great Falls and Cañon Next Below Stubbs Ferry (1892) . . . . . JA 900

H.R. Ex. Doc. No. 1, 54th Cong., Report of the Secretary of War, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1895) . . . . . JA 905

Letter from Secretary of War regarding Maintenance of Dam, Black Eagle Falls, Missouri River (1896) . . . JA 908

H.R. Ex. Doc. No. 1, 54th Cong., Report of the Secretary of War, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1896) . . . . . JA 910

H.R. Ex. Doc. No. 2, 55th Cong., Annual Reports of the War Department for the Fiscal Year ended June 30, 1898, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1898) . . . . . JA 913

Annual Reports of the War Department for the Fiscal Year ended June 30, 1915, Historical Summary Giving Scope of Previous Projects for Improvement of Rivers and Harbors in the Kansas City, Missouri, District (1915) . . . . . JA 918

Rebuttal Report of S. Schumm July 13, 2007 (Dkt. # 420) . . . . . JA 922

Exhibit A, River Map of the Madison . . . . . JA 951

Exhibit B, River Maps of the Missouri . . . . . JA 953

Exhibit C, River Maps of the Clark Fork . . . . . JA 956

PPL Montana, LLC v. State of Montana, No. DA 08-0506, Montana Supreme Court, Amicus Brief of School Trust Representatives, April 20, 2009, Excerpted materials . . . . . JA 959

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

PPL Montana, LLC v. State of Montana,
No. DA 08-0506, Opinion of the
Supreme Court of Montana,
dated March 30, 2010 . . . . . Pet.App.1

PPL Montana, LLC v. State of Montana,
No. CDV-2004-846, Memorandum of
Decision of the Montana First Judicial
District Court, Lewis & Clark County,
dated June 13, 2008 . . . . . Pet.App.118

PPL Montana, LLC, et al. v. State of Montana,
No. CDV-2004-846, Memorandum and
Order on the Navigability of the Missouri,
Madison and Clark Fork Rivers of the
Montana First Judicial District Court,
Lewis & Clark County,
dated August 28, 2007 . . . . . Pet.App.130

PPL Montana, LLC, et al. v. State of Montana,
No. CDV-2004-846, Memorandum and
Order of the Montana First Judicial
District Court, Lewis & Clark County,
dated April 14, 2006 . . . . . Pet.App.145

Stephen R. Brown
Robert E. Sheridan
GARLINGTON, LOHN & ROBINSON, PLLP
199 West Pine • P.O. Box 7909
Missoula, MT 59807-7909
Telephone: (406) 523-2500
Telefax: (406) 523-2595

R. Blair Strong
PAINE, HAMBLEN, COFFIN, BROOKE
& MILLER LLP
717 West Sprague, Suite 1200
Spokane, WA 99201-3505
Telephone: (509) 455-6000
Telefax; (509) 838-0007

Attorneys for Avista Corporation

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY**

Cause No. CDV 2004-846

[Dated October 4, 2006]

PPLY MONTANA, LLC, a Delaware Limited Liability Corporation; and AVISTA CORPORATION, a Washington Corporation; PACIFICORP, an Oregon Corporation,	)
Plaintiffs,	)
v.	)

STATE OF MONTANA,)
)
Defendant.)
)

AFFIDAVIT OF R. BLAIR STRONG IN SUPPORT OF AVISTA CORPORATION'S MOTIONS FOR SUMMARY JUDGMENT

STATE OF WASHINGTON,)
: ss.
County of Spokane)

I, R. BLAIR STRONG, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys representing Plaintiff, Avista Corporation ("Avista") in the above-captioned matter. I have personal knowledge of the matters contained herein and am competent to testify to the matters hereto.

2. Attached as Exhibit No. 1 is a true and correct copy of extracts copied by me from the Report of Lieut. T. W. Symons, Corps of Engineers, transmitted by the Secretary of War to the United States Senate in response to Senate Resolution of April 5, 1882, "[r]especting the navigable waters of the Upper Columbia River and its tributaries," on deposit with the Spokane Public Library, 906 West Main Avenue, Spokane, Washington.

3. Attached as Exhibit No. 2 is a copy of a Preliminary Examination of Clarke Fork of the Columbia River (by whatever name called) from the International Boundary Line to the Mouth of the Big

Blackfoot River, in the State of Montana, dated March 21, 1891, filed as Exhibit F to the Affidavit David B. Kinnard in Support of PPL Montana's Motion to File an Amended Answer to Defendant State of Montana's Counterclaims and Affirmative Defenses.

4. Attached as Exhibit No. 3 is a true and correct copy of a Report on Columbia River above Snake River, Washington, Idaho, and Montana, dated February, 1929, made pursuant to House Document 308, Sixty-ninth Congress, First Session, under authority of River and Harbor Act of January 21, 1927, and relating to navigation, power development, flood control and irrigation, obtained at my request by Morgan Angel & Associates, LLC of Washington, D.C.

5. Attached as Exhibit No. 4 is a true and correct copy of a certified copy of a Report on Navigability of Clark Fork River Above Pend Oreille Lake, Idaho and Montana, dated April 15, 1932.

6. Attached as Exhibit No. 5 is a true and correct copy of the Corps of Engineers correspondence to Montana Board of Land Commissioners inquiry regarding navigability of the Clark Fork River, 1932, obtained at my request by Morgan Angel & Associates, LLC of Washington, D.C.

7. Attached as Exhibit No. 6 is a true and correct copy of correspondence from Office of the Chief of Engineers to the Division Engineer, Pacific Division, San Francisco, California, dated February 9, 1933, obtained at my request by Morgan Angel & Associates, LLC of Washington, D.C.

8. Attached as Exhibit No. 7 is a true and correct copy of extracts from the Army Chief of Engineers' *List of Bridges Over the Navigable Waters of the United States,* obtained at my request direction by Morgan Angel & Associates, LLC of Washington, D.C.

9. Attached as Exhibit No. 8 is a true and correct copy printed by me of the Department of Natural Resources & Conservation webpage as of September 20, 2006 at http://dnrc.mt.govipermits/stream_permitting/fraha.asp .

10. Attached as Exhibit No. 9 is a copy of the decision of the United States Circuit Court for the Ninth Circuit, District of Montana in *Steele v. Donlan,* Equity No. 950 (9th Cir. for the D. Mont., 1910), filed as Exhibit G to the Affidavit David B. Kinnard in Support of PPL Montana's Motion to File an Amended Answer to Defendant State of Montana's Counterclaims and Affirmative Defenses.

11. Attached as Exhibit No. 10 is a true and correct copy of a certified copy of the Findings of Fact, Conclusions of Law, and Order in Case No. 76N-46 *before the Water Courts of the State of Montana,* Clark Fork Division, Clark Fork River Below the Flathead River Basin issued by Robert M. Holier, Water Judge.

DATED this 4th day of October, 2006.

/s/ R. Blair Strong
R. Blair Strong

SUBSCRIBED AND SWORN to before me this 4th day of October, 2006.

[Notary Seal]

/s/ Carmella McGinnis
Print Name: CARMELLA MCGINNIS
NOTARY PUBLIC in and for the State
Of Washington, residing in Spokane.
Commission Expires: 1-25-09

EXHIBIT 4

STATE OF WASHINGTON)
)
) CERTIFICATE OF
) CUSTODIAN
COUNTY OF WALLA WALLA)

I, the undersigned, Catherine M. Harrison, Records Manager for the Walla Walla District, U.S. Army Corps of Engineers, Walla Walla, Washington, in the performance of the functions of my office, hereby certify that the attached copies (listed below) pertaining to the navigability of the Clark Fork River, are true and correct copies from the work files compiled by the U.S. Army Corps of Engineers.

DOCUMENT FOR CERTIFICATION: "Report of Navigability of the Clark Fork River Above Pend Oreille Lake, Idaho and Montana" (15 April 1932)

I further certify that I am the Records Manager, that I have legal custody of the above described documents, and that I am the lawful possessor and keeper and have legal custody of the records in the Walla Walla District of the U.S. Army Corps of Engineers, Walla Walla, Walla Walla, Washington.

IN WITNESS WHEREOF, I hereunto set my hand this 25 day of May, 2005.

/s/ Catherine M. Harrison
CATHERINE M. HARRISON
Records Manager

STATE OF WASHINGTON)
)
COUNTY OF WALLA WALLA)

On this 25 day of May, 2005, before me, a Notary Public in and for the State of Washington, Catherine Harrison executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed, for the uses and purposes therein expressed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by notarial seal the day and year in this certificate first above written.

(SEAL)

[IMAGE OMITTED]

/s/ Keri Schenter
Notary Public for the State of Washington
Residing at Walla Walla
My commission expires: 7/29/06

[IMAGE OMITTED]

April 15, 1932

Report on navigability of Clark Fork River above Pend Oreille Lake, Idaho and Montana.

The Chief of Engineers, U. S. Army, Washington, D.C. (Through the Division Engineer, Pacific Division, San Francisco, Calif.)

1. Pursuant to instructions contained in a letter from the Chief of Engineers dated January 8, 1931, E. D. 7074, report on the navigability of Clark Fork River above Pend Oreille Lake, Idaho and Montana, is submitted. This river is a stream classified under paragraph 9 (e) of the letter mentioned.

(a) General description of stream

2. The Clark Fork River rises west of the Continental Divide in Montana, flows in a general northwesterly direction, crossing the "panhandle" of Idaho, where it flows through Pend Oreille Lake, and the northeast corner of Washington; and, after a short course in British Columbia, it empties into the Columbia River very close to the international boundary. The lake, with that part of the river which is below the lake, forms a continuous water highway over which interstate and foreign commerce may be conducted.

3. That part of the Clark Fork River above Pend Oreille Lake is, roughly, 350 miles long. The most important tributaries of this stretch of the river are: Blackfoot River, Bitterroot River, and Flathead

River. Clark Fork is 1,000 feet wide between banks at the town of Clark Fork, Idaho, which is 3 miles above the entrance of the river into Pend Oreille Lake. At Cabinet Gorge, about 11 miles above the lake, the river narrows to a width of 100 feet. There is a controlling depth of 3 to 4 feet at average low water for about 1 mile above the town of Clark Fork. Farther upstream the controlling depth gradually diminishes.

4. The Northern Pacific Railway bridge and the county highway bridge, near the town of Clark Fork, Idaho, both have fixed spans, with horizontal clearances of about 200 feet and vertical clearances of about 6 feet at high water and 16 feet at low water. No bridges are obstructive to log driving, which has been the only important form of water commerce. A power dam at Thompson Falls, Montana, about 69 miles above Pend Oreille Lake, is a complete obstruction to boat navigation, but over which logs are splashed.

5. There are frequent rapids, the rapids nearest to the lake being at Cabinet Gorge close to the Montana-Idaho boundary line. Four miles above Cabinet Gorge are the Heron Rapids, and 18 miles above Heron are the Rock Island Rapids. During about one month of each year the current of the river is of such high velocity that no sort of navigation is possible.

(b) Present commerce

6. There in no commerce now.

(c) Past commerce

7. From about 1900 until 1929 logs wore floated down Clark Pork River on rising water in the spring, rafted where the river empties into Pend Oreille Lake, and towed by tug boats to lumber mills on the lake. About 5 million feet of timber was floated during the last drive in 1929. Companies which operated upon the river and the year in which their operations were discontinued when the immediate available timber in Idaho tributary to the Clark Fork ran out, follow: *Laclode Lumber Co. in 1914, Hope Lumber Co. in* 1919, Dover Lumber Co. in 1920, and A. C. White Lumber Co. in 1929. There are millions of feet of timber still standing tributary to the Clark Fork in Montana. Logs have been floated from as far upstream as Dixon, Montana, on the Flathead River, about 22 miles above where that river empties into the Clark Fork near Paradise, Montana, which town is more than 100 miles above Pend Oreille Lake.

8. In 1883, supplies for the construction of Northern Pacific Railway were transported during high water as far as Cabinet Gorge.

(d) Improvements authorized by Congress

9. No improvements have been authorized by Congress.

(e) Recommendations for improvement

10. A report on preliminary examination of "Clark Fork of the Columbia River," dated March 21, 1891, and published in the Annual Report of the Chief

of Engineers for 1891, on page 3250, was unfavorable for any improvement.

(f) Federal or State laws relating to navigable status

11. This office has no record of any Federal or state laws relating to the navigable status of this stream.

(g) Conclusions

12. Loose logs have been floated down the Clark Fork River from the mouth of the Flathead River near Paradise, Montana. Although during the construction of the Northern Pacific Railway, small boats engaged in the construction work made trips to Cabinet Gorge, no use is now made of the river to that point. Captain George A. Pease, who commanded a steamer engaged in this work, stated that the river above the lake is exceedingly rough, and that in his opinion it is utterly impossible to make it a navigable river. The practical head of navigation for tugs and light-draft boats is at the Northern Pacific Railway bridge, about 4 miles above the lake.

13. It is concluded that the Clark Fork River above Pend Oreille Lake is a waterway of the United States because, by its connection with the Pend Oreille Lake and the Clark Fork River below the lake, it forms a highway over which interstate and foreign commerce may be conducted. the head of navigation is at the Northern Pacific Railway bridge about 4 miles above the entrance of the Clark Fork into Pend Oreille Lake.

14. Source and authority for data given:

For (a), (b), and (c) -- field investigation.
For (e) and (f) -- search of office records.

/s/ C.L.S.
C. L. Sturdevant,
Lt. Col., Corps. of Engineers,
District Engineers.

522/41 1st Ind.

Office, Division Engineer, Pacific Division, San Francisco, April 23, 1932,
To the Chief of Engineers, U. S. Army, Washington, D. C.

1. Forwarded, concurring.

Thomas M. Robins,
Lieut. Colonel, Corps of Engineers,
Division Engineer.

7074 (Clarks Fork R., Mont.- Idaho) S.

Subject: Navigability of Clark Fork River above Pend Oreille Lake, Idaho and Montana.

2d Ind.

Office, C. of Eng.,
April 29, 1932.

To the division Engineer,
PACIFIC DIVISION,
SAN FRANCISCO, CALIF.

The conclusion of the District and Division Engineers is concurred in.

By direction of the Chief of Engineers:

[IMAGE OMITTED]

V. L. Petersen,
Lieut. Col., Corps of Engineers.

522/41 3rd Ind.

Office, Division Engineer, Pacific Division, San Francisco, May 3, 1932,

To the District Engineer, SEATTLE, WASH.

1. To note.

[IMAGE OMITTED]

Thomas M. Robins,
Lieut. Colonel, Corps of Engineers,
Division Engineer.

1125.1/163 4th Ind. SEF/BW

U.S.E.O., Seattle, Wash, May 5, 1932. To the Division Engineer, Pacific Division, San Francisco, Calif.

Noted.

/s/ C.L.S.
C. L. Sturdevant,
Lt. Col., Corps of Engineers,
District Engineer.

[IMAGES OMITTED]

HELENA September 9, 1932

Dwight F. Johns,
Major, Corps of Engineers,
Office of the Chief of Engineers,
Washington, D. C.

Your File No. 7054-59

Dear Major Johns:

In your letter dated April 2, 1931, you give us general information of interest and value to this department in regard to the classification of rivers and lakes in Montana as navigable and non navigable. Under paragraph 3 of this letter you state that your office has under study the question of the navigability of nine separate streams in the State of Montana including the Clark Fork River (western Montana branch of the Columbia River), and that as soon as your decisions with regard to these streams have been made, you will make the information available to us.

A question has now arisen involving the classification of the Clark Fork River as navigable or non navigable, and we shall be thankful for any information that you can give us on this subject even though it maybe only preliminary.. Your help will be greatly appreciated.

Very respectfully,

IMB-EBM
c.c. Judge Edward Horsky,
Helena, Montana

/s/ [ ]
COMMISSIONER.

EXHIBIT 5

WAR DEPARTMENT

OFFICE OF THE CHIEF OF ENGINEERS

WASHINGTON

September 20, 1932

JBL/MB

Mr. I. M. Brandjord,
State Board of Land Commissioners,
Department of State Lands and Investments,
Helena, Montana.

Dear Mr. Brandjord:

Reference is made to your letter of September 9, 1932, addressed to Major Dwight F. Johns, requesting information concerning the navigable or non navigable status of the Clarks Fork River in Montana.

The Department has recently investigated the navigable status of the Clarks Fork River. The facts developed in this investigation appear to warrant the conclusion that the river is not navigable water of the United States in Montana, and that the head of navigation is at the Northern Pacific Railway bridge about 4 miles above the entrance of Clark Fork into Pend Oreille Lake, Idaho. It should be understood, however, that this merely represents the view of this Department based upon a study of the best data available and is not conclusive in law since the

determination may be conclusively arrived at only by judicial procedure.

For the Chief of Engineers,

Very respectfully,

/s/ [ ]
Malcolm Elliott
Major, Corps of Engineers

[Seal]

EXHIBIT 6

ADDRESS REPLY TO
CHIEF OF ENGINEERS, U. S. ARMY
WASHINGTON, D. C.

REPLY TO FILE NO. 7074–58

[IMAGE OMITTED]

WAR DEPARTMENT

OFFICE OF THE CHIEF OF ENGINEERS

WASHINGTON

February 9, 1933

Subject: Navigability of waterways,
Seattle District.

To: The Division Engineer,
Pacific Division,
SAN FRANCISCO, CALIF.

1. Referring to the Report of the Division Engineer, North Pacific Division, dated March 14, 1931, on "Navigable Status of Waterways, United States", the conclusions of this office regarding those listed for the Seattle District are as follows:

Rivers	Head of Navigation
Baker River, Wash.	(a)

Rivers	Head of Navigation
Bear River, Wash.	Head of tide water about 4 miles above the mouth.
Big Quilcene R., Wash.	(a)
Bitter Root R., Mont.	(a)
Black R., Wash., Trib. of Chehalis R.	15 miles above the mouth.
Black R., Wash., Trib. of Duwamish R.	(a)
Bogachiel R., Wash.	(a)
Calawah R., Wash.	(a)
Cedar R., Wash.	Northern Pacific Railroad bridge 1¼ mi. above the mouth.
Chehalis R., Wash.	Chehalis, Wash., 68½ mi. above mouth.
Clarks Fork of Columbia R., Idaho, Washington & Montana (or Pend d'Oreille River)	Northern Pacific Railroad bridge about 4 mi. above the entrance of the Clark Fork into Pend Oreille Lake, Idaho.

* * *

RG 77; NACP
Entry 109; Civil Works 1923-42- General Correspondence
Box 466; "7074-Part 3-Serials 126-162"

Robert L. Sterup
Kyle Anne Gray
HOLLAND & HART LLP
401 North 31st Street
Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
Telephone: (406) 252-2166
Fax: (406) 252-1669

Paul J. Lawrence
Preston Gates Ellis LLP
Suite 2900
925 Fourth Avenue
Seattle, Washington 98104-1158
Telephone: (206) 623-7580
Fax: (206) 626-7022

Attorneys for Plaintiff PPL MONTANA, LLC

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

No. CDV 2004-846

[Dated November 1, 2006]

PPL MONTANA, LLC, a Delaware Limited Liability Company; AVISTA CORPORATION, a Washington Corporation; and PACIFICORP, an Oregon Corporation,	)
Plaintiffs,	)
v.	)

STATE OF MONTANA,)
)
Defendant.)
)

AFFIDAVIT OF DAVID M. EMMONS IN SUPPORT OF PPL MONTANA'S OPPOSITION TO THE STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RULE 37(c) EXPENSES

STATE OF MONTANA)
)ss
COUNTY OF MISSOULA)

I, DAVID M. EMMONS, being first duly sworn upon oath, depose and state the following:

1. Education and Credentials as Historian. I am a Professor of History Emeritus at the University of Montana. I began my professional career at the University of Montana in 1967 as an Instructor of History. I was subsequently promoted to Assist Professor in 1970, Associate Professor in 1973 and, finally, to Full Professor in 1976. A copy of my curriculum vitae is attached as **Exhibit A**.

2. I received from the University of Colorado my Bachelor of Arts degree in history in 1961, my Masters of Arts in history in 1963, and my Ph.D. in history in 1969. I have published two books: *Garden in the Grasslands: The Boomer Literature of the Central Plains* (Lincoln: University of Nebraska Press, 1971) and *The Butte Irish: Class and Ethnicity in an American Mining Town* (Urbana and Chicago: University of Illinois Press, 1989). A joint committee

of the American Historical Association and the Organization of American Historians awarded *The Butte Irish* the Ellis Island/Statue of Liberty Centennial Prize in 1989. The *Butte Irish* also received the 1990 Robert G. Athern Prize from the Western Historical Association, given every other year to the best book on Western history. I have published more than twenty articles in historical journals, and I have served as referee for articles published by the University of Illinois Press, the University Press of Kansas, Oxford University Press, *The Western Historical Quarterly, Montana: The Magazine of Western History, Labor History, American Quarterly, The Journal of American History,* and *The Journal of American Ethnic History*.

3. I have been a member of the following professional organizations: American Historical Association, Organization of American Historians, Western Historical Association (past chair and member of the W. Turrentine Jackson Prize Committee), American Conference for Irish Studies, Catholic Historical Association, Irish-American Cultural Institute, Immigration and Ethnic History Society (member of the Executive Board), and the Montana Historical Association (member of the Editorial Board for *Montana: The Magazine of Western History*.)

4. During my tenure as professor at the University of Montana, I taught numerous courses focusing on the development of the United States in the late nineteenth and early twentieth centuries. I also taught a course entitled "The Historian's Craft," a required course for history majors. During the course, students were instructed on what would be required of

them as professional historians, including how to assess the credibility of various historical sources, and the care with which sources must be evaluated and used.

5. Review of State's Navigability Brief. I have read the State's Brief in Support of State's Rule 56(c) Motion for Partial Summary Judgment on Liability and Rule 37(c) Expenses, the Affidavits of Jodie Foley, Monte Mason and Bob McFarland and the Exhibits thereto. It is based upon these documents that I formed my opinion regarding the adequacy and credibility of the State's historical evidence.

6. Summary of Opinions. In my expert opinion, the State's evidence of historical use of the relevant reaches of the Missouri, Madison and Clark Fork rivers is unreliable from a historical perspective. The State relies on secondary sources that are inappropriate for the purposes for which the State attempts to use them. Further, these secondary sources appear to rely for their conclusions on primary sources, such as frontier-era newspapers and personal reminiscences, that are either unreliable, misread or misused. By contrast, credible sources of evidence indicate that the relevant reaches of the rivers at issue were non-navigable.

7. The State's Use of Secondary Sources. The State's Brief relies on the following secondary sources to support its assertions that relevant reaches of the Missouri, Madison and Clark Fort rivers are navigable: (a) the 1986 Montana Navigable Water Study ("Study"); and (b) what it refers to as "Corps Reports" for the Clark Fork, Madison and Missouri Rivers. The Study was provided as Exhibit A to the

Affidavit of Monte Mason ("Mason Aff.") and relevant portions of the Study are attached as **Exhibit B**. The "Corps Reports" were provided as Exhibits B, C and D to the Mason Aff. And relevant portions are attached as **Exhibit C, Exhibit D, and Exhibit E,** respectively. The State places far more credence in the conclusions made in these secondary sources than is warranted by the circumstances of their preparation.

8. The Study itself highlights its limitations. In the discussion of the methodology used in preparing the Study, its author (Heritage Research Center) warns the State that: "Due to funding limitations, several exclusions were made from the research." Study, p. 3. County Courthouse records and a thorough review of all local newspapers were excluded because of the associated costs. Study, p. 4. The author continued: "Because the approach to documenting navigable waterways for title purposes has been constrained by lack of funding, efforts have been focused upon generating the most information for the least possible cost." *Id.* The funding limitations did not permit the Study's authors to conduct the research necessary to prepare a credible historical account.

9. That the budgetary constrains imposed by the State limited severely the adequacy of the Study is confirmed by Historical Research Associates ("HRA"). HRA was the other historical research firm invited by the State to bid on the Study preparation, but it refused to submit a bid because of its experience with similar projects. HRA wrote to the State: "Based on this experience we are familiar with the amount of time required to provide our clients with a solidly researched and defensible product. Unfortunately, we

do not think that we could provide the necessary document given the stated project ceiling and the stipulation that no additional costs incurred would be reimbursed." A copy of that letter is attached as **Exhibit F**.

10. Not only is the historical value of the Study limited by the budgetary constraints, it is overly dependent on two of the least trustworthy historical sources known to Western historians - frontier-era newspapers and personal memoirs or reminiscences. Western frontier-era newspaper are suspect as they were often vehicles used by local communities to promote the community to possible occupants and business investors. As I stated in *Gardens in the Grassland,* "the most representative example of the mood of western boomerism . . . was the local newspapers. No one ever doubted the [western] press' commitment to growth or its eagerness to engage in promotional hyperbole." Frontier-era newspaper editors often acted more as unabashed promoters of economic development that unbiased news reporters. One frontier-era newspaper editor stated that many newspapers of that time "represented things that had not yet gone through the formality of taking place." I taught my students in The Historian's Craft that frontier-era newspapers, because of their promotional nature, should never be used as sole primary historical sources as they were used for the Study.

11. Similarly, I found problems with the State's use of the "Corps Reports" as credible historical evidence. First, the Clark Fork Corps Report contains no title page or other indication of author, date of preparation, or purpose. Perhaps most important, these reports were not prepared by the United States

Army Corps of Engineers (the "Corps") as the State contends, but rather they were prepared for the Corps, and thus do not carry any imprimatur of credibility that might be associated with an actual Corps Report. There is no indication in the evidence provided by the State that the Corps ever adopted the conclusions made or concurred in these so-called "Corps Reports."

12. The submitted "Corps Reports" rely on the same types of untrustworthy historical sources as a Study to reach conclusions regarding historical use of the rivers. As such, they are not themselves historically credible. Despite these shortcomings, the State uses these reports to argue that the Corps of Engineers itself has made determinations that the relevant reaches of the Madison, Missouri and Clark Fork Rivers are navigable. In fact, the opposite is true, as described in paragraphs 22-29 below.

13. The State's sue of the "Corps Reports" is fallacious in three ways: (a) it has taken secondary sources based on less than credible historical evidence; (b) attributed them to the more authoritative Corps of Engineers; and (c) proffered them as historical evidence of the historical use of the rivers. In my opinion as a historian, the State's evidence lacks the credibility to prove anything about the historical use of these rivers.

14. I found numerous examples of the State's reliance on non-credible evidence of historical use. For example, the State cites to the Study and the Missouri Corps Report for historical accounts of gold miners floating down river from the Helena area to Fort Benton as evidence that the Missouri River between the historic Stubbs Ferry and Fort Benton was

navigated. Brief, p. 5. Beside the fact that the geography of the Great Falls Reach of the Missouri River makes it utterly impossible that these miners actually floated the entire river to Fort Benton, there are considerable historical problems with the source of these reports, Hubert Hugh Bancroft. Bancroft (a nineteenth-century book seller and antiquarian) did not write anything that approaches what the State refers to in its Brief as "historical works generally considered authentic." He is not an authentic source of historical information. One historian, Kevin Starr, referred to Bancroft: "as historian, [he] was often ludicrous and sometimes dishonest." I know of no professional historian who would use Bancroft as a credible historical source, as the State has done.

15. Another example of the State's use of unreliable secondary sources for historical evidence is found in the Study section on the Clark Fork River. The Study cites an article from the *Missoulan* published on February 24, 1882 that, according to the Study's author, demonstrated that logs were floated to Weeksville, Montana down the Missoula River and Pend Oreille River [other names for segments of the Clark Fork River]. However, that article actually states that Weeksville was "situated near the river in a body of fine timber and when the supply of logs in the immediate neighborhood gives out, the *can* be floated right to the locality down the Missoula and Pend d'Oreille rivers." (misspelling in original). This article as provided as part of Exhibit 12 to Jodie Foley's Affidavit, a copy of which is attached as **Exhibit G**. There is a considerable difference historically between a frontier-era newspaper claiming that logs could be floated down a river and credible

evidence that logs were actually floated down the river.

16. In summary, my opinion as a historian is that the State's reliance on these secondary sources is inappropriate, and they should be disregarded as containing any actual evidence of the historical navigability of the rivers in question.

17. Evidence Regarding the Great Falls Reach of the Missouri River and the Madison River From the Lewis and Clark Expedition. The State makes the bold claim that "[a]s anyone with even a passing knowledge of the Lewis and Clark Expedition must concede, the Missouri River is navigable in fact throughout Montana." Brief, p. 5. I have acquired more than a passing knowledge of the Lewis and Clark Expedition during my 35 years as a professional historian in Montana. I know that the Expedition did not navigate the Great Falls Reach of the Missouri because it was impossible for them to do so. Instead, they engaged in an arduous month-long portage around that reach. An except of the Journals of the Lewis and Clark Expedition describing the portage around the Great Falls Reach is attached as **Exhibit H.**

18. To my knowledge as a professional historian, there has never been any navigation on the Missouri River in the Great Falls Reach because the physical characteristics of the falls prevent it. Captain William Clark prepared a map describing the features of the Great Falls Reach of the Missouri River. On this map, Captain Clark listed fifteen different rapids and nine waterfalls, including the five named waterfalls in this reach: (1) Black Eagle Falls - 26 ft. 5 in. descent, (2)

Colter Falls (non submerged) - 14 ft. 7 in. descent, (3) Beautiful Cascade (now named Rainbow Falls) - 47 ft. 8 in descent, (4) Crooked Falls - 9 ft. descent, and (5) the Great Falls of the Missouri - 87 ft. ¾ in. descent. A copy of Captain Clark's map, identifying the locations of the various features and indicating which features remain visible today, is attached as **Exhibit I.** This version of Captain Clark's map was found on the Discovering Lewis & Clark website (www.lewis-clark.org) at http://www.lewis-clark.org/content/content-article.asp?ArticleID=833. Through my work as a professional historian, I am acquainted with those responsible for the production of this website and am confident based on my review of the website and its contents that the website is accurate.

19. Lewis and Clark observed the conditions of the Madison River at its mouth near the current city of Three Forks, Montana. The Expedition chose not to ascend the Madison River, but instead proceeded up the Jefferson River. The Expedition's travels up the Jefferson were difficult, as Captain William Clark noted in his journal: "the method we are compelled to take to get on is fatigueing & laborious in the extreen, haul the Canoes over the rapids, which Suckceed each other every two or three hundred yards and between the water rapid oblige to towe & walke on Stones the whole day except when we have poleing men wet all day Sore feet &c." (misspellings in the original). This portion of the Lewis and Clark Journals gives no reason to think that the Madison River would have been navigable. A copy of the portion of the Journals of the Lewis and Clark Expedition describing the ascent up the Jefferson River is attached as **Exhibit J.**

20. In summary, my opinion as a historian is that the actual activities of the Lewis and Clark Expedition do not support the State's claims about the navigability of the rivers. In addition, in my years as a historian in Montana, I have seen no evidence of any navigation of the Great Falls Reach.

21. Other Credible Evidence of Non-Navigability. In reviewing the historical documentation produced in this case, I found several credible pieces of evidence that indicate that the relevant reaches of the Missouri, Madison and Clark Fork Rivers should be considered non-navigable at the time Montana entered the Union. This evidence includes governmental reports, including those actually prepared by the Corps of Engineers, and court documents. These sources are far more credible for establishing historical conditions that the secondary reports, newspaper articles, advertisements and personal reminiscences upon which the State relies.

22. Missouri River. In 1896, Samuel Hill asked the War Department whether a permit was required for maintenance on the dam constructed immediately above Black Eagle Falls. (Until the formation of the Department of the Army in 1947, the United States Army Corps of Engineers was part of the War Department.) The War Department informed Mr. Hill in a November 2, 1896 letter that, based on an October 24, 1896 report by Captain J.C. Sanford of the Corps of engineers, no permit was required. The Sanford report, after describing the physical characteristics of the Great Falls Reach, stated: "this portion of the river can, in my judgment never be made navigable at a cost that the demands of commerce will ever justify. While the dam is in a stream which in the greater

portion of its length is a 'navigable stream' it is situated in a portion of this stream that is not now navigable and which in all probability never will be." A copy of the War Department's November 2, 1896 letter and the October 24, 1896 report are attached as **Exhibit K.**

23. Additionally, in the Annual Report of the War Department for the Fiscal Year Ended June 30, 1898 ("1898 Annual Report"), the Corps of Engineers reported to Congress that the reach from Fort Benton to Great Falls was "an unnavigable section, occupied by cataracts and dangerous rapids." The report also described the various navigation improvement projects that had been contemplated for the reach between Great Falls and the historic Stubbs Ferry. According to the 1898 Annual Report, the cost of creating a three-foot-deep channel from Great Falls to Cascade was in 1898 dollars, estimated at $213,646.50. A copy of the relevant excerpts of the 1898 Annual Report is attached as **Exhibit L.**

24. In summary, my opinion as a historian is that credible historical evidence demonstrates clearly that the Great Falls Reach of the Missouri River is not and has never been navigable and that the reach of the Missouri River between Great Falls and Stubbs Ferry would have required post-statehood improvements to support commercial navigation.

25. Madison River. In 1931, the Corps of Engineers submitted to Congress a "Report from the Chief of Engineers on the Jefferson, Madison, and Gallatin Rivers Covering Navigation, Flood Control, Power Development and Irrigation," House Document No. 193, 72nd Congress, First Session ("Madison

Congressional Report"). The Corps of Engineers concluded that "[a]s far as is known there has never been any navigation on these streams, and commercial navigation on them is entirely out of the question." Madison Congressional Report, p. 66. Further, in discussing the impact of the Hebgen and Ennis Reservoirs, which are located upstream from the Madison Hydroelectric Project, the Corps concluded that their operations "results in a regulated flow during low-water periods that is generally greater than the natural low water discharge . . . The operation of power reservoirs, therefore tends to improve the low-water flow." *Id.* Thus, the Corps of Engineers concluded that the Madison River was not capable of commercial navigation, even with the increase in low-water flow resulting from the operation of the post-statehood reservoirs. A copy of the Madison Congressional Report is attached as **Exhibit M**.

26. It is my opinion as a historian that credible evidence in the form of a report actually prepared by the Corps of Engineers demonstrates that the Madison River *was* not used or capable for use for commercial navigation.

27. Clark Fork River. The Corps of Engineers evaluated the navigability of the Clark Fork River. In 1891, two years after Montana's statehood, the "Preliminary Examination of the Clark Fork of the Columbia River (By Whatever Name Called) from the International Boundary Line to the Mouth of the Big Blackfoot River, in the State of Montana" ("Clark Fork Examination") (misspelling in original) was submitted to Congress. The report concluded that the river in the surveyed reach, which includes the location of PPL

Montana's Thompson Falls Project, "is a mountain torrential stream, full of rocks, rapids and falls, and is utterly unnavigable, and incapable of being made navigable except at an enormous cost." The author of the report interviewed the mayor and other prominent citizens of Missoula, who informed him that the idea of making the river navigable was "an absurdity." A true and correct copy of the Clark Fork Examination is attached as **Exhibit N**.

28. The Corps' conclusions that the Clark Fork River is not navigable was reinforced in a 1940 letter from Major Mark Boatner stating that the Corps considers the Clark Fork navigable only from its mouth in Pend Oreille Lake to the Northern Pacific Railroad Bridge, a total distance of about four miles, far downstream from PPL Montana's Thompson Falls hydro project. A copy of the November 22, 1940 letter from Major Boatner is attached as **Exhibit O**.

29. Finally, a 1910 court decree from *Steele v. Donlan*, a case in the Federal District Court, District of Montana, concluded that "the Clark's Fork of the Columbia River in Sanders County, Montana [the county where the Thompson Falls Project is located] was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation . . . that said stream [the Clark Fork] is a non-navigable stream, and that said defendant Northwestern Development Company [which I am informed was a predecessor in title to PPL Montana] owns the bed thereof and both banks thereof at all points up stream from the north and wet lines of section seven (7) in township twenty-one (21) north of range twenty-nine (29) west, Montana Principal Meridian, eastward continuously to the Thompson

Falls and for one-quarter of a mile above said stream . . ." A copy of the *Steele v. Donlan* decree is attached as **Exhibit P.**

30. In summary, credible evidence from the Corps of engineers and the Montana federal court, roughly contemporaneous with statehood, leads me to conclude that the Clark Fork River in Sanders County was not a navigable highway for commerce at statehood.

31. Conclusion. The State's claims regarding the historical uses of the relevant rivers are not credible and not supported by adequate historical evidence. Instead of relying on more credible sources such as court records, business records or governmental reports, the State relies exclusively on secondary sources that by their own admission are limited in scope and which rely on untrustworthy primary sources to reach their conclusions. Had the State been a student of mine at the University of Montana, presenting its brief as a paper on the historical uses of the relevant reaches of the Missouri, Madison and Clark Fork Rivers, it would have received a failing grade for not following the most fundamental tenets of historical analysis. This is buttressed by the credible evidence of non-navigability that is readily obtainable regarding the rivers in question.

I declare under penalty of perjury under the laws of the State of Montana that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Dated this 1 day of November, 2006.

/s/ David M. Emmons
David M. Emmons

SIGNED AND SWORN to before me on November 1, 2006, by David M. Emmons.

/s/ Kevin Pfau
KEVIN PFAU
[Print Name]
Notary Public for the State of MONTANA
Residing at MISSOULA
My commission expires: 01-27-2007

EXHIBIT A

JA 384

DAVID MICHAEL EMMONS

Department of History
University of Montana
Missoula, MT 59812

1001 Pineview Dr.
Missoula, MT 59802
(406) 543-0146

Education

B.A., History. University of Colorado, Boulder. 1961
M.A., History. University of Colorado, Boulder. 1963
Ph.D., History. University of Colorado, Boulder, 1969
Major advisor and dissertation director: Professor Robert G. Athearn

Professional Experience

2001-present: Professor Emeritus, History. University of Montana
1976-2001: Professor of History. University of Montana; department chair, 1980-82.
1973-76: Associate Professor of History. University of Montana
1970-73: Assistant Professor of History. University of Montana
1967-70: Instructor, History. University of Montana
1966-67: Assistant Professor of History. Eastern Illinois University

Selected Courses Taught

U.S. History Survey, 1865-present
The Age of the Civil War, 1830-1880
Industrializing America, 1870-1930.
Immigration and Labor in American History
The Historians' Craft

Ireland and Irish-America
Graduate Level Seminar in Industrial America, 1840-1929

Publications: Books

1. *Garden in the Grasslands: The Boomer Literature of the Central Plains* (Lincoln: University of Nebraska Press, 1971). 220 pp.

2. *The Butte Irish: Class and Ethnicity in an American Mining Town, 1875-1925* (Urbana and Chicago: University of Illinois Press, 1989). 443 pp.

Paperback edition (University of Illinois Press, 1990). Now in sixth printing (I think).

Publications: Articles

1. "Richard Smith Elliott, Kansas Promoter," *The Kansas Historical Quarterly*, XXXVI (Winter 1970), pp. 390-402.

2. "Theories of Increased Rainfall and the Timber Culture Act 1873," *Forest History*, XV (October 1971), pp. 6-14.

3. "The Influence of Ideology on Changing Environmental Images: the Case of Six Gazetteers," in Brian Blouet and Merlin Lawson (eds.), *Images of the Plains: The Role of Human Nature in Settlement* (Lincoln: University of Nebraska Press, 1975), pp. 124-138.

4. "A 'Spleene to Drayne Ill Humors: Directed Immigration as an Instrument of Social Control," in

Duane Smith (ed.), *A Taste of the West: Essays in Honor of Robert G. Athearn* (Boulder: Regents Press, University of Colorado, 1983), pp. 32-49.

5. "Immigrant Workers and Industrial Hazards: The Irish Miners of Butte, 1880-1919," *Journal of American Ethnic History*, V (Fall 1985), pp. 41-64.

6. "The Orange and the Green in Montana: A Reconsideration of the Clark-Daly Feud," *Arizona and the West*, 28 (Autumn 1986), pp. 225-45.

Anthologized in Harry Fritz and Robert Swarthout (eds.), *Montana Heritage: An Anthology of Historical Essays* (Helena: Montana Historical Society Press, 1992), pp. 149-70.

7. "An Aristocracy of Labor: The Irish Miners of Butte," *Labor History*, 28 (Summer 1987), pp. 275-306.

Anthologized in George Pozetta (ed.) *American Immigration and Ethnicity*, 20 vols., vol. 6, *The Work Experience: Labor, Class, and Immigrant Enterprise* (New York, 1990).

8. "Social Myth and Social Reality," *Montana: The Magazine of Western History*, 39 (Autumn 1989), pp. 2-10.

9. "Ethnic Cohesion and Advancement: Irish Worker Conservatism in Butte, 1876-1906," *The Journal of the West*, XXXI (April 1992), pp. 59-76.

10. "Faction Fights: The Irish Worlds of Butte, Montana, 1870-1930," in Patrick O'Sullivan (ed.), The *Irish World Wide: History, Heritage, Identity*, vol. II

The Irish in the New Communities (Leicester: Leicester University Press; New York: St. Martin's Press, 1992), pp. 80-104.

11. "The Socialization of Uncertainty: The Ancient Order of Hibernians in Butte, Montana, 1880¬1925," *Eire-Ireland: A Journal of Irish Studies*, XXIX (Fall 1994), pp. 74-92.

12. "The Price of 'Freedom': Montana in the Late and Post-Anaconda Era," in Richard Lowitt (ed.), *Politics in the Postwar American West* (Norman: University of Oklahoma Press, 1995), pp. 120-35.

A shorter version of this chapter appeared under the same title in *Montana: The Magazine of Western History* (Fall 1994).

13. "Constructed Province: History and the Making of the Last American West," *Western Historical Quarterly*, XXV (Winter 1994), pp. 437-59; followed by a Roundtable of Responses from William Cronon, Edward Ayers, Joan Jensen, A. Yvette Huginnie, Charles Reagan Wilson, and Albert L. Hurtado.

14. "In Defense of Imposed Myth," rejoinder to Responses to "Constructed Province," *ibid*, pp. 482-86.

15. "The Making and Unmaking of Western Radicalism, 1880-1905," *Reviews in American History*, XVI (Fall 1996).

16. "Irish Miners: From the Emerald Isle to Copper Butte," appeared as Chapter 4 in Frederick Luebke (ed.), *European Immigrants in the American West:*

Community Histories (Albuquerque: University of New Mexico Press, 1998).

17. "Safe and Steady Work: The Irish and the Hazards of Butte," appeared as Chapter 7 in *ibid*.

18. "Where Have All the Heroes Gone?" review essay of J. Anthony Lukas, *Big Trouble*, in *Montana: The Magazine of Western History*, 48 (Fall 1998).

19. "The Irish in Montana," in Michael Glazier (ed.), *The Irish in America* (Notre Dame: University of Notre Dame Press, 2000). pp. 625-30.

20. "The Irish Voice in American Labor," review essay of Kevin Kenny, *Making Sense of the Molly Maguires* and L.A. O'Donnell, *The Irish Voice in American Labor*, in *Saothar: The Journal of the Irish Labour History Society*, XVIII (Winter 2000).

21. "Taking the Barnacles Off," forward to Stewart Udall, *The Forgotten Founders* (New York: Island Press, 2002).

22. "The Strange Death of Thomas Francis Meagher: Tribal Politics in Territorial Montana," in *Thomas Francis Meagher* (Dublin: Irish Academic Press, 2005), pp. 223-240.

23. "Homecoming: Finding a Catholic Hermeneutic," in Nick Salvatore (ed.) *Faith and The Historians: A Catholic Perspective* (Chicago and Urbana: University of Illinois Press, forthcoming, Fall 2006).

23. I have five short articles in encyclopedias

Book Reviews and Professional Presentations, Affiliations, and Service

I have reviewed books in the *American Historical Review*; the *Journal of American History*; *Labor History; The Journal of American Ethnic History*; *The Pacific Northwest Quarterly*; *The Western Historical Quarterly*, *The Pacific Historical Review* among other journals.

I have served as a referee of book length MSS for the University of Illinois Press, Harvard University Press, The Johns Hopkins University Press, Cornell University Press, The University Press of Kansas, and Oxford University Press, and of article length MSS for, among others, *The Western Historical Quarterly*; *Montana: The Magazine of Western History*, *Labor History*, *American Quarterly*, *The Journal of American History*, and *The Journal of American Ethnic History*.

I have presented formal papers at the conferences of the International Labor History Association, the American Historical Association, The Organizations of American Historians (2), The American Conference for Irish Studies (2), The Western Historical Association (4), The American Studies Association (2; highlighted sessions in Pittsburgh in 1995 and Kansas City, 1996); The Pacific Coast Branch of the AHA; The O'Connor Center for the American West, and The Montana Historical Association.

I am or have been a member of the following professional organizations:

American Historical Association
Organization of American Historians

Western Historical Association (chair and member of W. Turrentine Jackson Prize Committee.
American Conference for Irish History
Catholic Historical Association
Irish-American Cultural Institute
Immigration and Ethnic History Society (member of Executive Board and Saloutos Prize Committee)
Montana Historical Association (member of Editorial Board of *Montana: The Magazine of Western History*.

Awards, Grants, and Miscellaneous

1. Invited to give the banquet address at the Friendly Sons of St. Patrick dinner, March 17, 1985. Butte, Montana.

2. A joint committee of the American Historical Association and the Organization of American Historians awarded *The Butte Irish* the Ellis Island/Statue of Liberty Centennial Prize for 1989.

3. 1989 Burlington Northern Distinguished Achievement Award for Scholarship; awarded by the University of Montana Foundation.

4. Irish-American Cultural Institute Research Grant for 1990.

5. The Western Historical Association awarded *The Butte Irish* the 1989-1990 Robert G. Athearn Prize for the best book written on the 20th Century West in the previous two years.

6. The American Conference for Irish Studies awarded *The Butte Irish* honorable mention for the 1990 James B. Donnelly Prize for the best book in Irish or Irish American history. It was the only book, other than the winner, to be officially recognized.

7. Invited to give the 1992 Hibernian Lecture at the Cushwa Center for the Study of American Catholicism, University of Notre Dame.

8. Winner of UM's Distinguished Teacher Award for 1994.

9. The Irish American Cultural Institute selected *The Butte Irish* as one of the fifteen best and most influential books written on the Irish-American experience. 1995.

10. The Western Historical Association nominated my article "Constructed Province" for the Western Heritage Award. The article was also runner-up for the Association's Oscar Winther Award for best article in the *WHQ*. 1995.

11. Invited Address to the Colorado Historical Society's 1997-98 Lecture Series. Denver 1998.

12. Winner of UM's Outstanding Academic Advising Award. 1998.

13. Invited Address to the Irish Literary and Historical Society of San Francisco. May, 2001.

14. Invited Address to the Spokane-Limerick Sister City Society. Spokane. April, 2002

15. Keynote Address for the University of Montana-University College Cork (Ireland) Conference on the Irish in Montana. April 25-27, 2005.

16. Invited Addresses sponsored by the Department of History and the Celtic Studies Program, University of Wisconsin, Madison. November 13 and 14, 2005.

Over the course of my 35 years at UM, I have given uncounted talks and speeches to a wide variety of groups and organizations.

EXHIBIT F

[logo]

HISTORICAL RESEARCH ASSOCIATES
P.O. Box 7086
Missoula, Montana 59807-7086
(406) 721-1958

P.O. Box 36720, Station D Square
Albuquerque, New Mexico 87176
(505) 296-6187

February 14, 1986

Roy Henderson
Resource Development Bureau
Lands Division
Department of State Lands
1625 Eleventh Avenue
Helena, Montana 59620

RECEIVED
FEB 18 1986
STATE LANDS

Dear Mr. Henderson:

On February 4, 1986, I discussed with you the Department of State Lands (DSL proposed Navigability and Reach contract for 35 streams in Montana. I expressed my concern that given the budget ceiling for the project our firm would be hesitant to submit a bid. As I stated, Historical Research Associates (HRA) has extensive experience in this type of research, both for Montana waterways and for waterways in other western states. Based on this experience we are familiar with the amount of time required to provide our clients with a solidly researched and defensible product. Unfortunately, we do not think that we could provide the necessary document given the stated project ceiling and the stipulation that no additional costs incurred would be

reimbursed. Therefore, given the Department's budgetary constraints, HRA is not able to offer a proposal on this project.

You stated that if the other firm selected to submit a proposal expressed similar reservations, DSL would probably have to re-evaluate the scope of the project. If this in fact occurs, HRA would like the opportunity to respond.

We appreciate the opportunity to respond to the Department's solicitation and hope that we may be called upon in the future.

Thank you for your time and consideration.

Sincerely,

/s/ Daniel Gallacher

DANIEL GALLACHER

DG/pm

EXHIBIT H

JA 397

A Project of the Center for

Great Plains Studies,

University of Nebraska-Lincoln

Gary E. Moulton, Editor

Thomas W. Dunlay, Assistant Editor

The Journals of the Lewis & Clark Expedition

Volume 4, April 7–July 27, 1805

University of Nebraska Press

Lincoln and London

[*Editor footnotes are omitted without indication in the text*]

* * *

Introduction to Volume 4

Fort Mandan, North Dakota, to Three Forks of Missouri River, Montana

April 7—July 27, 1805

On April 7, 1805, the permanent party of the Lewis and Clark expedition set out up the Missouri River from Fort Mandan in present day North Dakota. They had spent the winter among the Mandan and Hidatsa Indians, waiting for the river's ice to break up and make travel possible. On the same day that they headed upriver, their keelboat which had brought them as far as the Mandan villages set off downriver for St. Louis with most of their French boatmen and a squad of soldiers under Corporal Richard Warfington. The boat carried dispatches and ethnological and natural history specimens which the captains were sending back to President Thomas Jefferson—the first fruits of the expedition.

The Corps of Discovery was now entering an area where there had been no previous white exploration, although they were informed about the country as far as the Continental Divide from the Mandans and Hidatsas. They also had with them the Shoshone woman Sacagawea, through whom they hoped to make

friendly contact with her people living along the divide. Beyond that point they could only hope that with Indian assistance and guidance they could make a portage of the Rocky Mountains to some navigable stream flowing into the Columbia River, and thus reach the Pacific.

They would spend the rest of the spring and summer toiling their way up the Missouri to its headwaters in their two pirogues and six canoes. On April 25 Lewis with four men reached the Yellowstone River, near the present North Dakota-Montana boundary. Two days later, after taking astronomical readings to fix the position of the site, they passed on into Montana. The journey across Montana, unlike the earlier stages of the trip, brought no encounters with Indians. The party observed signs of Assiniboine and Blackfeet encampments, but the people themselves were absent. It may be, however, that Indians did observe the group's passage without making themselves known. In place of meetings with Indians, however, the party began a series of combats with grizzly bears. At first they had thought that their superior weaponry would give them an advantage over these animals—one not possessed by the Indians. Instead; the subsequent encounters led them to feel some of the same awe and respect for the bear that the Indians did.

Other natural phenomena posed even greater dangers. The severe spring winds sometimes made it impossible to navigate safely on the river, thus impeding their progress. On May 14 a pirogue turned on its side in a squall of wind, nearly causing the loss of its contents and passengers, including Sacagawea and her baby. Aside from the potential human

tragedy, the loss of the supplies in the pirogue might have made it impossible for the expedition to continue; fortunately the quick action of boatman Pierre Cruzatte righted the craft and saved the situation.

As they moved west the country grew increasingly arid and rugged. Small mountain ranges in the distance came into view which the captains assumed to be part of the Rockies. To the north and south they were viewing the present Bears Paw, Little Rocky, and Judith mountains. In late May the travelers entered the Breaks of the Missouri, an area of colorful and impressive geological formations, including the fantastically sculpted White Cliffs, which prompted Lewis to pen a romantic description of these "seens of visionary enchantment." Clark named one major stream in the area for a young woman, Julia Hancock, who would later become his wife and today it retains that name, the Judith. The captains were also beginning to notice new species not seen on the lower Missouri. Ponderosa pine began to appear as did quaking aspen, sagebrush, and new varieties of willows and cottonwood trees. They were also taken with the abundance of currants and gooseberries. While the expedition's fisherman Silas Goodrich caught goldeye and cutthroat trout, others saw new animals such as the prairie rattlesnake, the Montana horned owl, and the thirteen-lined ground squirrel.

After nearly two months of travel, on June 2, the Corps arrived at the mouth of a major fork of the Missouri which they named the Marias River, after a cousin of Lewis's. This stream posed a dilemma, for none of the information given them by the Mandans and Hidatsas had referred to this stream. The problem was to determine which fork was the true

Missouri, which would lead them to the Continental Divide. To make the wrong decision and take the wrong river might cause such delay as to leave them stranded in the mountains in winter, with the likelihood that the expedition would fail altogether. Matters were not helped by the fact that, while the captains believed that the river coming from the southwest , was the Missouri, virtually all their men were sure that the other fork was the one to be followed. The captains led reconnaissances a short distance up each stream, without reaching any satisfactory conclusion. Finally they decided to set off up the southwest fork, with Lewis going ahead with a few men in the hope of finding an identifiable landmark soon enough to determine if they were in error.

On June 13 Lewis found the evidence that proved they were on the right river; the Hidatsas had told them of the Great Falls of the Missouri, the point at which the river emerged from the mountains. As his little group walked upstream, Lewis heard a roaring and saw clouds of spray that could only come from the falls. His relief was great, reflected in his ecstatic description of the beauty of the "sublime" spectacle, but the presence of the five cascades and intervening rapids presented a new problem, for the canoes and supplies must now be portaged around this obstacle. This task would consume an 'entire month of their precious time.

A survey of the area showed that a portage of about eighteen miles would be necessary to skirt the falls. To transport the heavy canoes and goods to their upper portage camp they constructed crude carriages out of cottonwood, the wheels being rounded slabs of the

trunks. The men had to pull heavy loads across ground roughened by the dried tracks of buffalo and infested with prickly pear cactus, all of which tormented their moccasined feet. The exertion was so great that at every rest stop they fell down and went immediately to sleep. Some of the men were exempted from this labor to hunt for the party's food, but they had to contend with the numerous grizzly bears. Heavy rain showers drenched everyone, and large hailstones injured several. During one downpour Clark, surveying the falls with Charbonneau, Sacagawea, her baby, and York, was nearly swept into the Missouri by a flash flood coming down the gully in which the little group had taken refuge.

At the upper portage camp Lewis labored on a collapsible boat of his own design, whose dismantled frame the party had transported across the continent for use when heavier boats had to be left behind. The frame could be bolted together and covered with animal skins. Unfortunately, tar was required to make the invention waterproof, and there were no pine trees near the area to provide it. Attempts to contrive a substitute were unsuccessful; the boat leaked too badly to be useful. The captains decided that Clark should go ahead several miles upriver where there were some sizable cottonwood trees and build two more dugout canoes.

On July 15 the party set our from the canoe-building camp, after more than three months of travel from Fort Mandan. First Lewis and then Clark forged ahead of the main party looking for the Shoshones, for it was now vital to find these Indians to obtain horses and guides for the mountain crossing which increasingly appeared likely. The party moved

through the deep canyon which they called the "Gales of the Rocky Mountains," a name which remains today. They were now within the mountains, and shallow waters and rapids would make navigation increasingly difficult. On July 25 Clark with four men reached the Three Forks of the Missouri, of which the Hidatsas had told them. Lewis with the main party reached the forks two days later, and the captains decided to name the three streams the Jefferson, the Madison, and the Gallatin, after the president and his secretaries of state and treasury. There was still no contact with the Shoshones, although various signs of their presence were evident. Sacagawea was now recognizing familiar landmarks. A meeting with her people was now their most urgent concern.

* * *

Chapter Sixteen

Portaging the Great Falls

June 21—July 14, 1805

[Lewis] *Friday June 21st 1805.*

This morning I employed the greater part of the men in transporting a part of the bagage over portage creek to the top of the high plain about three miles in advance on the portage. I also had one canoe carryed on truck wheles to the same place and put the baggage in it, in order to make an early start in the morning, as the rout of our portage is not yet entirely settled, and it would be inconvenient to remain in the open plain

all night at a distance from water, which would probably be the case if we did not set out early as the latter part of the rout is destitute of water for about 8 miles— having determined to go to the upper part of the portage tomorrow; in order to prepare my boat[1] and receive and take care of the stores as they were transported, I caused the Iron frame of the boat and the necessary tools my private bagage and Instruments to be taken as a part of this load, also the baggage Joseph Fields, Serge Gass and John sheilds, whom I had scelected to assist me in constructing the leather boat. Th[r]ee men were employed today in shaving the Elk skins which had ben collected for the boat. the ballance of the party were employed in cuting the meat we had killed yesterday into thin fletches and drying it, and in bring in the ballance of what had been left over the river with three men last evening. I readily preceive several difficulties in preparing the leather boat which are the want of convenient and proper timber; bark, skins, and above all that of pitch to pay her seams, a deficiency that I really know not how to surmount unless it be by means of tallow and pounded charcoal which mixture has answered a very good purpose on our wooden canoes heretofore. * * *

[Clark] *June 21st Friday 1805*

a fine morning wind from the S W. off the mountains and hard, Capt Lewis with the men except a few take a part of the baggage & a Canoe up the Hill 3 mile in advance, Several men employed in Shaveing & Graneing Elk hides for the Iron boat as it is called— 3 men were Sent up the Medison river yesterday to kill Elk for the Skins for the boat, I fear that we Shall be put to Some dificuelty in precureing Elk Skins

Sufficent—, Cloudy afternoon, we dry meat for the men to eat on their return from the upper part of the portage Capt Lewis determine to proceed to the upper part of the Portage tomorrow & with 3 men proced to fix the Iron boat with Skins &c. &c.

* * *

[Lewis] *Saturday June 22nd 1805.*

This morning early Capt Clark and myself with all the party except Sergt. Ordway Sharbono, Goodrich, york and the Indian woman, set out to pass the portage with the canoe and baggage to the Whitebear Islands, where we intend that this portage shall end. Capt. Clarke piloted us through the plains. about noon we reached a little stream about 8 miles on the portage where we halted and dined;[1] we were obliged here to renew both axeltrees and the tongues and howns[2] of one set of wheels which took us no more than 2 hours. these parts of our carriage had been made of cottonwood and one axetree of an old mast, all of which proved deficient and had broken down several times before we reached this place we have now renewed them with the sweet willow and hope that they will answer better. after dark we had reached within half a mile of our intended camp when the tongues gave way and we were obliged to leave the canoe, each man took as much of the baggage as he could carry on his back and proceeded to the river where we formed our encampment much fortiegued. the prickly pears were extreemly troublesome to us sticking our feet through our mockersons. * * *

[Clark] *June 22nd Satturday 1805*

a fine morning, Capt Lewis my Self and all the party except a Sergeant Ordway Guterich and the Interpreter and his wife *Sar car gah we â* (who are left at Camp to take Care of the baggage left) across the portage with one Canoe on truck wheels and loaded with a part of our Baggage I piloted thro the plains to the Camp I [made] at which place I intended the portage to end which is 3 miles above the Medesin River we had great dificuelty in getting on as the axeltree broke Several times, and the Cuppling tongus of the wheels which was of Cotton & willow, the only wood except Boxelder & [*blank*] that grow in this quarter, we got within half a mile of our intended Camp much fatigued at dark, our tongus broke & we took aload to the river on the mens back, where we found a number of wolves which had distroyed a great part of our meat which I had left at that place when I was up day before yesterday we Soon went to Sleep & Slept Sound wind from the [*blank*] we deturmine to employ every man Cooks & all on the portage after to day

* * *

[Lewis] *Sunday June 23rd 1805.*

This morning early I scelected a place for the purpose of constructing my boat near the water under some shady willows. Capt Clark had the Canoe and baggage brought up, after which we breakfasted and nearly consumed the meal which he had left her[e]. he now set out on his return with the party. I employed the three men with me in the forenoon clearing away the brush and forming our camp, and puting the frame of the boat together. this being done I sent Shields and Gass to look out for the necessary timber, and

with J. Fields decended the river in the canoe to the mouth of Medicine river in surch of the hunters whom I had dispatched thither on the 19th inst. and from whom we had not heard a sentence. I entered the mouth of medicine river and ascended it about half a mile when we landed and walked up the Stard. side, frequently hooping as we went on in order to find the hunters; at length after ascending the river about five miles we found Shannon who had passed the Medecine river & fixed his camp on the Lard. side, where he had killed seven deer and several buffaloe and dryed about 600 lbs. of buffaloe meat; but had killed no Elk. Shannon could give me no further account of R. Fields and Drewyer than that he had left them about noon on the 19th at the great falls and had come on the mouth of Medicine river to hunt Elk as he had been directed, and never had seen them since. the evening being now far spent I thought it better to pass the Medicine river and remain all night at Shannon's camp; I passed the river on a raft which we soon constructed for the purpose. the river is here about 80 yds. wide, is deep and but a moderate current. the banks low as those of the Missouri above the falls yet never appear to overflow. * * * he returned this evening to the lower camp in sufficient time to take up two of the canoes from portage creek to the top of the plain about a mile in advance. this evening the men repaired their mockersons, and put on double souls to protect their feet from the prickley pears. during the late rains the buffaloe have troden up the praire very much, which having now become dry the sharp points of earth as hard as frozen ground stand up in such abundance that there is no avoiding them. this is particulary severe on the feet of the men who have not only their own wight to bear in treading on those hacklelike points but have also the addition of the burthen which

they draw and which in fact is as much as they can possibly move with. they are obliged to halt and rest frequently for a few minutes, at every halt these poor fellows tumble down and are so much fortiegued that many of them are asleep in an instant; in short their fatiegues are incredible; some are limping from the soreness of their feet, others faint and unable to stand for a few minutes, with heat and fatiegue, yet no one complains, all go with cheerfullness. in evening Reubin Fields returned to the lower camp and informed Capt. Clark of the absence of Shannon, with rispect to whome they were extreemly uneasy.

* * *

[Clark] *June 23rd Sunday 1805*

a Cloudy morning wind from the S. E, after getting the Canoe to Camp & the articles left in the plains we eate brackfast of the remaining meat found in Camp & I with the party the truck wheels & poles to Stick up in the prarie as a guide, Set out on our return, we proceeded on, & measured the Way which I Streightened considerably from that I went on yesterday, and arrived at our lower camp in Suffcent time to take up 2 Canoes on the top of the hill from the Creek, found all Safe at Camp the men mended their mockersons with double Soles to Save their feet from the prickley pear, (which abounds in the Praries,) and the hard ground which in Some & maney places So hard as to hurt the feet verry much, the emence number of Buffalow after the last rain has trod the flat places in Such a manner as to leave it uneaven, and that has tried and is wars than frozen ground, added to those obstructions, the men has to haul with all their Strength wate & art, maney times every man (an)

all catching the grass & knobes & Stones with their hands to give them more force in drawing on the Canoes & Loads, and notwithstanding the Coolness of the air in high presperation and every halt, those not employed in reparing the Couse; are asleep in a moment, maney limping from the Soreness of their feet Some become fant for a fiew moments, but no man Complains all go Chearfully on— to State the fatigues of this party would take up more of the journal than other notes which I findScercely time to Set down. I had the best rout Staked out and measured which is 17 miles ¾ to the river & ½ a mile up i 'e 18¼ miles portage— from the lower rapid to the 1st Creek is 286 poles, to a Deep run of water, Called *Willow Run* is 6 miles thence to the river 3 miles above Medison Riv at 3 Island Called *White Bear* Islands is 11 miles all prarie without wood or water except at the Creek & run which afford a plenty of fine water and a little wood the plain is tolerably leavel except at the river (the Creek) a Small assent & passing a low hill from the Creek a rough & Steep assent for about ¼ of a mile and Several Gullies & a gradual hill for 1½ miles * * *

* * *

[Lewis] *Monday June 24th 1805.*

Supposing that Drewyer and R. Fields might possibly be still higher up medicine river, I dispatched J. Fields up the river with orders to proceede about four miles and then return whether he found them or not and join Shannon at this camp. I set out early and walked down the South West side of the river and sent Shannon down the opposite side to bring the canoe over to me and put me across the Missouri; having landed on the Lard side of the Missouri I sent Shannon

back with the canoe to, ascend the Medicine river as far as his camp to meet J. Fields and bring the dryed meat at that place to the camp at the white bear Islands which accomplished and arrived with Fields this evening. the party also arrived this evening with two canoes from the lower camp. they were wet and fatiegued, gave them a dram. R. Fields came with them and gave me an account of his & Drewyer's hunt, and informed me that Drewyer was still at their camp with the meat they had dryed. the iron frame of my boat is 36 feet long 4½ F. in the beam and 26 Inches in the hole.

This morning early Capt. Clark had the remaining canoe drawn out of the water; and divided the remainder of our baggage into three parcels, one of which he sent today by the party with two canoes. The Indian woman is now perfectly recovered. Capt. C. came a few miles this morning to see the party under way and returned. on my arrival at the upper camp this morning, I found that Sergt. Gass and Shields had made but slow progress in collecting timber for the boat; they complained of great difficulty in geting streight or even tolerably streight sticks of 4½ feet long. we were obliged to make use of the willow and box alder, the cottonwood being too soft and brittle. I kept one of them collecting timber while the other shaved and fitted them. I have found some pine logs among the drift wood near this place, from which, I hope to obtain as much pitch as will answer to pay the seams of the boat. I directed Fraizer to remain in order to sew the hides together, and form the covering for the boat.

[Clark] *June 24th Monday 1805*

a Cloudy morning I rose early had, the remaining Canoe hauled out of the water to dry and divided the baggage into 3 parcels, one of which the party took on their backs & one waggon with truk wheels to the Canoes 3 miles in advance (Those Canoes or 5 of our Canoes were Carried up the Creek 1 ¾ of a mile taken out on the bank and left to dry from which place they are taken up a point and intersects this rout from the mouth of the Creek at 3 miles from the foot of the rapids) after getting up their loads they divided men & load & proceeded on with 2 canoes on truck wheels as before, I accompaned them 4 miles and returned, my feet being verry Sore from the walk over ruts Stones & hills & thro the leavel plain for 6 days proceeding Carrying my pack and gun. * * *

* * *

[Clark] *June 25th Tuesday 1805*

* * * at 5 oClock the party returned, fatigued as usial, and proceeded to mend their mockersons &c. and G Shannon & R, Fds. to of the men who ware Sent up the medison river to hunt Elk, they killed no Elk, Several Buffalow & Deer, and reports that the river is 120 yds wide and about 8 feet deep Some timber on its borders— a powerfull rain fell on the party on their rout yesterday Wet Some fiew articles, and Caused the rout to be So bad wet & Deep thay Could with dificuelty proceed, Capt, Lewis & the men with him much employd with the Iron Boat in fitting it for the water, dispatched one man to George Drewyers Camp below medison river for meat &c. a fair after noon— great numbers of buffalow water opposit to my Camp

everry day— it may be here worthy of remark that the Sales were hoised in the Canoes as the men were drawing them and the wind was great relief to them being Sufficently Strong to move the Canoes on the Trucks, this is Saleing on Dry land in every Sence of the word, Serjeant N Pryor Sick, the party amused themselves with danceing untill 10 oClock all Chearfullness and good humer, they all tied up their loads to make an early Start in the morning.

* * *

[Lewis] *Wednesday June 26th 1805*

The Musquetoes are extreemly troublesome to us. This morning early I dispatched J. Fields and Drewyer in one of the canoes up the river to hunt Elk. set Frazier at work to sew the skins together for the covering of the boat. Sheilds and Gas I sent over the river to surch a small timbered bottom on that side opposite to the Islands for timber and bark; and to myself I assign the duty of cook as well for those present as for the party which I expect again to arrive this evening from the lower camp. * * * late in the evening the party arrived with two more canoes and another protion of the baggage. Whitehouse one of them much heated and fortiegued on his arrivall dank a very hearty draught of water and was taken almost instantly extreemly ill. his pulse were very full and I therefore bled him plentifully from which he felt great relief. I had no other instrument with which to perform this operation but my pen knife, however it answered very well. the wind being from S.E today and favourable the men made considerable progress by means of their sails.

* * *

[Lewis] *Thursday June 27th 1805.*

* * * soon after the storm this evening the water on this side of the river became of a deep crimson colour which I pesume proceeded from some stream above and on this side. there is a kind of soft red stone in the bluffs and bottoms of the gullies in this neighbourhood which forms this colouring matter.— [1] *At the lower camp*. Capt. Clark completed a draught of the river with the couses and distances from the entrance of the Missouri to Ft. Mandan, which we intend depositing here in order to guard against accedents.[2] Sergt. Pryor is somewhat better this morning. at 4 P. M. the party returned from the upper camp; Capt. C. gave them a drink of grog; they prepared for the labour of the next day. soon after the party returned it began to rain accompanyed by some hail and continued a short time; a second shower fell late in the evening accompanyed by a high wind from N. W.— the mangled carcases of several buffaloe pass down the river *today which had no doubt perished* in the falls.—

* * *

[Clark] *June 27th Thursday 1805*

* * * Soon after it began to hail and rain hard and continued for a fiew minits & Ceased for an hour (when) and began to rain again with a heavey wind from the N W. I refresh the men with a drink of grog The river beginning to *rise a little the water is Coloured a redish brown, the Small Streams,* discharges in great torrents, and partake of the Choler of the earth over which it passes—a great part of

which is light & of a redish brown. Several Buffalow pass drowned & (dashed to pices) in passing over the falls Cloudy all night, Cold

* * *

[Lewis] *Friday June 28th 1805*

Set Drewyer to shaving the Elk skins, Fields to make the cross stays for the boat, Frazier and Whitehouse continue their operation with the skins, Shields and Gass finish the horizontal bars of the sections; after which I sent them in surch ofwillow bark, a sufficient supply of which they now obtained to bind the boat. expecting the party this evening I prepared a supper for them but they did not arrive. not having quite Elk skins enough I employed three buffaloe hides to cover one section. not being able to shave these skins I had them singed pretty closely with a blazeing torch; I think they will answer tolerable well. * * * the river is now about nine inches higher than it was on my arrival. *lower Camp.* early this morning Capt. C. dispatched the remaining canoe with some baggage to the top of the plain above Portage creek three miles in advance; some others he employed in carrying the articles to the cash and depositing them and others to mend the carriages which wer somewhat out of repair. this being accomplished he loaded the two carriages with the remaining baggage and set out with all the party and proceeded on with much difficulty to the canoe in the plain. portage creek had arisen considerably and the water was of crimson colour and illy tasted. * * *

[Clark] *June 28th Friday 1805*

a fair morning wind from the South I dispatch the remaining Canoe with baggage in her to the top of the Hill three miles, imploy Some hands in Carrying those things we intend to deposit to the *Carsh* or hole, Some to repareing one of the trucks &c &c. the water is riseing and of aredish brown Cholour after Covering the *Carshe* & loading the two Carrges with the remaining part of our Baggage we all Set out passed the Creek which had rose a little and the water nearly red, and bad tasted, we assended the hill to the place the Canoe lay with great labour, at the Canoe at which place we left Some boxes & Kegs of Pork & flour for another Load, and proceeded on with the Canoe & what baggage we could draw on the wheels to willow run 6 miles where we Camped, * * *

* * *

[Lewis] *Saturday June 29th 1805.*

This morning we experienced a heavy shower of rain for about an hour after which it became fair. not having seen the large fountain of which Capt. Clark spoke I determined to visit it today as I could better spare this day from my attention to the boat than probably any other when the work would be further advanced; * * * I think this fountain the largest I ever beheld, and the hadsome cascade which it affords over some steep and irregular rocks in it's passage to the river adds not a little to it's beauty. it is about 25 yds. from the river, situated in a pretty little level plain, and has a suddon decent of about 6 feet in one part of it's course. the water of this fountain is extreemly tranparent and cold; nor is it impregnated with lime or

any other extranious matter which I can discover, but is very pure and pleasent. it's waters marke their passage as Capt. Clark observes for a considerable distance down the Missouri notwithstanding it's rapidity and force. the water of the fountain boil up with such force near it's center that it's surface in that part seems even higher than the surrounding earth which is a firm handsom terf of fine green grass. * * * on my arrival at camp I was astonished not to find the party yet arrived, but then concluded that probably the state of the praries had detained them, as in the wet state in which they are at present the mud sticks to the wheels. is such manner that they are obliged to halt frequently and clense them. *Transaction and occurrencies which took place with Capt. Clark and party today.*

Shortly after the rain which fell early this morning he found it imposseble from the state of the plains for the party to reach the upper extremity of the portage with their present load, and therefore sent back almost all of the party to bring the baggage which had been left behind yesterday. he determined himself to pass by the way of the river to camp in order to supply the deficiency of some notes and remarks which he had made as he first ascended the river but which he had unfortunately lost. * * * on Capt. Clark's arrival at camp he found that the party dispatched for the baggage had returned in great confusion and consternation leaving their loads in the plains; the men who were all nearly naked and [no] covering on the head were sorely mawled with the hail which was so large and driven with such force by the wind that it nocked many of them down and one particulary as many as three times most of them were bleeding freely and complained of being much bruised. willow run

raised about 6 feet with this rain and the plains were so wet they could do nothing more this evening. Capt. C. gave the party a dram to console them in some measure for their general defeat.

[Clark] *June 29th Satturday 1805*

a little rain verry early this morning after Clear, finding that the Prarie was So wet as to render it impossible to pass on to the end of the portage, deturmined to Send back to the top of the hill at the Creek for the remaining part of the baggage left at that place yesterday, leaveing one man to take care of the baggage at this place. * * * on arrival at the Camp on the willow run—met the party who had returned in great Confusion to the run leaveing their loads in the Plain, the hail & wind being So large and violent in the plains, and them naked, they were much brused, and Some nearly killed one knocked down three times, and others without hats or any thing on their heads bloodey & Complained verry much; I refreshed them with a little grog— Soon after the run began to rise and rose 6 feet in a few minits—. I lost at the river in the torrent the large *Compas*, an eligant fusee, Tomahawk *Humbrallo*, Shot pouh, & horn wih powder & Ball, mockersons, & the woman lost her Childs Bear & Clothes bedding &c.— [*X: Sah car gah we â*] The Compass is a Serious loss; as we have no other large one. The plains ar So wet that we Can do nothing this evining particilarly as two deep reveins are between ourselves & Load

* * *

[Lewis] *Sunday June 30th 1805.*

* * * I begin to be extremely impatient to be off as the season is now waisting a pace nearly three months have now elapsed since we left Fort Mandan and not yet reached the Rocky Mountains I am therefore fully preswaded that we shall not reach Fort Mandan again this season if we even return from the ocean to the Snake Indians. * * * This evening the bark was shaved and the leather covering for the secitons were also completed and I had them put into the water, in order to toughen the bark, and prepare the leather for sewing on the sections in the morning. it has taken 28 Elk skins and 4 Buffaloe skins to complete her. the cross bars are also finished this evening; we have therefore only the way strips[3] now to obtain in order tom complete the wood work, and this I fear will be a difficult task. The party have not returned from the lower camp I am threfore fearfull that some uncommon accedent has happened.

Occurrences with Capt. Clark and Party

This morning Capt. Clark dispatched two men to kill some buffaloe, two others to the falls to surch for the articles lost yesterday, one he retained to cook and sent the others for the baggage left in the plains yesterday. the hunters soon returned loaded with meat those sent for the baggage brought it up in a few hours, he then set four men at work to make axel trees and repare the carrages; the others he employed in conveying the baggage over the run on their sholders it having now fallent to about 3 feet water. the men complained much today of the bruises and wounds which they had received yesterday from the hail. * * *

* * *

[Clark] *June 30th Sunday 1805*

a fair morning, I dispatch the party except 5 for the remaining baggage Scattered in the plains, two to hunt for meat, two to the falls, and one to Cook at 10 oClock the hunters Came in loaded with fat meat, & those were dispatched for the baggage returned with it. I Set 4 men to make new axeltrees & repare the Carrages, others to take the load across the run which had fallen & is about 3 feet water, men Complain of being Swore this day dull and lolling about, The two men dispatched in Serch of the articls lost yesterday returned and brought the Compass which they found in the mud & Stones near the mouth of the revein, no other articles found , the place I Sheltered under filled up with, hugh Rocks, I Set the party out at 11 oClock to take a load to the 6 mile Stake & return this evening, and I intend to take on the ballance to the river tomorrow if the prarie will permit. at 3 oClock a Storm of wind from the S. W. after which we had a clear evening. Great numbers of Buffalow in every direction, I think 10,000 maybe Seen in a view.

* * *

[Lewis] *Monday July 1st 1805.*

This morning I set Frazier and Whitehouse to sewing the leather on the sides of the sections of the boat; Shields and J. Fields to collect and split light wood and prepare a pit to make tar. Gas I set at work to make the way strips out of some willow limbs which tho' indifferent were the best which could be obtained. Drewyer and myself completed the opperation of

rendering the tallow; we obtained about 100 lbs. by evening the skins were all attatched to their sections and I returned them again to the water. all matters were now in readiness to commence the opperation of puting the parts of the boat together in the morning. the way strips are not yet ready but will be done in time as I have obtained the necessary timber. the difficulty in obtaining the necessary materials has retarded my operations in forming this boat extreemly tedious and troublesome; and as it was a novel peice of machinism to all who were employed my constant attention was necessary to every part of the work; this together with the duties of chief cook has kept me pretty well employed. at 3 P. M. Capt. Clark arrived with the party all very much fortiegued. he brought with him all the baggage except what he had deposited yesterday at the six mile stake, for which the party were too much fortiegued to return this evening. we gave them a dram and suffered them to rest from their labours this evening. I directed Bratton to assist in making the tar tomorrow, and scelected several others to assist in puting the boat together. * * *

[Clark][1]

* * *

I arrived at this place to day at 3 oClock P. M. with the party from the lower part of the portage much fatigued &c.

[Clark] *July 1st Monday 1805.*

We Set out early this morning with the remaining load, and proceeded on verry well to Capt Lewis's Camp where we arrived at 3 oClock, the Day worm

and party much fatigued, found Capt. Lewis and party all buisey employd in fitting up the Iron boat, the wind hard from the S, W,— one man verry unwell, his legs & theis broke out and Swelled the hail which fell at Capt. Lewis Camp 27 Ins was 7 Inches in circumfrance & waied 3 ounces, fortunately for us it was not So large in the plains, if it had we Should most certainly fallen victims to its rage as the men were mostly naked, and but few with hats or any covering on their heads. * * *

* * *

[Lewis] *Tuesday July 2cd 1805.*

* * * Shields and Bratton seting their tarkiln, Sergts. Pryor and Gass at work on the waystrips and myself and all other hands engaged in puting the boat together which we accomplished in about 3 hours and I then set four men at work sewing the leather over the cross bars of Iron on the inner side of the boat, which form the ends of the sections. about 2 P. M. the party returned with the baggage, all well pleased that they had completed the laborious task of the portage. * * *

* * *

[Clark] *July 2nd Tuesday 1805*

Some rain at day light this morning. dispatched the party for the remaining baggage left at the 6 mile Stake, they returned in the evening and we Crossed to a large Island nearly opposit to us to kill *bear* which has been Seen frequently in the Island, we killed one

bear & returned at Sun Set. The Roreing of the falls for maney miles above us

* * *

[Lewis] *Wednesday July 3rd 1805.*

This morning early we employed all hands; some were making tar or attempting to make it, others were attatching the skins on the boat, other cuting and fiting the bark for lining puting in the woodworke &c some hunters were sent out to kill buffaloe in order to make pemecon to take with us and also for their skins which we now wa[n]t to cover our baggage in the boat and canoes when we depart from hence. the Indians have informed us that we should shortly leave the buffaloe country after passing the falls; this I much regret for I know when we leave the buffaloe that we shal sometimes be under the necessity of fasting occasionaily. and at all events the white puddings will be irretreivably lost and Sharbono out of imployment. our tar-kiln which ought to have began to run this morning has yealded no tar as yet and I am much affraid will not yeald any, if so I fear the whole opperation of my boat will be useless. I fear I have committed another blunder also in sewing the skins with a nedle which has sharp edges these have cut the skin and as it drys I discover that the throng dose not fill the holes as I expected tho' I made them sew with a large throng for that purpose. at 10 OCk A. M. we had a.slight shower which scarcely wet the grass. One buffaloe only and 2 Antelopes killed today six beaver and 2 otter have been killed within the last three days. The current of the river looks so gentle and inviting that the men all seem anxious to be moving upward as well as ourselves. we have got the boat prety well

forward today and think we shall be able to complete her tomorrow except paying her, to do which will require some little time to make her first perfectly dry. she has assumed her shape and looks extreemly well. She will be very light, more so than any vessel of her size that I ever saw.

* * *

[Lewis] *Thursday July 4th 1805.*

Yesterday we permitted Sergt. Gass McNeal and several others who had not yet seen the falls to visit them. no appearance of tar yet and I am now confident that we shall not be able to obtain any; a serious misfortune. I employed a number of hands on the boat today and by 4 P. M. in the evening completed her except the most difficult part of the work that of making her seams secure. I had her turned up and some small fires kindled underneath to dry her. Capt. C. completed a draught of the river from Fort Mandan to this place which we intend depositing at this place in order to guard against accedents. not having seen the Snake indians or knowing in fact whether to calculate on their friendship or hostility or friendship we have conceived our party sufficiently small and therefore have concluded not to dispatch a canoe with a part of our men to St. Louis as we had intended early in the spring. we fear also that such a measure might possibly discourage those who would in such case remain, and might possibly hazzard the fate of the expedition. we have never once hinted to any one of the party that we had such a scheme in contemplation, and all appear perfectly to have made up their minds to suceed in the expedition or purish in the attempt. we all beleive that we are now about to enter on the

most perilous and difficult part of our voyage, yet I see no one repining; all appear ready to met those difficulties which wait us with resolution and becoming fortitude. * * *

* * *

[Lewis] *Friday July 5th 1805.*

This morning I had the boat removed to an open situation, scaffold her off the ground, turned her keel to the sun and kindled fires under her to dry her more expediciously. I then set a couple of men to pounding of charcoal to form a composition with some beeswax which we have and buffaloe tallow now my only hope and resource for paying my boat; I sincerely hope it may answer yet I fear it will not. the boat in every other rispect completely answers my most sanguine expectation; she is not yet dry and eight men can carry her with the greatest ease; she is strong and will carry at least 8,000 lbs. with her suit of hands; her form is as complete as I could wish it. the stitches begin to gape very much since she has began to dry; I am now convinced this would not have been the case had the skins been sewed with a sharp point only and the leather not cut by the edges of a sharp nedle. * * *

* * *

[Lewis] *Sunday July 7th 1805.*

The weather warm and cloudy therefore unfavourable for many operations; I keep small fires under the boat; the blowing flies are innumerable about it; the moisture retained by the bark prevents it from drying as fast as it otherwise would. we have no

tents; the men are therefore obliged to have recourse to the sails for shelter from the weather and we have not more skins than are sufficient to cover our baggage when stoed away in bulk on land. many of the men are engaged in dressing leather to cloath themselves. their leather cloathes soon become rotton as they are much exposed to the water and frequently wet. * * *

* * *

[Lewis] *Monday July 8th 1805.*

Capt. Clark Determined to make a second effort to replace the notes which he had made with rispect to the river and falls accordingly he set out after an early breakfast and took with him the greater part of the men[1] with a view also to kill buffaloe should there be any in that quarter. * * *

The day being warm and fair about 12 OCk. the boat was sufficiently dry to receive a coat of the composition which I accordingly applyed. this adds very much to her appearance whether it will be effectual or not. it gives her hull the appearance of being formed of one solid piece. after the first coat had cooled I gave her a second which I think has made it sufficiently thick. * * *

[Clark] July 8th Monday 1805

A worm morning flying Clouds. I deturmin take the width of the river at the falls & the Medison river and to take the greater part of the men which Can be Speared to Kill Buffalow for their Skins as well as meat, devided the party & Sent them in different directions to hunt & proceeded my Self to the mouth of

Medison river measured it and found it to be 137 yards wide, in the narrowest art of the Missouri imediately above Medison river the Missouri is 300 yards wide, below and a little above the falls 1440 yards wide with the direction of the upper great fall 580 yards wide, at the great Spring 270 yards wide, at the handsom falls of 47 ft. 8 I. the river is 473 yards wide, at the lower great falls the river is confined within 280 yards, below the falls the water occupies 93 yards only— after takeing the wedth of the river at those Sundery placies I returned thro' the plains in a direct line to Camp. Some rain this evening after a verry hot day.— the mountains which are in view to the South & N W. are Covered with Snow. those nearer us and form a ¾ Circle around us is not Covered with Snow at this time. The hunters killed 3 buffalow, two antelopes, & a Deer to day— the emence herds of buffalow which was near us a fiew days ago, has proceeded on down the river, we Can See but a fiew Bulls in the plains

* * *

[Lewis] *Tuesday July 9th 1805.*

* * * we corked the canoes and put them in the water and also launched the boat, she lay like a perfect cork on the water. five men would carry her with the greatest ease. I now directed seats to be fixed in her and oars to be fitted. the men loaded the canoes in readiness to depart. just at this moment a violent wind commenced and blew so hard that we were obliged to unload the canoes again; a part of the baggage in several of them got wet before it could be taken out. the wind continued violent untill late in the evening by which time we discovered that a greater

part of the composition had seperated from the skins and left the seams of the boat exposed to the water and she leaked in such manner that she would not answer. I need not add that this circumstance mortifyed me not a little; * * * I therefore relinquished all further hope of my favorite boat and ordered her to be sunk in the water, that the skins might become soft in order the better to take her in peices tomorrow and deposite the iron fraim at this place as it could probably be of no further service to us. had I only singed my Elk skins in stead of shaving them I beleive the composition would have remained and the boat have answered; at least untill we could have reached the pine country which must be in advance of us from the pine which is brought down by the water and which is probably at no great distance where we might have supplyed ourselves with the necessary pich or gum. but it was now too late to introduce a remidy and I bid a dieu to my boat, and her expected services.—[1] The next difficulty which presented itself was how we should convey the stores and baggage which we had purposed carrying in the boat. both Capt. [*NB: Capt*] Clark and myself recollected having heard the hunters [*NB: Capt Clark had previously sent them in quest of timber for the purpose*] mention that the bottoms of the river some few miles above us were much better timbered than below and that some of the trees were large. the idea therefore suggested itself of building two other canoes sufficiently large to carry the surplus baggage. on enquiry of the hunters it seemed to be the general opinion that trees sufficiently a large for this purpose might be obtained in a bottom on the opposite side about 8 miles distant by land and reather more than double that distance by water; accordingly Capt. Clark determined to set out early in the morning with ten of the best workmen and proceede by land to that place

while the others would in the mean time be employed by myself in taking the Boat in peices and depositing her, toge[the]r with the articles which we had previously determined to deposit at this place, and also in trasporting all the baggage up the river to that point in the six small canoes. this plan being settled between us orders were accordingly given to the party, and the ten men who were to accompany Capt. Clark had ground and prepared their axes and adds this evening in order to .prepare for an early departure in the morning. * * *

* * *

[Clark] *July 9th Tuesday 1805*

a clear worm morning wind from the S W Lanced the Leather boat, and found that it leaked a little; Corked Lanced & loaded the Canoes, burried our truk wheels, & made a Carsh for a Skin &,a fiew papers I intend to leave here

on trial found the leather boat would not answer without the addition of Tar which we had none of, haveing Substituted *Cole & Tallow* in its place to Stop the Seams &c. which would not answer as it Seperated from the Skins when exposed to the water and left the Skins naked & Seams exposed to the water this falire of our favourate boat was a great disapointment to us, we haveing more baggage than our Canoes would Carry. Concluded to build Canoes for to Carry them; no timber near our Camp. I deturmined to proceed on up the river to a bottom in which our hunters reported was large Trees &c.

1. Apparently the boat was abandoned for good; there is no record of its recovery on the return trip in 1806. Rose.

* * *

[Lewis] *Wednesday July 10th 1805.*

Capt. Clark set out with his party early this morning and passed over to the opposite side. after which I dispatched Sergt. Ordway with 4 Canoes and 8 men[1] to take up a load of baggage as far as Capt. Clark's camp and return for the remainder of our plunder. with six others[2] I now set to work on my boat, which had been previously drawn out of the water before the men departed, and in two hours had her fraim in readiness to be deposited. had a cash dug and deposited the Fraim of the boat, some papers and a few other trivial articles of but little importance. the wind blew very hard the greater part of the day. I also had the truck wheels buried in the pit which had been made to hold the tar. having nothing further to do I amused myself in fishing and caught a few small fish; they were of the species of white chub mentioned below the falls, tho' they are small and few in number. I had thought on my first arrival here that there were no fish in this part of the river. Capt. Clark proceeded up the river 8 miles by land (distance by water 23¼)[3] and found 2 trees of Cottonwood and cut them down; one proved to be hollow and split in falling at the upper part and was somewhat windshaken at bottom; the other proved to be much windshaken. he surched the bottom for better but could not find any he therefore determined to make canoes of those which he had fallen; and to contract their length in such manner as to clear the craks and the worst of the windsken

parts making up the deficiency by allowing them to be as wide as the trees would permit. they were much at a loss for wood to make axhandles. the Chokecherry is the best we can procure for this purpose and of that wood they made and broke thir 13 handles in the course of this part of a day. had the eyes of our axes been round they would have answered this country much better. the musquetoes were very troublesome to them as well as ourselves today. Sergt. Ordway proceeded up the river about 5 miles when the wind became so violent that he was obliged to ly by untill late in the evening when he again set out with the canoes and arrived within 3 miles of Capt. Clark's Camp where he halted for the night. about five miles above whitebear camp there are two Islands [*NB: Qu*] in the river covered with Cottonwood box alder and some sweet willow also the undergrowth like that of the islands at this place.—

* * *

[Clark] *July 10th Wednesday 1805*

a fair windey day wind hard the most of the day from the S. W.— rained modderately all last night (by Showers) we dispatched Serjt. Ordway with 4 Canoes loaded & 8 men by water to assend as high as I Should have found timber for Canoes & formed a Camp;—. I Set out with Sergt. Pryor four Choppers two Involids[4] & one man to hunt, Crossed to the Std. Side and proceeded on up the river 8 miles by land (distance by water 23¼ ms.) and found two Trees which I thought would make Canoes, had them fallen, one of them proved to be hollow & Split at one End & verry much win Shaken at the other the other much win Shaken. we Serched the bottoms for better trees and made ε

trial of Several which proved to be more indifferent. I deturmined to make Canoes out of the two first trees we had fallen, to Contract thir length so as to clear the hollow & winshakes, & ad to the width as much as the tree would allow. The Musquitors emencely noumerous & troublesom, Killed two deer & a goat. The Canoes did not arrive as I expected, owing to the hard wind which blew a head in maney places. we ar much at a loss for wood to make ax hilthes,[5] 13 hath been made & broken in this piece of a day by the four Choppers, no other wood but Cotton Box elder Choke Cherry and red arrow wood. we Substitute the Cherry in place of Hickory for ax hilthes ram rods. &c. &c.

* * *

3. This camp, where Clark remained until July 15 making canoes, is in Cascade County, Montana, on the north side of the Missouri, just southeast of Antelope Butte and a few miles east of the present town of Ulm. It is misplaced on *Atlas* map 61. Clark's route by land is shown by a dotted line on the *Atlas* maps. *Atlas* map 54; MRC 78.

* * *

[Lewis] *Thursday July 11th 1805.*

We had now nothing to do but wait for the canoes; as they had not returned I sent out some of the small party with me to hunt; in the evening they returned with a good quantity of the flesh of a fat buffaloe which they had killed. the canoes not arrived this evening.
* * *

This morning Capt. Clark dispatched Bratton to meet the canoes which were detained by the wind to get a couple of axes. he obtained the axes and returned in about two hours. this man has been unable to work for several days in consequence of a whitlow on one of his fingers; a complaint which has been very common among the men. one of the canoes arrived at Capt. Clarks camp about 10 A. M. this he had unloaded and set a few miles up the river for a buffaloe which had been killed, the party sent killed another in thir rout and brought in the flesh and skins of both they were in good order; his, hunters had also killed two deer and an Antelope yesterday. the three other canoes did not arrive untill late in the evening in consequence of the wind and the fear of weting their loads which consisted of articles much more liable to be injured by moisture than those which composed the load of that which arrived in the morning. Capt. C. had the canoes unloaded and ordered them to float down in the course of the night to my camp, but the wind proved so high after night that they were obliged to put too about 8 miles above and remain untill morning. Capt. C. kept the party with him busily engaged at the canoes. his hunters killed and brought in three very fat deer this evening.—

[Clark] *July 11th Thursday 1805*

a fair windey morning wind S. W. I dispatch W Bratten (who cannot work he haveing a turner rising on his finger) to meat the Canoes & bring from them two axes, which is necessary for the work at the perogues or Canoes, and is indespenceable he returned in about two hours & in formed that one Canoe was within three miles, about 1 oClock the Canoe which Bratten left arrived haveing killed a

Buffalow on the river above our Camp, at which place the bend of the river below & that above is about 1 mile apart, I dispatched Seljt. Pryor with 3 men in the Canoe to get the meat they killed another buffalow near the one killed and brought the meat of both down. at Sunset the 3 remaining Canoes arrived unloaded & returned imeadeately with orders to flote down to Camp at the portage to night for the purpose of takeing up the remaining baggage. * * *

* * *

[Lewis] *Friday July 12th 1805.*

The canoes not having arrived and the wind still high I dispatched Sergt. Gass with three men to join Capt. Clark and assist in completing the canoes retaining only a few who in addition to those in the canoes that I expect every moment, will be sufficient to man the six canoes and take up all the baggage we have here at one load. I feel excessively anxious to be moving on. the canoes were detained by the wind untill 2 P. M. when they set out and arrived at this place so late that I thought it best to detain them untill morning morning. * * *

* * *

[Lewis] *Saturday July 13th 1805.*

This morning being calm and Clear I had the remainder of our baggage embarked in the six small canoes and maned them with two men each. I now bid a cheerfull adue to my camp and passed over to the opposite shore. * * * from the head of the white bear Islands I passed in a S. W. direction and struck the

Missouri at 3 miles and continued up it to Capt. Clark's camp where I arrived about 9 A. M. and found them busily engaged with their canoes Meat &c. * * * The canoes and party with Sergt. Ordway poceeded up the river about 5 miles when the wind became so violent that two of the canoes shiped a considerable quanty of water and they were compelled to put too take out the baggage to dry and dense the canoes of the water. * * *

* * *

[Lewis] *Sunday July 14th 1805.*

This morning was calm fair and warm; the Musquetoes of course troublesome. all hands that could work were employed about the canoes. which we completed and launched this evening. the one was 25 feet and the other 33 feet in length and about 3 feet wide. we have now the seats and oars to make and fit &c. I walked out today and ascended the bluffs which are high rockey and steep; I continued my rout about 3½ when I gained a conspicuous eminence about 2 mes. distant from the river a little below the entrance of Fort Mountain Creek. from this place I had a commanding view of the country and took the bearings of the following places. (vox)

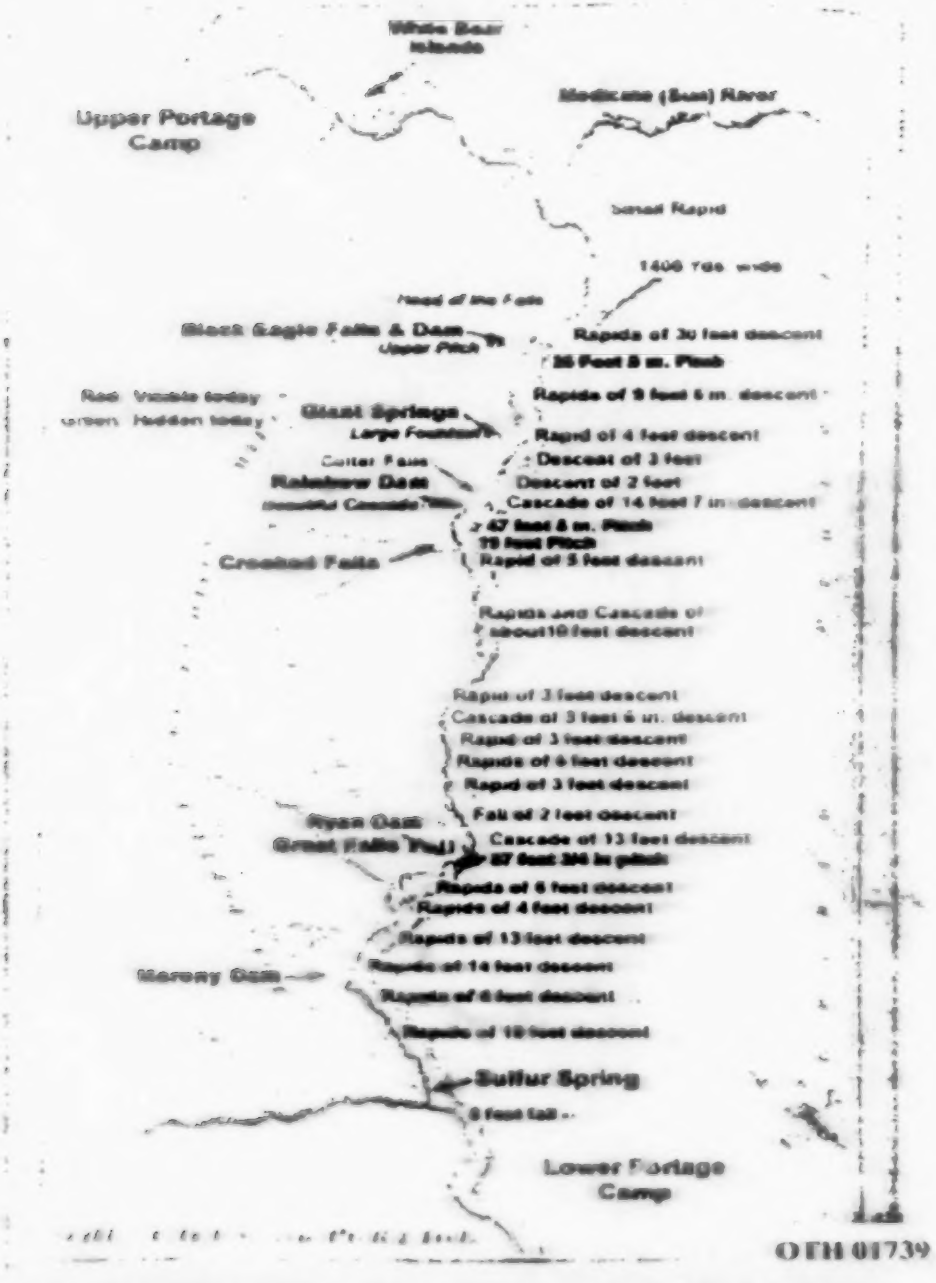
		miles
To the point at which the Missouri first enters the Rocky Mountains	S. 28°W.	25

To the termineation of the 1st Chain of Rocky Mountains; northwardly, being that through which the Missouri first passes	N. 73°W	80
To the extremity or tirmineation of 2cd Chain of the Rocky Mountains	N. 65 W.	150
To the most distant point of a third and continued chain of the same mts.	N. 50°W.	200
The direction of the 1st Chain of Rocky Mouts. from S. 20 E. to N 20 W.		
The direction of the 2cd Do. from S 45 E. to N. 45. W.—		
To Fort mountain	S. 75°W.	8

The country in most parts very level and in others swelling with gentle rises and decents, or in other wirds what I have heretofore designated a wavy country destitute of timber except along the water-courses. On my return to camp found Sergt. Ordway had arrived with all the canoes about noon and had unloaded them every preperation except the entire completion of the oars poles &c is made for our departure tomorrow. the grass and weeds in this bottom are about 2 feet high; which is a much greater hight than we have seen them elsewhere this season.
* * *

* * *

EXHIBIT I


White Bear Islands
Upper Portage Camp
Medicine (Sun) River
Small Rapid
1400 Yds. wide
Head of the Falls
Black Eagle Falls & Dam
Upper Pitch
Rapids of 30 feet descent
Rapids of 9 feet 6 in. descent
Red: Visible today
Green: Hidden today
Giant Springs
Large Fountains
Rapid of 4 feet descent
Descent of 3 feet
Colter Falls
Rainbow Dam
Descent of 2 feet
Cascade of 14 feet 7 in. descent
Crooked Falls
Rapid of 5 feet descent
Rapids and Cascade of about 10 feet descent
Rapid of 3 feet descent
Cascade of 3 feet 6 in. descent
Rapid of 3 feet descent
Rapids of 6 feet descent
Rapid of 3 feet descent
Fall of 2 feet descent
Ryan Dam
Great Falls Falls
Cascade of 13 feet descent
Rapids of 6 feet descent
Rapids of 4 feet descent
Rapids of 13 feet descent
Rapids of 14 feet descent
Morony Dam
Rapids of 6 feet descent
Rapids of 10 feet descent
Sulfur Spring
8 feet fall
Lower Portage Camp

OTH 01739

EXHIBIT J

Introduction to Volume 5

Three Forks of Missouri River, Montana, to the Cascades of Columbia River, Washington-Oregon

July 28—November 1, 1805

Lewis and Clark had reached the Three Forks of the Missouri, which they named the Jefferson, the Madison, and the Gallatin, on July 27, 1805. Beyond lay the major obstacle in their journey to the Pacific, the passage over the Rocky Mountains to some navigable tributary of the Columbia River. To make this trip they needed the assistance of the Shoshone Indians, Sacagawea's people, and although they had seen signs indicating the presence of these people, none of them had yet appeared.

What Lewis and Clark hoped to find was the "pyramidal height of land," the point from which, geographical theorists believed, the great rivers of the West flowed toward the Pacific, the Gulf of Mexico, and the Gulf of California. It would be, in 1805, the closest thing still possible to the Northwest Passage that so many mariners had yearned and searched for, that James Cook had sought less than thirty years before, and that Alexander Mackenzie had failed to find in the previous decade but had thought might

exist somewhere in the continent. The information supplied by the Mandans and Hidatsas suggested there might yet be an easy portage to the Columbia headwaters.

The captains decided to proceed up the Jefferson, the westernmost fork, with Lewis going ahead with a few men to search for the Shoshones. Clark, unable to do much walking because of illness and a bad boil on his ankle, would command the main party in the canoes. The passage of the canoes became increasingly difficult as the streams became more shallow and unnavigable because of rapids. Much of the time the men had to draw the canoes along by hand, wading in the water. The party moved on up the Jefferson and then its main tributary, the Beaverhead. Lewis proceeded ahead, past the forks of the Jefferson and such landmarks as Beaverhead Rock. He left a message for Clark to take the Beaverhead River instead of the west fork, which they named Wisdom River (today's Big Hole River), but a beaver chewed down the pole on which he left the message and Clark took the wrong fork, causing another day's delay.

Lewis was amazed that the rivers penetrated so far into the mountains while still being navigable, but he knew that this situation would not long continue. On August so he reached the forks of the Beaverhead River and followed the western fork into the valley the captains later called "Shoshone Cove." The next day, following an Indian trail, the advance party came upon a Shoshone on horseback. Lewis tried to convince him by signs that they were friendly, but the Indian evidently feared they were Blackfeet raiders and fled.

On August 12 Lewis and his three men continued following Indian paths up later Trail Creek. At the head of that stream they reached what they considered the source of the "heretofore deemed endless Missouri." A short distance beyond was the ridge of the Continental Divide. From this vantage point Lewis could look west and and see further ranges of mountains—proof that the portage to the waters of the Columbia would not be as easy as he had hoped. His immediate problem, however, remained that of making friendly contact with the Shoshones.

Lewis's party had crossed Lemhi Pass into Idaho, the first U.S. citizens to traverse the Continental Divide. On August 13 they continued down into the valley of the Lemhi River, still following the Indian trail. Once again they encountered some Indians, who fled at their approach. Finally they found a woman and two girls who did not see them until they were quite close. One of the girls fled, but the woman and the other girl apparently thought it was too late to run and sat waiting for the, strangers to kill them. Lewis took the woman's hand, repeating the word "*ta-ba-bone*," which he evidently obtained from Sacagawea and which he thought meant "white man." He rolled up his sleeve to show his white skin And gave the two Shoshones presents. Somehow he calmed them and, through George Drouillard's sign language, persuaded them to call back the girl who had fled before she could raise an alarm in the main Shoshone camp.

Through these three Shoshones Lewis was able to make contact. with their people who were camped on the Lemhi River. The chief, Cameahwait, seemed friendly, but his people were still afraid that the strangers were in league with the Blackfeet and would

betray them into the hands of their enemies. Lewis, trying to persuade them to go with hire to meet Clark's party on the Beaverhead River, feared that they would take alarm and disperse into the mountains, where he knew that he would never find them, and that his command would be left stranded in the mountains with winter corning on. To prevent this he used every form of persuasion he could think of, including promises that white traders would follow him and would provide the Shoshones with trade goods, such as guns to use against their enemies. He gave the chief his own gun, saying that Cameahwait could shoot him if he proved unfaithful. Recovering a message he himself had left at the forks of the Beaverhead for Clark, he stalled for time, saying it was a message from Clark that the main party would soon be there. These means, along with stories about a man with black skin and another with red hair----wonders that greatly intrigued the Indians—persuaded them to wait at the forks until Clark's party arrived on August 17. Such was the captains' relief that they called the campsite at the forks of the Beaverhead "Camp Fortunate."

Geographical information obtained from the Shoshones was not encouraging. A reconnaissance by Clark confirmed that the principal streams in the vicinity, though they did flow toward the Columbia, were unnavigable because of rapids. The only alternative was to obtain horses from the Shoshones and cross the mountains by land. Fortunately, they secured the services of an Indian they called "Old Toby," who knew of a route over the ranges. The latter part of. August and much of September would be consumed by the overland trek, which would take them back into Montana, then back to Idaho, and

would include a journey over the rugged Lolo Trail. Along the way they met the Flathead Indians, another tribe who had never seen white men.

The trip over the Bitterroot Mountains via the Lolo Trail was perhaps the severest test of the whole expedition. Winter was already beginning in the high country in September, and the party would struggle through deepening snow. Lack of game forced them to kill and eat some of their horses. Pack animals slipped and fell down steep mountainsides. Old Toby misled them at one point, costing even more time. Finally the captains decided to adopt their old procedure of sending one of the officers ahead with a small party to find open country and make contact with friendly Indians. Accordingly, Clark set out with six men on September 18 and two days later reached Weippe Prairie, an open area. in west-central Idaho, where he was the first white man to meet the Nez Perce Indians. The long and difficult trip from mountain pass to meadows dashed all hope of a short portage across the Rocky Mountains and ended dreams of an easy passage to the Orient.

The Indians offered the party roots to eat, but the food proved a mixed blessing, for it caused indigestion and diarrhea among most of the Corps' men. In spite of their suffering they established a camp on the Clearwater River and began building dugout canoes for the trip to the Pacific. On October 7 they were ready to start out, leaving their horses with the Nez Perces to await their return.

The Clearwater flows into the Snake and the Snake into the Columbia. Following these streams, the Corps passed out of the mountains down to the Great

Columbian Plain. The party had traveled through a variety of ecosystems previously unknown to Anglo-Americans. From the Great Plains, semi-arid and largely treeless yet teeming with game, they had entered the Rocky Mountains, the first English-speaking whites to do so with the exception of Alexander Mackenzie's Canadian party to the north of a few years earlier. In the mountains they found a region heavily wooded in many places, where the game necessary for sustenance was scarce and the natives often lived on the edge of starvation. Even so, they encountered unfamiliar species at every turn. They saw the birds that would bear the captains' names, Lewis's woodpecker and Clark's nutcracker. They were the first whites on record to examine the hide and horns of the mountain goat, and Clark caught a distant sight of one, although the party would never obtain a full specimen. In traversing the mountains they saw new trees such as grand fir and lodgepole pine. On the western side of the mountains they found the camas root, a vital element in the diet of tribes like the Nez Perces. Their own diet shifted drastically as they passed from the abundance of buffalo and elk on the plains to the scarcity of the mountains. They supplemented the increasingly scarce deer with roots and with the flesh of their own horses. The changes sometimes had drastic effects on their health.

Coming down to the Columbian Plain, they again entered a new world, barren of trees like the Great Plains but also barren of game. They shifted from an area inhabited by horseback tribes who hunted on the plains east of the mountains to tribes who traveled by canoe and subsisted on salmon and roots. They were able to observe the end of the great salmon run on the Columbia, the numbers of which Clark found

"incrediable to say." The steelhead trout appeared near the falls of the Columbia. Clark thought he saw a sea otter, but this mammal never leaves salt water and the creature sighted was probably the harbor seal, another species new to Anglo-Americans.

The captains had expected to find rapids and falls on the Columbia, and they did. They reached the Celilo, or Great, Falls on October 22, and beyond them lay the Cascades, passing through the mountain range of the same name. They portaged some of these obstacles and, to save time, ran through some others, lowering the canoes with elkskin ropes. Beyond the Cascades lay the final run to the Pacific Coast, which they had come so far to reach.

* * *

Chapter Eighteen

From Three Forks to Beaverhead Rock

July 28—August 10, 1805

[Lewis] *Sunday July 28th 1805.*

My friend Capt. Clark was very sick all last night but feels himself somewhat better this morning since his medicine has opperated.[1] I dispatched two men early this morning up the S. E. Fork to examine the river; and permitted sundry others to hunt in the neighbourhood of this place. Both Capt. C. and myself corrisponded in opinon with rispect to the impropriety of calling either of these streams the Missouri and

accordingly agreed to name them after the President of the United States and the Secretaries of the Treasury and state having previously named one river in honour of the Secretaries of War and Navy. In pursuance of this resolution we called the S. W. fork, that which we meant to ascend, Jefferson's River in honor of (that illustrious personage) Thomas Jefferson. [*NB?: the author of our enterprise.*][2] the Middle fork we called Madison's River in honor of James Madison, and the S. E. Fork we called Gallitin's River in honor of Albert Gallitin.[3] the two first are 90 yards wide and the last is 70 yards. all of them run with great valocity and thow out large bodies of water. Gallitin's River is reather more rapid than either of the others, is not quite as deep but from all appearances may be navigated to a considerable distance. Capt. C. who came down Madison's river yesterday and has also seen Jefferson's some distance thinks Madison's reather the most do much walking because of illness and a bad boil on leis ankle, would command rapid, but it is not as much so by any means as Gallitin's. the beds of all these streams are formed of smooth pebble and gravel,[4] and their waters perfectly transparent; in short they are three noble streams. there is timber enough here to support an establishment,[5] provided it be erected with brick or stone either of which would be much cheaper than wood as all the materials for such a work are immediately at the spot. there are several small sand-bars along the shores at nogreat distance of very pure sand and the earth appears as if it would make good brick.[6] I had all our baggage spread out to dry this morning; and the day proving warm, I had a small bower or booth erected for the comfort of. Capt. C. our leather lodge when exposed to the sun is excessively hot. * * * all those who are not hunting altho' much fatiegued are busily engaged in dressing

their skins, making mockersons lexing [leggings] &c to make themselves comfortable. The Musquetoes are more than usually troublesome, the knats are not as much so.[8] * * * those whom I had sent up Gallitin's river reported that after it passed the point to which I had seen it yesterday that it turned more to the East to a considerable distance or as far as they could discover the opening of the mountains formed by it's valley wihich was many miles. The bottoms were tolerably wide but not as much so as at or near it's mouth. It's current is rappid and the stream much divided with islands but sufficiently deep for canoe navigation. Our present camp is precisely on the spot that the Snake Indians were encamped at the time the Minnetares of the Knife R. first came in sight of them five years since. * * *

* * *

[Clark] *July 28th Sunday 1805*

I was verry unwell all night, Something better this morning, a very worm day untill 4 oClock when the wind rose & blew hard from the S W. and was Cloudy, The Thermometr. Stood at 90° above o in the evening a heavy thunder Shower from the S W. which continud at intervales untill after dark, Several deer killed to day men all employed dressing Skins for Clothes & Mockersons, two men went up the East fork & reports that it is nearly the Size of the N. fork, verry rapid & has maney Islands. Our present Camp is the prosise Spot the Snake Indians were Camped at the time the Minetarries came in Sight, attacked & killed 4 men 4 women & a number of boys, & made prisoners of all the females & 4 boys.

* * *

8. The mosquitoes are Aedes vexans and the gnats are probably the buffalo gnat, Simulium sp.

* * *

[Lewis] *Tuesday July 30th 1805.*

Capt. Clark being much better this morning and having completed my observations we reloaded our canoes and set out, ascending Jeffersons river. Sharbono, his woman two invalleds and myself walked through the bottom on the Lard. side of the river about 4 ½ miles when we again struck it at the place the woman informed us that she was taken prisoner.[1] here we halted untill Capt. Clark arrived which was not until' after one P. M. the water being strong and the river extreemly crooked. we dined and again proceeded on; as the river now passed through the woods the invalleds got on board together with Sharbono and the Indian woman; I passed the river and continued my walk on the Stard. side. saw a vast number of beaver in many large dams which they had maid in various bayoes of the river which are distributed to the distance of three or four miles on this side of the river over an extensive bottom of timbered and meadow lands intermixed. in order to avoid these bayoes and beaver darns which I found difficult to pass I directed my course to the high plain to the right which I gained after some time with much difficulty and waiding many beaver dams to my waist in mud and water. I would willingly have joined the canoes but the brush were so thick, the river crooked and bottoms intercepted in such manner by the beaver dams, that I found it uceless to attempt to find them,

and therefore proceeded on up the river in order to intersept it where it came near the plain and woult be more collected into one channel. at length about sunset I arrived at the river only about six miles from my calculation on a direct line from the place 1 had left the canoes but I thought they were still below me. I found the river was divided where I reached it by an Island and was therefore fearful! that they might pass without my seeing them, and went down to the lower point of the large island; here I discovered a small Island,.close under the shore on which I was; I passed the narrow channel to the small island and examined the grayly bar along the edge of the river for the tracks of the men, knowing from the appearance of the river at this place that if they had passed they would have used the cord on the side where I was. I saw no tracks and was then, fully convinced that they were below me. I fired my gun and hallooed but counld hear nothing of them. * * *

* * *

[Clark] *July 30th Monday 1805*[5]

We Set out 8 oClock and proceeded on 13½ miles up the N. fork the river verry rapid & Sholey the Channel entirely Corse gravel[6] (passed the) many Islands and a number of Chanels in different directions thro' the bottom &c. passed the place the Squar interpretress was taken, one man with his Sholder Strained,[7] 2 with Turners, we Camped on the Std. Side the evening Cool. Capt Lewis who walkd on Shore did not join me. this evening

1. Probably in the vicinity of the town of Three Forks, Gallatin County, Montana. Atlas Map 65.

* * *

3. Clark camped in Jefferson, County, Montana, just below a mouth of Philosophy River (present willow Creek), and about two miles north of the town of Willow Creek. Atlas map 65.

* * *

6. Although Jefferson River meanders extensively here through a wide flood plain, its bed is dominantly course gravel and cobbles. These are carried downstream from mountain sources during the flood flows of the main river and its tributaries.

* * *

[Lewis] *Wednesday July 31st 1805.*

This morning I waited at my camp very impatiently for the arrival of Capt. Clark and party; I observed by my watch that it was 7 A. M. and they had not come in sight. I now became very uneasy and determined to wait until 8 and if they did not arrive by that time to proceed on up the river taking it as a fact that they had passed my camp some miles last evening. just as I set out. to pursue my plan I discovered Charbono walking up shore some distance below me and waited until] arrived I now learnt that the canoes were behind, they arrived shortly after. their detention had been caused by the rapidity of the water and the circuitous rout of the river. they halted and breakfasted after which we all set out again and I continued my walk on the. Stard. shore the river now becomes more collected the islands tho' numerous ar generally small. the river continues rapid and is from

90 to 120 yd. wide has a considerable quantity of timber in it's bottoms. towards evening the bottoms became much narrower and the timber much more scant. high hills set in close on the Lard. and the plain high waivy or reather broken on the Stard. and approach the river closely for a shot distance vally above 1 ½ M wd. About one mile above Capt. Clark's encampment of the last evening the principall entrance of a considerable river discharges itself into Jefferson's river. this stream is a little upwards of 30 yd. wide discharges a large quantity of very clear water it's bed like that of Jefferson's river is pebble and gravel: it takes it's rise in the snowclad ,mountains between Jefferson's and Madison's Rivers to the S. W. and discharges itself into the former by seven mouths it has some timber in it's bottoms and vas numbers of beaver and Otter.[1] this stream we call River Philosophy.[2] the rock of the clifts this evening is a hard black grannite like that of the clifts of most parts of the river below the limestone clifts at the 3 forks of the Missouri.[3] * * *

* * *

[Clark] *July 31st Tuesday 1805*

a fair Morning Cap Lewis out all night, we arrived at his Camp to brackfast, he was without a blanket, & he killed a Duck whiche Suped on &c. the river as yesterday Sholey & rapid, passed the lower mouth of a Small river on the Lard. in the morning & the upper mouth a [blank] Miles above, this little river is the one I camped on the 26th & heads in the Snow mountains to [10] the S W. proceeded on verry well and Camped on a Small Island a little above the place I Camped the 25th instant at the mouth of a run on the Lard Side,[11]

the bottoms from the Mouth of the river extend to 2 1/(2) Miles & enter a Short & high hill which is about 1 mile thro' and, the river then passes thro a 2d vallie of about 1 ½ Miles wide, Some Islands. below this Knobe the river is Crouded with Islands, we are out of fresh meet, & nothing killed to day The Mountains on either Side is high & rough we have two men with toumers and unable to work.

Capt Lewis deturmin to proceed on with three me[n] in Serch of the Snake Indians, tomorrow[12]

* * *

[Lewis] *Thursday August 1st 1805.*

This morning we set out early and proceeded on tolerably well until 8 OC'k. by which time. we had arrived within a few miles of a mountain through which the river passes. we halted on the Stard. side and took breakfast. after which or at ½ after 8 A. M. as had been previously concerted betwen Capt. Clark and myself I set out with three men in surch of the Snake Indians or Sosonees. our rout lay over a high range of mountains on the North side of the river. Capt C. recommended this rout to me no doubt from a beleif that the river as soon as it passed this chain of mountains boar to the N. 'of W. he having on the 26th ult. ascended these mountains to a position from whence he discoved a large. valley passing between the mountains which boar to the N. W. and presumed that the river passed in that direction; this however proved-to be the passage of a large creek which discharged itself into the river just above this range of mountains, the river bearing to the S. W. we were therefore thrown several miles out of our rout. as soon as we

discovered our error we directed our course to the river which we at length gained about 2 P. M. much exhausted by the heat of the day, the roughness of the road and the want of water. * * *

Shortly after I left Capt. Clark this morning he proceed on and passed through the mountains; they formed tremendious clifts of ragged and nearly perpendicular rocks; the lower part of this rock is of the black grannite before mentioned and the upper part a light coloured freestone.[8] these clifts continue for 9 miles and approach the river very closely on either side. he found the current verry strong. Capt. C. killed a big horn on these clifts which himself arid party dined on. after passing this range of mountain he entered this beautiful valley in which we also were it is from 6 to 8 miles wide. The river is crooked and crouded with islands, it's bottoms wide fertile and covered with fine grass from 9 inches to 2 feet high and possesses but a scant proportion of timber, which consists almost entirely of a few narrow leafed cottonwood trees9 distributed along the verge of the river. * * * just the upper side of the mountain there is a bad rappid here the toe line of our canoe broke in the shoot of the rapids and swung on the rocks and had very nearly overset. a small distance above this rapid a large bold Creek falls in on Lard side which we call Frazier's Creek after Robt. Frazier.[12] * * *

* * *

[Clark] *August 1st Wednesday 1805*

A fine day Capt. Lewis left me at 8 oClock just below the place I entered a verrey high mountain which jutted its tremedious Clifts on either Side for 9

Miles, the rocks ragide Some verry dark & other part verry light rock the light rocks is Sand Stone.[14] The water Swift & very Sholey. I killed a *Ibix* on which the whole party Dined, after passing through the Mountain we entered a wide extesive value of from 4 to 8 Miles wide verry leavell a Creek falls in at the Commencement of this Vallie on the Lard Side, the river widens & spreds into Small Chapels. W[e] encamped on the Lard Side opposit a large Creek I sent out Jo: & R fields to hunt this evening they killed 5 Deer, I saw a large Bear eateing Currents this evining The river so rapid that the greatest exertion is required by all to get the boats on wind S W Murckery at sun rise 50° Ab. o

* * *

[Lewis] *August 2nd 1805.*

We resumed our march this morning at sunrise the weather was fair and wind from N. W. finding that the river still boar to the south I determined to pass it if possible to shorten our rout this we effected about five miles above our camp of last evening by wading it.[1] found the current very rappid about go yards wide and waist deep this is the first time that I ever dared to make the attempt to wade the river, tho' there are many places between this and the three forks where I presume it migh be attempted with equal success. the valley though which our rout of this . [day] lay and through which the river winds it's meandering course is a beatifull level plain with but little timber and that on the verge of the river. the land is tolerably fertile, consisting of a black or dark yellow loam,[2] and covered with grass from 9 Inches to 2 feet high. the plain ascends gradually on either side of the river to the

bases of two ranges of mountains which ly parrallel to the river and which terminate (it's) the width of the vally. the tops of these mountains were yet partially covered with snow while we in the valley. * * *

* * *

[Clark] *August 2dnd Friday 1805*

a fine day Set out early the river has much the Same kind of banks Chanel Current &c. as it had in the last vallie, I walked out this morning on Shore & Saw Several rattle Snakes in the plain, the wind from the S W we proceeded on with great dificuelty from the rapidity of the current & rapids, abt. 15 miles and Encamped on the Lard Side, saw a large Gangue of Elk at Sunset to the S W. passed a Small Creek on the Staid Side [*ML?: called birth Creek*] and maney large and Small Islands. Saw a number of young Ducks as we have also Seen everry Day, Some geese I saw Black woodpeckers— I have either got my foot bitten by Some poisonous insect or a turner is riseing on the inner bone of my ankle which is painful]

* * *

[Clark] *August 3rd Saturday 1805*

a fine morning wind from the N E I walked on Shore & killed a Deer in my walk I saw a fresh track which I took to be an Indian from the Shape of the foot as the toes turned in, I think it probable that this Indian Spied our fires and Came to a Situation to view us from the top of a Small knob on the Lard Side. the river more rapid and Sholey than yesterday one R.F. man killed a large panther on the Shore we are oblige

to haul over the Cones Sholey in maney places where the Islands are noumerours and bottom Sholey, in the evening the river more rapid and Sholey we encamped on an Island avove a part of the river which passed thro a rockey bed enclosed on both sides with thick willow current & red buries &c &c passed a bold Stream which heads in the mountains to our right and the drean of the minting Snow on the Montn. On that side ar in View— at 4 oClock passed a bold Stream which falls from a mountn in three Channels to our left, the Greater portion of the Snow on this mountain is melted, but little remaining near us * * *

* * *

[Lewis] *Sunday August 4th 1805.*

Set out very early this morning and Steered S. E. by E. 4 M. when we eased a bold runing Creek 12 yds. wide, the water of which was dear and very cold. it appears to be formed by four dranes from the snowey mountains to our left. after passing this creek we changed our direction to S. Ea passing obliquely across a valley which boar E leaving the valley we had pursued for the two peceeding days. at the distance of 3 Ms. We passed a handsome little river which meanders through this valley; it is about 30 yds wide, affords a considerable quantity of water and appears as if it might be navigated some miles. the currant is not rapid nor the water very clear; the banks are low and the bed formed of stone and gravel.[3] I now changed my rout to S. W. passed a high plain which lies betwen the valleies and returned to the South valley, in passing which I fell in with a river about 45 yds. wide gravley bottom gentle currant waist deep and water of a whitish blue tinge. this stream we

waded and continued our rout down it to the entrance of the river just mentioned about ¾ of a mile. still continuing down we passed the entrance of the creek about 2 miles lower down; and at the distance of three miles further arrived at it's junction with a river 50 yds. wide which Comes from the S. W. and falling into the South valley runs parallel with the middle fork about 12 miles before it forms a junction. I now found that our encampment of the last evening was about 1 ½ miles above the entrance of this large river on Stard. this is a bold rappid and Clear Stream, it's bed so much broken and obstructed by gravley bars and it's waters so much subdivided by Islands that it appears to me utterly impossible to navigate it with safety. the middle fork is gentle and possesses about $^{2}/_{3}$rds as much water as this stream. it's course so far as I can observe it is about S. W., and from the opening of the valley I beleive it still bears more to the West above it may be safely navigated. it's water is much warmer then the rapid fork and it's water more turbid; from which I conjecture that it has it's sources at a greater distance in the mountains and passes through an opener country than the other. under this impression I wrote a note to Capt Clark, recommending his 'taking the middle fork povided he should arrive at this place before my return, which I expect will be the clay after tomorrow. * * * This morning Capt. Clark set out at sunrise, and sent two hunters ahead to kill some meat. at 8 A. M. he arrived at my camp of the zed inst. where he breakfasted; here he found a note which I had left for him at that place informing him of the oceurences of my rout Sec. the river continued to be crouded with Islands, rapid and shoaly. these shoals or riffles succeeded each other every 3 or four hundred yards; at those places they are obliged to drag the canoes over the stone there not being water enough to float them,

and betwen the rifles the current is so strong that they are compelled to have cecourse to the cord; and .being unable to walk on the shore for the brush wade in the river along the shore and bawl them by the cord; this has increased the pain and labour extreemly; their feet soon get tender and soar by wading and walking over the stones. these are also so slipry that they frequently get severe falls. being constantly wet soon makes them feble also. * * *

* * *

[Clark] *August 4th Sunday 1805*

a fine morning cool proceeded on verry early and Brackfast at the Camp Capt Lewis left yesterday morning, at this Camp he left a note informing that he discovered no fresh Sign of Indians &c. The river continued to be crouded with Islands Sholey rapid & clear, I could not walk on Shore to day as my ankle was Sore from a turner on that part. the method we are compelled to take to get on is fatigueing & laborious in the extreen, haul the Canoes over the rapids, which Suckceed each other every two or three hundred yards and between the. water rapid oblige to towe & walke on Stones the whole day except when we have poleing men wet all day Sore feet &c. &c Murcury at Sun rise 49 a. o,

* * *

[Lewis] *Monday August 5th 1805.*

As Charbono complained of being unable to march far today I ordered him and Sergt. Gass to pass the rappid river near our camp and proceed at their

leasure through the level bottom to a point of high timber about seven miles distant on the middle fork which was in view; I gave them my pack that of Drewyer and the meat which we had, directing them to remain at that place untill we joined them. I took Drewyer with me and continued my rout up the stard. side of the river about 4 miles and then waded it; found it so rapid and shallow that it was impossible to navigate it. continued up it on the Lard. side about 1½ miles further when the mountains put in close on both sides and arrose to great hight, partially covered with snow. from hence the course of the river was to the East of North. I took the advantage of a high projecting spur of the mountain which with some difficulty we ascended to it's summit in about half an hour. from this erninance I had a pleasing view of the valley through which I had passed many miles below and the continuation of the middle fork through the valley equally wide above me to the distance of about 20 miles when that also appeared to enter the mountains and disappeared to my view; however the mountains which termineate the valley in this direction appeared much lower than those up either of the other forks. on the rapid fork they appeared still to rise the one range towering above another as far as I could perceive them. the middle fork as I suspected dose bear considerably to the West of South and the gap formed by it in the mountains after the valley terminates is in the same direction. under these circumstances I did not hesitate in beleiving the middle fork the most proper for us to ascend.[2] about South from me, the middle fork approached within about 5 miles. I resolved to pass across the plains to it and return to Gass and Charbono, accordingly we set out and decended the mountain among some steep and difficult pices of rocks. * * *

This morning Capt. Clark set out at sunrise and dispatched Joseph & Reubin Fields to hunt. they killed two deer on one of which the party breakfasted. the river today they found streighter and more rapid even than yesterday, and the labour and difficulty of the navigation was proportionably increased, they therefore proceeded but slowly and with great pain as the men had become very languid from working in the water and many of their feet swolen and so painfull that they. could scarcely walk. at 4 P. M. they arrived at the confluence of the two rivers where I had left the note. this note had unfortunately been placed on a green pole which the beaver had cut and carried off together with the note; the possibility of such an occurrence never one occurred to me when I placed it on the green pole. this accedent deprived Capt. Clark of any information with ripect to the country and supposing that the rapid fork was most in the direction which it was proper we should pursue, or West, he took that stream and asscended it with much difficulty about a mile and encamped on an island that had been lately overflown and was yet damp;[6] they were therefore compelled to make beds of brush to keep themselves out of the mud. in ascending this stream for about a quarter of a mile it scattered in such a maner that they were obliged to cut a passage through the willow brush which leant over the little channels and united their tops. Capt. Clarks ankle is extreemly painfull to him this evening; the tumor has riot yet mature, he has a slight fever.— The men were so much fortiegued today that they wished much that navigation was at an end that they might go by land.—

* * *

[Clark] *August 5th Monday 1805*

a Cold Clear morning the wind from the S. E. the river Streight & much more rapid than yesterday, I Sent out Jo. & R. Fields to kill Some meat they killed 2 Deer 84. we brackfast on one of them and proceeded on with great dificuelety from the rapidity of the Current, and numerable rapids we had to encounter, at 4 oCloc. k P M Murcury 49 ab. o, passed the mouth' of principal fork which falls in on the Lard. Side, this fork is about the Size of the Stard. one less water reather not so rapid, its Course as far as can be Seen is S. E & appear to pass through between two mountains, the N W. fork being the one most in our course i. e. S 25 W. as far as I can.See, deturmind me to take this fork as the principal and the one most proper the S E fork is of a Greenish Colour & contains but little timber. The S W fok contains more timber than is below for Some distance,' we assended this fork about one mile and Encamped on an Island which had been laterly overflown & was wet we raised our bead on bushes, we passed a part of the river above the forks which was divided and Scattered thro the willows in Such a manner as to render it difiaielt to pass through for a 1/4 of a mile, we wer oblige to Cut our way thro' the willows— Men much fatigued from their excessive labours in hauling the Canoes over the rapids &cc. verry weak being in the water all day. my foot verry painfull

* * *

[Lewis] *Tuesday August 6th 1805.*

We set out this morning very early on our return to the forks. * * * it was easiest & more in our direction,

and apd. To contain as much water he had hoever previously to my comeing up with him, met Drewyer who informed him of the state of the two rivers and was on his return. one of their canoes had just overset and all the baggage wet, the medecine box among other articles and several articles lost a shot pouch and horn with all the implements for one rifle lost and never recovered. I walked down to the point where I waited their return. on their arrival found that two other canoes had filled with water and wet their cargoes completely. Whitehouse had been thrown out of one of the canoes as she swing in a rapid current and the canoe had rubed him and pressed him to the bottom as she passed over him and had the water been 2 inches shallower must inevitably have crushed him to death. our parched meal, corn, Indian preasents, and a great part of our most valuable stores were wet and much damaged on this ocasion. to examine, dry and arrange our stores was the first object; we therefore passed over to the lard. side opposite to .the entrance of the rapid fork where there 'was a large grayly bar that answered our purposes; wood was also convenient and plenty. here we fixed our camp,[1] and unloaded all our canoes and, opened and exposed to dry such articles as had been wet * * *

we beleive that the N. W. or rapid fork is the dane [*NB: drain*] of the melting snows of the mountains, and that it is not as long as the middle fork and dose not at all seasons of the year supply any thing like as much water as the other and that about this season it rises to it's greatest hight. this last appears from the apparent bed of the river which is now overflown and the water in many plases spreads through old channels which have their bottoms covered with grass that has grown this season and is such as appears on

the parts of the bottom not innundated. we therefore determined that the middle fork was that which ought of right to bear the name we had given to the lower portion or *River Jefferson* and called the bold rapid an clear stream *Wisdom*, and the more mild and placid one which flows in from the S. E. *Philanthrophy*,[2] in commemoration of two of those cardinal virtues, which have so eminently marked' that deservedly selibrated character through life.

[Clark] *August 6th Tuesday 1805*

a Clear morning Cool wind from the S W we proceeded on with much dificuelty and fatigue over rapids & Stones; river about 40 or 50 yards wide much divided by Islands and narrow Bayoos to a low bluff on the Stard Side & Brackfast, dureing the time of Brackfast Drewyer Came to me from Capt. Lewis and informed me that they had explored both forks for 30 or 40 miles & that the one we were assending was impractiabl much further up & turned imediately to the north, The middle fork he reported was jintle and after a Short distant turned to the S. W. and that all the Indian roades leades up the middle fork. this report deturmind me to take the middle fork, accordingly Droped down to the forks where I met with Capt Lewis & party, Capt Lewis had left a Letter on a pole in the forks informing me what he had discovered & the course of the rivers &c. this lettr was Cut down by the [beaver] as it was on a green pole & Carried off. Three Skins which was left on a tree was taken off by the Panthers or wolvers.[3] In decending to the Point one Can[o]e Struck & turned on a rapid & Sunk, and wet every thing which was in her, this misfortune obliged us to halt at the forks and dry those articles, one other Canoe nearly turning over, filled half full of

water & wet our medison & Some Goods Corn &c. Several hunters out to day & killed a young Elk, Antilope, & 3 Deer, one man *Shannon* did not return to night— This evening Cool my anckle much wors than it has been— this evening a Violent wind from the N. W accompanied with rain which lasted half an hour wind N. W

* * *

[Lewis] *Wednesday August 7th 1805.*

The morning being fair we spread our stores to dry at an early hour. Dispatched Reubin Fields in surch of Shannon. our stores were now so much exhausted that we found we could proceed with one canoe less. we therefore drew out one of them into a thicket of brush 'and secured her in such manner that the water could not take her off should the river rise to the hight where she is. The creek which falls in above us we called turf creek from the cercustance of it's bottoms being composed of excellent turf.[1] * * *

[Clark] *August 7th Wednesday 1805*[4]

a fine morning put out our Stores &c. to dry & took equal altitudes with the Sextant,— as our Store were a little exorsted and one Canoe became unnecessary deturmind to leave one. we Hauled her up in the bushes on the lower Side of the main fork & fastened her So that the water could not Rote her off. The Countrey in this quarter is as follows i, e a Value of 5 or 6 miles wide Inclosed between two high Mountains, the bottom rich Some Small timber on the Islands & bushes on the edges of the river Some *Bogs* & verry good *turf* in different places in the vallie, Some

scattering Pine & ceder on the mountains in places, other Parts packed except grass and Stone The *Lattitude* of the Mouth of *Wisdom River* is 45° 2' 21.6" North, we proceeded up the Main Middle or S. E. fork, passed a Camped on the Lard. Side above the mouth of a bold running Stream 12 yards wide, which we call *turf* Creek from the number of bogs & quanty of turf in its waters. this Creek runs thro a open Plain for Several miles, takeing its rise in a high mountain to the N E. The river Jefferson above Wisdom is gentle Crooked and about 40 yards wide, Containing but little timber, Some few Cotton willow Willow & Birch,[5] and the Srubs common to the countrey and before mentioned at 5 oClock a thunder Storm from the N. W. accompanied with rain which lasted about 40 minits.— despatched R Fields to hunt Shannon, who was out huntg. on Wisdom river at the time I returned down that Stream, and has made o[n] up the river expecting us to follow him up that river one Deer killed this evening. all those Streams Contain emence number of Beaver oiler Muskrats &c.[6]

* * *

[Lewis] *Thursday August 8th 1805.*

We had a heavy dew this morning. as one canoe had been left we had now more hads to spear for the chase; game being scarce it requires more hunters to supply us. we therefore dispatched four this morning. we set out at sunrise and continued our rout up the river which we find much more gentle and deep than below the entrance of Wisdom river it is from 35 to 45 yards wide very crooked many short bends constituteing large and general bends; insomuch that altho' we travel briskly and a considerable distance yet

it takes us only a few miles on our general course or rout. there is but very little timber on this fork principally the under brush frequently mentioned.
* * *

* * *

[Clark] *August 8th Thursday 1805*

We proceeded on early wind from the S W. The Thermometer at 52 a o at Sunrise at 5 miles by water & 4 ½ on a derect line from the forks we passed a River on the Lard Side 30 yards wide and navagable for Some distance takeing its rise in the Mountains Easterly & with the waters of Madisons River, passes thro an extensive value open & furtill &c. this river we call Philanthophy— above this river (which has but little timber) Jeffersons R is crooked with Short bends a flew Islands and maney gravelly Sholes, no large timber, Small willow Birch & Srubs &c. Encamped on the Lard Side, R Fields joined us this eveng. & informes that he could not. find Shannon my foot yet verry Swore

* * *

[Lewis] *Friday August 9th 1805.*

The morning was fair and fine; we set out at an early hour and proceeded on very well. some parts of the river more rapid than yesterday. I walked on shore across the land to a point which I presumed they would reach by 8 A. M. our usual time of halting. by this means I acquired Leasure to accomplish some wrightings which I conceived from the nature of my instructions necessary lest any accedent should befall

me on the long and readier hazardous rout I was now about to take.[1] the party did not arrive and I returned about a mile and met them, here they halted and we breakefasted; I had killed two fine gees on my return. while we halted here Shannon arrived, and informed us that having missed the party the day on which he set out he had returned the next morning to the place from whence he had set out or furst left them and not finding that he had supposed that they wer above him; that he then set out and marched one day up wisdom river, by which time he was convinced that they were not above him as the river could not be navigated; he then returned to the forks and had pursued us up this river. he brought the skins of three deer which he had killed which he said were in good order. he had lived very plentifully this trip but looked a good deel worried[2] with his march. he informed us that Wisdom river still kept it's course obliquely down the Jefferson's river as far as he was up it. immediately after breakfast I slung my pack and set out accompanyed by Drewyer Shields and McNeal who had been previously directed to hold themselves in readiness for this service. I directed my course across the bottom to the Stand. plain led left the beaver's head about 2 miles to my left and interscepted the river about 8 miles from the point at which I had left it; I then Waded it and continued my rout to the point where I could observe that it entered the mountain, but not being able to reach that place, changed my direction to the river which I struck some miles below the mountain and encamped for the evening having traveled 16 M.[3] we passed a handsom little stream formed by some large spring which rise in this wide bottom on the Lard side of the river. * * * the river very crooked much divided by islands, shallow rocky in many plases and very rapid; insomuch that I have my

doubts whether the canoes could get on or not, or if they do it must be with great labour.— Capt. Clark proceeded after I left him as usual, found the current of the river increasing in rapidity towards evening. his hunter skilled 2 antelopes only. * * *

* * *

[Clark] *August 9th Friday 1805*

a fine morning wind from the N. E we proceeded on verry well. rapid places more noumerous than below,.Shannon the man whome we lost on Wisdom River Joined us, haveing returned to the forks & prosued us up after prosueing Wisdom River one day

Capt Lewis and 3 men Set out after brackft. to examine the river above, find a portage if possible, also the Snake Indians. I Should have taken this trip had I have been able to march, from the rageing fury of a " turner on my anckle musk, in the evening Clouded up and a .fiew drops of rain Encamped on the Lard Side near a low bluff,' the river to day as yesterday. the three hunters Could kill only two antelopes to day, game of every kind Scerce

* * *

[Lewis] *Saturday August 10th 1805.*

We set out very early this morning and continued our rout through the wide bottom on the Lard. side of the river after passing a large creek[1] at about 5 miles we fel in with a plain Indian road which led towards the point that the river entered the mountain we therefore pursued the road Isent Drewyer to the

wright to kill a deer which we saw feeding and halted on the river under an immencely high perpendicular clift.of rocks[2] where it entered the mountain * * *

Capt Clark set out at sunrise this morning and pursued his rout; found the river not rapid but shallow also very crooked. they were obliged to drag the .canoes over many riffles in the course of the day. they passed the point which the natives call the beaver's head. it is a steep rocky clift of 150 feet high near the Stard. side of the river, opposite to it at the distance of 300 yards is a low clift of about 50 feet which is the extremity of a spur of the mountains about 4 miles distant on Lard. at 4 P.M. they experienced a heavy shower of rain attended with hail thunder and Lightning which continued about an hour. the men defended themselves from the hail by means of the willow bushes but all the party got perfectly wet. after the shower was over they pursued their march and encamped on the stard side.[9] only one deer killed by their hunters today. tho' they took up another by the way which had been killed three days before by Jos. Fields and hung up near the river.

* * *

EXHIBIT K

COPY

Subject: Maintenance of Dam, Slack Eagle Falls, Mo. River.

File No. 4312.

WAR DEPARTMENT

Washington, D. C., November 2, 189[]

Sir:

In reply to your letter of July 22nd last, asking whether formal permission of this Department is necessary to permit the maintenance of a dam which has been constructed by your Company across the Missouri River near Great Falls, Montana, I beg to say that no action of the War Department is required, as appears from the report of the local U. S. Engineer Officer dated October 24, 1896, a copy of which is enclosed.

Very respectfully,
(Sgd) Daniel S. Lamont,
Secretary of War.

Samuel Hill, Esq.,
President, Townsite Company,
Saint Paul, Minn.

(Inclosure: Copy of Report referred to.)

(COPY OF COPY

United States Engineer Office,

Sioux City, Iowa

October 24, 1896.

Respectfully returned to the Chief of Engineers.

The dam referred to is located just above the Black Eagle Falls of the Missouri River, and is 3 1/4 miles below the railroad bridge at the town of Great Falls. About 400 feet above this bridge begins the series of rapids and falls in which the river falls 412 feet in a distance of 11 miles. Black Eagle falls is the upper of the five principal falls comprised within the above series. I have endeavored to obtain the exact fall of the river in the rapids above these falls, but have not yet been able to do so. It is safe to say, however, that the fall is not far from 60 feet. The height of the dam is about 13 feet above the original low water surface. This portion of the river can, in my judgment never be made navigable at a cost that the demands of commerce will ever justify. While the dam is in a stream which is the greater portion of its length is a "navigable stream" it is situated in a portion of this stream which is not now navigable and which in all probability never will be.

For these reasons it appears to me that the permit referred to is unnecessary.

J. C. Sanford,
Captain, Corps of Engineers, U.S.A.

EXHIBIT L

55TH CONGRESS, 3d Session | HOUSE OF REPRESENTATIVES | DOCUMENT No. 2.

ANNUAL REPORTS

96681

OF THE

WAR DEPARTMENT

FOR THE

FISCAL YEAR ENDED JUNE 30, 1898.

REPORT OF THE CHIEF OF ENGINEERS PART 1.

WASHINGTON:
GOVERNMENT PRINTING OFFICE
1898.

* * *

IMPROVEMENT OF MISSOURI RIVER AT AND ABOVE SIOUX CITY, IOWA, AND OF YELLOWSTONE RIVER, MONTANA AND NORTH DAKOTA.

This district was in the charge of Capt. J. O. Sanford, Corps of Engineers. Division Engineer, Col J. W. Barlow, Corps of Engineers.

1. Missouri River between Stubbs Ferry, Montana, and the lower limits of Sioux City, Iowa.—The river distance between the above points is 1,660 miles. By its physical characteristics this portion of the river is divided into four sections: The first, Stubbs Ferry to Greatfalls, Mont., 130 miles, is the navigable portion above the "Great Falls;" the second, Greatfalls to Fort Benton, Mont., 49 miles, is an unnavigable section, occupied by cataracts and dangerous rapids; the third, Fort Benton to Carroll, Mont., 173 miles, known as the "Rocky River," contains numerous rapids and rock obstructions, but has carried a heavy commerce; the fourth, Carroll to Sioux City, 1,309 miles, known as the "Sandy River," is characterized by muddy water, sand bars, and a shifting channel, with easily eroded and constantly eroding banks. Navigation is difficult at low water, due to the too great width of the river in many places. The upper 158 miles forms a transition portion between the "Rocky" and "Sandy" rivers.

Between Stubbs Ferry and Greatfalls.—This reach consists of two distinct portions. From Stubbs Ferry to just below the town of Cascade, 76 miles, the average slope is 3.73 feet per mile. Numerous rapids and rock obstructions exist in this reach. A channel depth of less than 2.5 feet at low water is found at a number of places (said to be fifteen). Below this rapid portion the

"Long Pool" extends to Greatfalls, 54 miles. The average slope is only 0.52 foot per mile. A channel depth of 3 feet originally existed throughout the greater part of the pool, though a less depth was found at a number of places.

In 1880 a small amount of rock removal work had been done at the worst two rapids above Cascade, under an appropriation for improving the Missouri River above the mouth of the Yellowstone River.

The original project, submitted January 23, 1892, contemplated obtaining a channel 3 feet deep at low water from Greatfalls to Cascade and a channel of 2.5 feet low-water depth from Cascade to the canyon next below Stubbs ferry, at an estimated cost of $115,837.50. The only work contemplated between Greatfalls and Cascade was on the 4 miles next below Cascade.

This project was based on maps of survey made in the spring of 1880, on which, as appears from recent data, the stages shown were from 2 to 3 feet too low. A revised project, contemplating the same results, but providing for improvement of a number of shoals found in 1984 nearer Greatfalls, and for the removal of certain artificial obstructions, in addition to the work provided for in the original project, was adopted November 30, 1894. In this project the estimate for the whole work was increased to $165,812.50. An examination made in September, 1897, between Greatfalls and Cascade showed that at a number of places, the improvement of which was not contemplated in the project of November 30, 1894, a less depth than 3 feet then existed, and at others the depth reduced to low water would have been less than 3 feet, some of these latter being, however, as show by later observations, only temporary obstructions. A further revision of the project, increasing the amount

of work below Cascade and its estimated cost, was therefore necessitated. This revised project was adopted January 4, 1898. In it the estimate for the whole work is increased to $213,646.50, the same results being contemplated as in the two previous projects and the same amount of work above Cascade being provided for. The project also contains an estimate, as did the previous projects, of $4,500 for animal maintenance.

To June 30, 1987, there had been expended on the project of November 30, 1984, $31,207.46, by which a channel of the proposed depth had been obtained from Greatfalls to Griffin Bar, about 12 miles. The shortness of the improved channel had prevented any marked effect on commerce.

During the fiscal year $16,486.58 has been expended, carrying the 3-foot channel to Buckshot Island, about 16 miles above Greatfalls, and beginning the improvement of Bird Creek Shoal, the present head of the 2 ½ -foot channel, about 48 miles above Greatfalls.

The maximum draft that can now be carried at low water over the shoalest part of the locality under improvement is about 2 feet at Bird Creek Shoal.

Between Greatfalls and Fort Benton.—Original condition described above. No work has ever been projected for this difficult reach.

* * *

EXHIBIT M

2nd Congress, 1st Session House Document No. 193

JEFFERSON, MADISON AND GALLATIN RIVERS, MONT. (THREE FORKS BASIN)

LETTER

FROM

THE SECRETARY OF WAR

TRANSMITTING

REPORT FROM THE CHIEF OF ENGINEERS ON THE JEFFERSON, MADISON AND GALLATIN RIVERS, MONT. (THREE FORKS BASIN), COVERING NAVIGATION, FLOOD CONTROL, POWER DEVELOPMENT AND IRRIGATION

[seal]

DECEMBER 16, 1931.—Referred to the Committee on Rivers and Harbors and ordered to be printed, with 7 illustrations

---

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1932

[TABLE OMITTED]

LETTER OF TRANSMITTAL

WAR DEPARTMENT,
Washington, December 16, 1931

The SPEAKER OF THE HOUSE OF REPRESENTATIVES.

DEAR MR. SPEAKER: I am transmitting herewith a report dated December 15, 1931, from the Chief of Engineers, United States Army, on Jefferson, Madison, and Gallatin Rivers, Mont., made under the provisions of House Document No. 308, Sixty-ninth Congress, first session, which was enacted into law, with modifications, in section 1 of the river and harbor act of January 21, 1927, and under the provisions of section 10 of the flood control act of May 15, 1928, together with accompanying papers and illustrations.

Sincerely yours,

PATRICK J. HURLEY,
Secretary of War.

JEFFERSON, MADISON AND GALLATIN RIVERS, MONT. (THREE FORKS BASIN)

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, December 15, 1931

Subject: Report on Jefferson, Madison and Gallatin Rivers, Mont.

To: The Secretary of War

1. I submit, for transmission to Congress, my report with accompanying papers and illustrations, on Jefferson, Madison, and Gallatin Rivers, Mont., made under the provisions of House Document No. 308, Sixty-ninth Congress, first session, which was enacted into law, with modifications, in section 1 of the river and harbor act of January 21, 1927, and under the provisions of section 10 of the flood control act of May 15, 1928.

2. The Jefferson, Madison and Gallatin Rivers are the sources of the Missouri River, which is formed by their junction at ThreeForks, Mont. They drain an area of nearly 14,000 square miles in southwestern Montana, including a portion of Yellowstone National park. The drainage area is all situated at a high elevation. About half of it is occupied by the main ranges of the Rocky Mountains. The other half consists of plateaus, terraces, and rolling upland. The streams flow generally in deep canyons and narrow mountain valleys, but there is an extensive level area near their junction. While mining is of some importance, farming and stock raising are the principal industries. The basin includes about 900,000 acres of improved farm land, about two-thirds of which is under irrigation. The annual precipitation in the

basin varies from 20 inches in the mountains to 10 inches in the lower portions. The average discharge of the Jefferson River at its mouth is about 2,300 cubic feet per second, of the Madison 2,100, and of the Gallatin 1,000. Because of the high altitude and severe winter climate the flow of these streams is low in winter and early spring and the spring break-up occurs at a comparatively late date.

3. There never has been any navigation on these rivers and their improvement for this purpose is impracticable. The rivers are not subject to destructive floods. The use of reservoirs on these streams for controlling the floods of the Mississippi River would require the impounding of water during a period when the stream flow is normally below the average and at a time when the release of stored water is customary for the benefit of power plants. The reservoirs would be located more than 2,500 river miles from the Mississippi and their effect on the latter stream would be insignificant.

4. There are 125,000 acres of irrigated lands in the Gallatin watershed, 35,000 in the Madison, and 428,000 in the Jefferson. In the Gallatin Basin irrigation by direct diversion without storage has been carried practically to the limit and the water supply of this stream is insufficient for the existing projects during most years, the average annual shortage being about 40,000 acre-feet. The district engineer states that the only suitable reservoir site for storing water to meet this shortage is the one known as the "lower basin site". The construction cost of a reservoir at that site is estimated at $2,316,000 and the annual carrying charges for the 75,000 acres of land which would be served would amount to $2.95 per acre in addition to the cost of the existing irrigation system. He is of the opinion that annual payments of over

$2.50 per acre on this land could not be carried and considers the project impracticable because of its excessive cost. In the Madison Basin practically all the areas with suitable soils which can be served by inexpensive irrigation systems are now under irrigation. The storage of water in a power reservoir produces a considerable degree of regulation and water shortages do not occur. The district engineer finds no practicable additional irrigation possibilities on this stream. In the Jefferson Basin also irrigation is practiced largely by direct diversion, but 12 small reservoirs have been constructed, with a total capacity of about 55,000 acre-feet. Practically all the good land along the main stream and tributaries that can be served by inexpensive systems is now under irrigation. There is a large amount of suitable land which could be served by large scale storage projects. The district engineer has investigated a number of these, for the irrigation in the aggregate of somewhat over 100,000 acres. He finds that the estimated annual payments required on these projects would vary from $8 to $45 per acre. While he is of the opinion that $3.50 per acre is the upper limit which these lands could successfully carry, and therefore concludes that all the projects are too costly.

5. The report of the district engineer was furnished the Commissioner of Reclamation of the Department of the Interior to remark upon the irrigation features, with a view to his concurrence with or objection to the conclusions drawn, for the information of Congress. His comments are appended.

6. At the present time there are three water-power plants in the Madison Basin, with installations of 10,000, 2,000 and 450 kilowatts. The two larger plants are part of the Montana Power Co's system and are located on the main stream. They are operated in

conjunction with a number of plants on the upper Missouri River and two storage reservoirs of 345,000 and 36,000 acre-feet capacity on the Madison River which are used for flow regulations for the entire group. In the Jefferson Basin there are three small plants, with varying capacities between 30 and 150 kilowatts. They supply current for small adjacent towns as does also the small plant in the Madison Basin. The district engineer has investigated the underdeveloped power possibilities of this region and describes six new projects with an aggregate capacity of 92,000 kilowatts. Since power is now produced at a very low cost in neighboring districts, he concludes that all of these projects are too expensive for individual developments at the present time, with the exception of the "upper canyon site" on the Madison River where an installation of 23,800 kilowatts might be developed with profit if a suitable market can be found for the power produced. He considers that some of the other power projects might be practicable for development as adjuncts to an extensive interconnected system of plants on the Yellowstone and upper Missouri River, and states that this matter will be discussed in more detail in forthcoming reports on these rivers.

7. The district engineer concludes that the best future plan for the comprehensive utilization of the water resources of the Three Forks Basin includes a limited amount of irrigation and some power development, the details of which can not be determined until investigations on the Yellowstone and upper Missouri are completed. He finds that there are no flood control or navigation problems on these rivers and that reservoirs on them would be of no practicable benefit to flood control or navigation on the Missouri or Mississippi Rivers. He recommends that

the projects outlined in the report be accepted by the department as an approved layout for the ultimate practicable utilization of the water resources of these streams. The division engineer concurs.

8. The Mississippi River Commission, to whom the report was referred, as required by section 10 of the flood control act of May 15, 1928, states that the effect of any existing or prospective reservoirs on these rivers on the flood heights of the Mississippi River at Cairo would be very slight and would have no material effect on the plan of flood control for the lower Mississippi River. The commission expresses its concurrence in the other conclusions and recommendations of the district engineer.

9. The report of the district engineer has been referred, as required by law, to the Board of Engineers for Rivers and Harbors, and its report, agreeing in general in the conclusions and recommendations of the district engineer, is submitted herewith.

10. After due consideration of the above-mentioned reports, I concur in the recommendations of the Board of Engineers for Rivers and Harbors. The streams in the Three Forks Basin are not subject to destructive floods and are not adapted to improvement for navigation. Projects for additional irrigation are generally costly and can not be considered economically practicable at the present time. The construction of additional power projects might prove a profitable undertaking and this matter will be discussed more fully in the forthcoming reports on adjacent streams. These power or irrigation developments would have but an insignificant effect on flood or navigation conditions on the Missouri and Mississippi Rivers. I therefore report that the improvement of the Jefferson, Madison and Gallatin Rivers, Mont., for navigation, in connection with power

development, the control of floods, or the needs or irrigation, or any combination thereof, is not deemed advisable at the present time.

LYTLE BROWN,
Major General, Chief of Engineers.

REPORT OF THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS

SYLLABUS

The Board of Engineers for Rivers and Harbors is of the opinion that the improvement of these rivers for navigation, in combination with power development, the control of floods, and the needs of irrigation, is not justified at the present time.

[Fourth Indorsement]

THE BOARD OF ENGINEERS
FOR RIVERS AND HARBORS
Washington, D.C., March 9, 1931.

To the CHIEF OF ENGINEERS, United States Army.

1. The following is in review of the report on Jefferson, Madison, and Gallatin Rivers, Mont., submitted under the provisions of House Document No. 308, Sixty-ninth Congress, first session, which was enacted into law, with modifications, in section 1 of the river and harbor act of January 21, 1927, and under the provisions of section 10 of the flood-control act approved May 15, 1928.

2. The Jefferson, Madison, and Gallatin Rivers drain an area approximately 120 miles square in southwestern Montana and Yellowstone National Park, known as the Three Forks Basin. They unite at Three Forks, Mont., forming the Missouri River. The Jefferson, with a watershed of 9,520 square miles, is formed by the Beaverhead and Big Hole Rivers, which drain 3,666 and 2,886 square miles, respectively, and flows northeasterly to the confluence. The Madison River, with a watershed of 2,520 square miles, is formed by Firehole and Gibbon Rivers in Yellowstone

Park. It flows westerly and then northerly to the forks. The Gallatin, with a watershed of 1,840 square miles, rises in Yellowstone Park and flows in a general northerly direction to the confluence.

3. About half of the Three Forks Basin is occupied by the main ranges of the Rocky Mountains with elevations of from 9,000 to 11,000 feet. The other half is taken up by plateaus, terraces and high rolling country. The streams flow through deep canyons and high mountain valleys generally not exceeding 2 miles in width. The main valley at Three Forks has a width of about 5 miles for a length of 8 miles and is very flat, with extensive marshy areas.

4. The settlement of the basin followed the discovery of gold in the Jefferson watershed about 90 years ago. The mining of gold, silver, copper, lead, and zinc subsequently became the most important industry of the area and farming developed with it. In recent years the mining has considerably diminished, and farming is the principal industry. The lower valley lands, including about 600,000 acres or two-thirds of the total improved farm land of the basin, are irrigated and the higher bench lands are used for dry farming and stock raising. Wheat, oats, hay and forage, barley, and potatoes are raised. The basin has a total population of 33,500 and its principal towns are Bozeman with 6,183 inhabitants, Dillon with 2,701 and Three Forks, with 1,071.

5. The annual precipitation of the basin varies from 10 to somewhat over 20 inches, the latter occurring in the mountains. Approximately 70 per cent of its falls during the months April to August, inclusive, and ordinarily provides good stream flow during the summer months. The flow of the Jefferson and the Gallatin Rivers is materially affected by irrigation diversions, and the flow of the Madison is

affected by the operation of two storage reservoirs for power purposes. The mean flow of the Jefferson at the mouth is about 2,300 cubic feet per second, of the Madison 2,100, and of the Gallatin 1,000.

6. There has never been any navigation on the streams in the Three Forks Basin and commercial navigation on them is impracticable.

7. Floods rarely occur in the basin and such as do occur cause practically no damage. Ice gorges form on the Madison River occasionally, causing small floods that affect roads, railroads, and a few farms, but the resulting damage is too small and infrequent to warrant the construction of flood protection works. The streams are not regarded as subject to destructive floods.

8. The most important undeveloped storage sites in the basin are on Big Hole River and on the Gallatin River. Their use for control of floods of the Mississippi River would require the impounding of water during a period when the stream flow is normally below the average and needed at the existing power plants below the reservoir sites. Their use for control of the floods of the Missouri River would require the impounding of water at a later date when this action would interfere with irrigation. It is therefore considered impracticable to install reservoirs in this basin and operate them exclusively in the interest of flood control for the Mississippi or Missouri Rivers.

9. At the present time there are three water power plants in the Madison Basin, with installations of 10,000, 2,000 and 450 kilowatts. The two larger plants are part of the Montana Power Co.'s system and are located on the main stream. They are operated in conjunction with a number of plants on the upper Missouri River and two storage reservoirs of 345,000 and 36,000 acre-feet capacity on the Madison River

which are used for flow regulation for the entire group. In the Jefferson Basin there are three small plants, with varying capacities between 30 and 150 kilowatts. They supply current for small adjacent towns as does also the small plant in the Madison Basin.

10. The district engineer finds that the only undeveloped waterpower projects of any consequence include three developments on the Gallatin, one on the lower and one on the upper part of the Madison River, and one development on the Big Hole River, a tributary of the Jefferson. Data on these projects are shown in the following table:

[Table Omitted]

In view of the low cost at which power is produced in neighboring districts the district engineer believes that all these projects, except the upper canyon project on the Madison River, are too expensive for individual development at the present time. The Gallatin and Big Hole projects could probably make a better showing if operated in conjunction with the existing plants on the Yellowstone and the upper Missouri Rivers, and such operation will be discussed more fully in the pending report on those streams. The natural flow of the stream in the Three Forks Basin is low during the period which corresponds to the flood period on the Mississippi River, at which time the release of stored water is necessary for the operation of power plants. The operation of the existing Hegben Reservoir ordinarily increases the natural flow by from 1,000 to 3,000 second-feet during this period, and new power storage would result in additional increases. Therefore the further development of the power resources of the region will tend to have an adverse effect upon Mississippi flood conditions, but as the

increased flow of the streams in this basin would be relatively very small in comparison to the flow of the Mississippi River during floods the effect would be insignificant.

11. There are 125,000 acres of irrigated lands in the Gallatin watershed, 35,000 in the Madison, and 428,000 in the Jefferson, a total of 590,000 acres. An area of 5,000 acres in the Jefferson Basin and one of 1,900 acres in the Madison Basin have been developed under State irrigation district laws and the rest by individual farmers or cooperative associations of water users.

12. In the Gallatin Basin the lands are irrigated by direct diversion without storage and include practically all the areas that it is physically possible to irrigate. The water supply of this stream is insufficient, and water shortages of some importance occur almost every year. The district engineer finds that the shortage averages about 40,000 acre-feet per year, and he has investigated the storage possibilities available for supplying this amount. The only site available with sufficient capacity is that known as the lower basin site. The construction cost of a reservoir at that site is estimated as $2,316,000. The annual payments that would be required to meet this cost, provided 75,000 acres were included in the project, would amount to $2.95 per acre for a period of 38 years. The district engineer is of the opinion that annual payments of over $2.50 per acre could not be successfully carried and therefore considers the project too costly. He believes that the water situation in the basin would be materially improved by lining portions of some of the existing canals to prevent excessive seepage losses and by rearranging the ditches.

13. In the Madison Basin practically all the areas with suitable soils which can be served by inexpensive

irrigation systems are now under irrigation. There is no irrigation storage, but the main stream is regulated by a power reservoir in the headwaters, and the direct diversion units do not suffer from water shortages. There are additional lands in the main valley that could be irrigated, but they are on gravel terraces that are unfavorable for successful crop production and would require a heavy use of water. The flow of the Madison River in the vicinity of these lands is controlled for power development by the Hebgen Reservoir of the Montana Power Co., which has well-established water rights on this stream and also on the upper Missouri River. The district engineer finds that the diversion of water for additional irrigation, as would be required in this section, would be impossible without encroaching on these rights of the power company and of present irrigation utilizing and depending upon direct flow.

14. In the Jefferson Basin 12 small reservoirs, with a total capacity of about 55,000 acre-feet, have been developed for irrigation purposes. Practically all the good land along the main stream and the tributaries that can be served by inexpensive systems is now under irrigation. The storage benefits only a portion of these areas. Some of the direct diversion units suffer from water shortages at times, but ordinarily only to a minor degree. There are a number of opportunities to develop additional irrigation projects in the Jefferson Basin by the use of storage, but the costs are generally high. The best lands that can be reached lie along the Beaverhead River in the east bench near Dillon, in the Whitetail Creek Basin, in an area near the mouth of Jefferson River known as Valley View, in the South Bench near Willow Creek, and in the vicinity of Crow Creek, a tributary of the Missouri River just below the mouth of the Jefferson.

The district engineer has included these areas under various projects, the essential features of which are shown in the following table:

[Table Omitted]

The annual payments as shown are based on 6 per cent bonds. The district engineer is of the opinion that annual payments of over $3.50 per acre could not be successfully carried and therefore considers all the projects too costly. Under Federal development, with repayment of the construction cost in 40 years and no interest, the Whitetail project would require annual payments of $3.32 per year. The annual payments for all the others would be excessive unless developed by the Federal Government with a repayment term of over 40 years. The East Bench, Whitetail and South Bench projects require the reservation of all available water in the river so no water power could be economically produced in connection with them. The Valley View project requires a pumping plant, no head being developed in connection with it. The Crow Creek project utilizes a large storage reservoir at which power could be produced, but the cost of the power would be excessive.

15. No benefits will accrue to navigation and agriculture from the prevention of erosion and siltage entering the streams of the basin, as bank erosion is not a serious problem, there is no navigation, and the streams carry an insignificant amount of silt. Most of the soils on lands that might be physically irrigable are of a porous character and have little water-holding capacity. The return flow from irrigated lands is estimated at 50 per cent of the supply. However, on these rivers the low-water flow diverted for irrigation would be greater than the return flow during the low-

water season, and the net result would be a slight decrease in the low flow of the Missouri. The only prospective income from the disposal of reservoired waters is from water power developed in the Three Forks Basin and on the Missouri River, which will be discussed in the report on the Missouri River. No public or private use can be made of the reservoirs except , as noted, for irrigation and power purposes.

16. The district engineer concludes that the best future plan for the comprehensive utilization of the water resources of the Three Forks Basin includes the irrigation of not more than 23,800 acres; that the construction of the reservoirs for flood control or for navigation would be of no practical benefit and would seriously infringe upon existing water rights for irrigation and water power; and that the best plan for further power development can not be determined until after present studies on the Yellowstone and upper Missouri Rivers have been completed. He is of the opinion that the lands proposed for irrigation could, under present conditions, carry only a fraction of the cost of the work and on the score of flood-control or navigation benefits there is no Federal interest in the projects. He recommends that the projects be considered and accepted by the department as an approved layout for the ultimate practicable utilization of the water resources of the Three Forks Basin for irrigation purposes. The division engineer concurs. As required by section 10 of the act of May 15, 1928, the report has been referred to the Mississippi River Commission and its conclusions and recommendations thereon are attached.

CONCLUSIONS AND RECOMMENDATIONS OF THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS

17. The board concurs in general in the views of the district and division engineers. The streams in the Three Forks Basin are not adapted to improvements for navigation. Destructive floods do not occur. Improvements for additional irrigation are generally costly and can not be considered economically practicable. The construction of additional power projects an their operation with existing plants might prove a profitable undertaking. Such projects would have an insignificant effect on flood conditions of the Mississippi and Missouri Rivers. The board therefore is of the opinion that the improvement of these streams for navigation alone or in connection with power development, flood control, or irrigation is not justified at the present time.

For the board.

HERBERT DEAKYNE,
Colonel, Corp of Engineers,
Senior Member.

REPORT ON THE JEFFERSON, MADISON AND GALLATIN RIVERS, MONT.

SYLLABUS

1. The Three Forks Basin is not subject to destructive floods. Commercial navigation on the streams of the basis is out of the question. Reservoirs for the specific purpose of benefiting Missouri and Mississippi flood and navigation conditions are impracticable because they would seriously infringe upon existing water rights for irrigation and water power, and would prevent the full development of

needed additional irrigation and water power in the region. Their theoretical effect would be very small.

2. A plan for further hydroelectric development in the basin can not be submitted until present studies on the Yellowstone and Upper Missouri Rivers have been completed, since the situation in the basin is closely interrelated with the power situation on the latter streams. Reservoir sites on the Gallatin and Big Hole Rivers appear to offer considerable promise in connection with providing additional storage for existing plans on the Upper Missouri River.

3. A plan is presented for the ultimate practicable utilization of the water resources of the Three Forks Basin for irrigation. The plan contemplates the irrigation of about 23,800 acres of land. None of the lands proposed for irrigation would carry the cost of development if they were to pay any interest; or if they were to repay the cost of construction in 40 years even without interest, except the Whitetail project in the latter case. However, the same would be true of the Whitetail project unless it could materially reduce existing obligations of the project. The effect of the plan on Mississippi and Missouri flood and navigation conditions would be minute, incalculable and entirely undependable. There is no Federal interest on the score of flood control or navigation benefits of the plan.

4. It is recommended that the plan be considered and accepted by the department as an approved layout for the ultimate practicable utilization of the water resources of the Three Forks Basin for irrigation purposes.

WAR DEPARTMENT,
UNITED STATES ENGINEER OFFICE
Kansas City, MO, May 24, 1930.

Subject: Report on the Jefferson, Madison and Gallatin Rivers (Three Forks Basin).

To: The Chief of Engineers, United States Army (Through the Division Engineer).

1. *Authority for report.*—This report is submitted under the provisions of House Document 308, Sixty-ninth Congress, first session; of the river and harbor act of January 21, 1927; and the flood control act of May 15, 1928.

2. The report is divided as follows:

Part	I.	Physical and economic description of the Jefferson, Madison and Gallatin Basins.
Part	II.	Existing and potential irrigation developments.
Part	III.	Existing and potential irrigation developments.
Part	IV.	Flood control and navigation.
Part	V.	Conclusions.
Part	VI.	Plan of redevelopment.
Part	VII.	Recommendations.

3. Appendix I contains maps and charts referred to in the report; Appendix II, tables referred to in the report, save such as are incorporated in the text; Appendix III, a description and history of the various existing and proposed irrigation and water-power projects in the basin.

4. In preparing this report, field parties reconnoitered the entire length of the Jefferson, Madison and Gallatin Rivers, and all tributaries and subtributaries of any importance. These parties collected whatever information was available, directly by reconnaissance, or indirectly through contact with State, county, and corporation officials and private parties. Records of the United States Bureau of

Reclamation, the United States Geological Survey, and other Federal agencies have been obtained and studied. A public hearing was held at Bozeman, Mont., on May 8, 1930, to afford an opportunity for local interest to present their views; 70 people attended Some records are available, and have been studied and compiled, from 28 gaging stations which existed when the study began or have existed in the past; four additional gaging stations have been established by this office, through the Geological Survey and they are now operating. All work was under the direct supervision of First Lieut. James M. Young, Corps of Engineers. His principal assistants were Mr. G. B. Archibald, irrigation engineer, in charge of irrigation investigations; Mr. G. W. Lucus, hydroelectric engineer, in charge of water-power investigations; Mr. G. A. Hathaway, hydraulic engineer, in charge of stream-flow investigations; Mr. H. H. Roberts, associate civil engineer, in charge of drafting and design; and Mr. J. B. Butler, junior engineer, in charge of field work.

BIBLIOGRAPHY

5. The following sources have been referred to:

East Bench irrigation district:

Preliminary report, State engineer, C. S. Heidel, January 21, 1921.

Report of district Engineer, G. V. Elder, December 6, 1924.

Final report on feasibility, Montana Public Service Commission, March 23, 1925.

Ruby River (Carey act project): Reports by G. R. Metlen and A. W. Mahon, April 26, 1912.

Whitetail irrigation district:

Preliminary report, Montana Public Service Commission, July 21, 1922.

Report of district engineers J. C. and T. T. Black, September 7, 1922.

Final report, Montana Public Service Commission, September 11, 1922.

Supplemental report, Montana Public Service Commission, December 23, 1922.

Valley View irrigation district:

Preliminary report, State engineer, C. S. Heidel, July 15, 1920.

Report of district engineer, D. M. Brown, December, 1922. Final report on feasibility, Montana Public Service Commission, May 15, 1923.

South Bench irrigation district:

Preliminary report by J. G. White Engineering Corporation, September 10, 1917.

Report and recommendations by Montana Public Service Commission, September 20, 1921.

Crow Creek irrigation district:

Preliminary report by Gerharz-Jaqueth Engineering Co., February 14, 1920.

Preliminary Report, Montana Public Service Commission, June, 1921.

Report by district engineer, A. J. Wiley, February 20, 1922.

Madison River irrigation project:

Reconnaissance report, S. H. Martin. October 1, 1900.

Reconnaissance report, F. F. Pendergrast. December, 1904.

United States Reclamation Service report by Geo. E. Stratton. May 19, 1906.

Extract (pp. 167-172) from Fifth Annual Report of the United States Reclamation Service. 1906.
Extract (p. 130), Sixth Annual Report of the United States Reclamation Service. 1907.
United States Geological Survey Annual Reports:
Tenth, Part II, Irrigation. 1890.
Eleventh, Part II, Irrigation. 1891.
Twelfth, Part II, Irrigation. 1891.
Thirteenth, Part III, Irrigation. 1892.
Twenty-second Part II, Geology and Ore Deposits of Elkhorn Mining District, Jefferson County, Mont., by W. H. Weed, pp. 399-550. 1901.
United States Geological Survey Bulletins:
No. 507. Mining Districts of Western United States: J. M. Hill. 1912.
No. 528. Geology and Ore Deposits, Lemhi County, Idaho: J. B. Umpleby 1913.
No. 574. Mining Districts of Dillon, Quadrangle: A. N. Winchell. 1914.
No. 661-I. Phosphatic Oil Shales, near Dell and Dillon, Mont: C. F. Bowen, 1917.
No. 690-F. Some Manganese Deposits in Madison County, Montana, Mont.: J. T. Pardee. 1918.
No. 780-A. Melrose Phosphate Field, Montana: Richards and Pardee. 1925.
No. 795-G. Phospate Rocks in the Three Forks D. D. Conduit. 1927.
United States Geological Survey Monographs:
No. 32. Geology of the Yellowstone National Park: Arnold Hague. 1899.
United States Geological Survey Professional Papers:
No. 74. Geology and Ore Deposits of the Butte Mining District, Montana: W. H. Weed. 1912.
United States Geological Survey Water Supply Papers:

No. 539. Geology and Ground Water Resources in the Townsend Valley, Mont.: J. T. Pardee. 1925.

No. 560-A. Water Power and Irrigation in the Madison River Basin, Mont.: Deeds and White. 1925.

No. 580-B. Water Power and Irrigation in the Jefferson River Basin, Mont. Deeds and White. 1926.

Water Resources Branch, Data on Stream Flow and Run-off. Various dates.

Folios of the Geologic Atlas of the United States:

No. 24. Three Forks, Mont.: A. C. Peale. 1896.

No. 30. Yellowstone National Park: Hague, Weed and Iddings. 1896.

No. 38. Butte Special, Montana: Weed, Emmons and Tower. 1897.

United States Department of Agriculture Experiment Station Bulletin: No. 172. Irrigation in Montana: Samuel Fortier. 1906.

Montana Agricultural Experiment Station Bulletins:

No. 103. Irrigation Development in Montana: S. T. Harding. 1915.

No. 195. Irrigation and Drainage Problems in the Gallatin Valley: H.E. Murdock. 1926.

United States Bureau of the Census: Data on population and production.

United States Department of Agriculture: Data on agriculture and soils.

United States Reclamation Service: Annual reports, various years.

I. PHYSICAL AND ECONOMIC DESCRIPTION OF THE JEFFERSON, MADISON AND GALLATIN RIVER BASINS

A. GEOGRAPHY

6. The basis of the Jefferson, Madison and Gallatin Rivers (hereafter designated the Three Forks Basin) form, in rough outline, an area approximately 120 miles square (with sides north and south and east and west) in southwestern Montana and the northwestern part of the Yellowstone National Park. The basin is bounded on the south, west, and northwest by the Rocky Mountain Ranges of the Continental Divide. On the northeast is the Missouri River, formed by the confluence of the Jefferson, Madison, and Gallatin Rivers at Three Forks, Mont. The Bridger and Gallatin Ranges form the east boundary and are the divide between the Three Forks and the Yellowstone Basins. Geographers consider the main channel of the Missouri River above Three Forks to be continued in successive order through the Jefferson and its tributaries, the Beaverhead and Red Rock Rivers and the source of the latter to be the ultimate source of the Mississippi-Missouri River system.

7. The combined basin area is 13,880 square miles, with 9,520, 2,520 and 1,840 square miles as the drainage areas of the Jefferson, Madison and Gallatin Rivers, respectively. The Jefferson Basin occupies the central and western part of the area, the Madison Basin the east central part and the Gallatin Basin the northeastern part. The three rivers, with their tributaries, converge on their junction at Three Forks from the east, south and west.

8. *Jefferson River.*—The Jefferson River is formed by the junction of the Beaverhead and Big Hole Rivers

just north of Twin Bridges and flows north and east to its junction with the Madison and Gallatin Rivers near Three Forks. Its principal tributary in the main river section is the Boulder River, which rises in the Continental Divide east and north of Deer Lodge National Forest, and flows east and south in a large loop to join the main river at Cardwell. Other tributaries of some importance are Pipestone, Whitetail and Willow Creeks.

9. The Big Hole River rises in the Beaverhead Mountains of the Continental Divide in Beaverhead National Forest and flows in a large S curve to its junction with the Beaverhead River at Twin Bridges. Its principal tributary is Wise River.

10. The Beaverhead river is formed by the junction of the Red Rock River and Horse Prairie Creek at Armstead, and flows northeast to join the Big Hole River at Twin Bridges. In this main river section its principal tributary is the Ruby River, which rises in the mountains north of Lima Reservoir and flows north and west to join the Beaverhead a few miles above its junction with the Big Hole at Twin Bridges. Other important tributaries are Blacktail Deer and Grasshopper Creeks.

11. The streams forming the Beaverhead River area:

Red Rock River, which rises in the mountains of the Continental Divide southwest of the Hebgen Reservoir, flows west through upper and lower Red Rock Lakes, Lima Reservoir and Centennial Valley to Lima, where it turns northwest to join Horse Prairie Creek at Armstead. Its principal tributaries are Junction, Sheep and Sage Basin Creeks.

Horse Prairie Creek, which rises in the mountains of the Continental Divide near Donovan Ranch and

flows north and east to join the Red Rock River at Armstead.

12. *Madison River.*—The Madison River is formed by the junction of the Firehole and Gibbon Rivers in Yellowstone National Park and flows west to the vicinity of Cliff Lake, where it turns north to its junction with the Jefferson and Gallatin Rivers at Three Forks. Its principal tributaries are:

Firehole River, which rises in the Continental Divide near the upper geyser basin in Yellowstone National Park, and is fed by the geysers and hot springs of the upper and lower geyser basins as it flows north to joint the Gibbon River.

Gibbon River, which rises near Grebe Lake in Yellowstone National Park and flows southwest to join the Firehole River.

West Fork, which rises in the mountains south of West Yellowstone, along the western boundary of Yellowstone National Park, and empties into the Hebgen Reservoir.

Bear Creek, which rises in the mountains of the Madison Range in the Gallatin National Forest near Cameron, and flows west and north to join the Madison near Ennis.

Cherry Creek, which rises in the mountains east of Madison Reservoir and flows north to join the Madison northeast of Norris.

13. *Gallatin River.*—The Gallatin River (frequently called the West Gallatin River in its upper course) rises in the northwest corner of Yellowstone National Park, and flows in a general northerly direction to its junction with the East Gallatin River, east of Logan, where it turns west to join the Jefferson and Madison Rivers at Three Forks. Its principal tributaries are:

Taylor Fork, which rises in the Madison Mountains north of Hebgen Reservoir in the Gallatin National

Forest, and flows east to joint the Gallatin east of Eldridge.

West Fork, which rises in the Madison Mountains in the Gallatin National Forest east of Cameron and flows east to join the Gallatin.

Spanish Creek, which rises in the Madison Mountains east of the Madison Reservoir and flows east to join the Gallatin River south of Salesville.

East Gallatin River, which rises in the Gallatin Range east of Bozeman, and flows in a general northeasterly direction to its junction with the main Gallatin north of Manhattan: Its principal tributary is Jackson Creek.

14. The lengths and drainage areas of the streams in Three Forks Basin are as follows:

Length of streams and drainage areas, Three Forks Basin

[Table omitted]

B. TOPOGRAPHY

15. *General.*—The Three Forks Basin is a high mountainous area, about half of which is occupied by large mountain ranges reaching generally to from 9,000 to 10,000 feet above sea level, with a few peaks of 11,000 feet or more. The remaining half of the area is mostly taken up by plateaus, terraces, or high rolling country; smaller areas are occupied by mountain valleys (sometimes called parks or meadows). These mountain valleys are scattered at various points along the main streams and their principal tributaries; they are generally quite flat. The transition from these valleys to the bordering

mountains is usually by a series of benches, but sometimes by a series of hills rising one above another.

16. The principal mountain ranges of the region are the Gallatin, Madison, Jefferson and Bridger Ranges, and the series of ranges along the western edge of the basin that form the Continental Divide. The Gallatin Range forms the eastern boundary of the basin from about the north boundary of Yellowstone National Park to just east of Bozeman. The Bridger Range forms the boundary of the northeastern portion of the basin roughly paralleling the East Gallatin River. The Madison River forms the boundary between the Madison and Gallatin Rivers down to the lower reaches of the two streams, where it gives way to a lower range of hills that themselves merge into a plateau separating the streams near their junction. The Jefferson Range forms the boundary between the Madison and Jefferson rivers. All these mountain ranges are very rugged and precipitous, and their higher peaks are covered with perpetual snow.

17. The minor tributaries of the basin are typical mountain streams, flowing through deep canyons or very narrow valleys with steep sides. The main streams and their principal tributaries flow alternately through deep canyons and high mountain valley areas, which latter generally do not exceed about 2 miles in width. The slopes of all the streams are very steep, except in some instances where the gradients are flattened to a few feet per mile as the streams pass through mountain valley areas.

18. In the valley portion of the streams courses there are frequent areas of swampy land adjacent to the streams. This is especially true on the lower reaches of the three main rivers near their junction at Three Forks. In the irrigated valleys this condition

has been accentuated by water-logging of the land by irrigation.

19. One of the large valleys surrounds the junction of the three main rivers and is known as the Three Forks Valley. In its immediate extent it is about 8 miles long by 5 miles wide, but it is continuous with the lower valley of the Madison and Jefferson Rivers, and with the lower end of the Gallatin Valley. It is very flat and contains extensive marshy areas along the streams, which are winding and sluggish, with numerous sloughs and supplementary channels. This character is particularly marked in the lower portion of the Madison River.

20. *Jefferson River.*—The headwaters of the Red Rock River (ordinarily considered as the continuation of the main stem of the Jefferson River) are tributary to a small mountain park area known as the Alaska Basin. From there the stream flows through a narrow outlet through the mountains into the upper end of the Centennial Valley, which has a width averaging about 6 miles and is 36 miles long. Included in this valley area are the two Red Rock Lakes and Swan Lake. The river through this section is sluggish and winding. A narrow canyon, a mile in length, separates the Centennial Valley from the lower Red Rock Valley. This valley extends down to the mouth of Horse Prairie Creek. From the latter junction (where the Beaverhead River is formed), for about 14 miles, there is a narrow canyonlike valley, not exceeding a quarter of a mile in width, which opens out onto the upper end of Dillon Valley. The latter extends downstream 25 miles. On each side of Dillon Valley are large areas of terraced bench lands of heavy gravel. Below Dillon Valley the Beaverhead River passes through a narrow aperture between two rocky points and enters a large, open, gently sloping plains area, which continues on to

its junction with the Big Hole River, and for some thirty-odd miles beyond. This valley has an average width of about 6 miles, and the flood-plain area is about 2 miles wide. The surface material is mostly very heavy gravel or cobblestones. The valley terminates in a box canyon about 3 miles in length, below which is the lower Jefferson Valley, which in turn merges into the Three Forks Valley.

21. The Big Hole River flows through narrow valleys or canyons throughout most of its length, except for an area known as the Big Hole Basin, a gently sloping and almost unbroken plain about 40 miles long and 12 to 15 miles wide, extending downstream from the vicinity of Divide.

22. *Madison River.*—The headwater area of the Madison River above the Hebgen Reservoir is for the most part in the high plateau region of Yellowstone National Park. From the vicinity of the Hebgen Dam, and downstream for 8 miles, the river flows through a deep and narrow gorge about 500 feet deep. Throughout most of its length the canyon walls are from about 1,000 to 2,000 feet apart. Below this canyon is the middle valley section, 2 to 7 miles wide and 57 miles long. The flood plain of the river ranges in width from a few hundred feet near its upper end to about 3 miles at the lower end. For the most part the flood plain is flanked by a series of coarse gravel terraces rising to about 150 feet above the river. From the vicinity of the Madison Reservoir to 2 miles below its junction with Cherry Creek the river flows through another canyon section similar to the upper canyon. Below the lower canyon is the lower Madison Valley which merges in to the Three Forks Valley.

23. *Gallatin River.*—From its headwaters to the vicinity of its junction with Spanish Creek the Gallatin River flows through a narrow gorge interrupted in a

few places by very small mountain valleys. Below this canyon section the river enters the broad Gallatin Valley. The East Gallatin River flows throughout most of its length at the base of the mountains along the eastern and northern edge of the Gallatin Valley. This Gallatin Valley is the largest of the mountain valley areas in the Three Forks Basin and is about 24 miles in length with an average width of about 12 miles. It has little relief, and with its excellent soil is one of the most intensively developed irrigation regions in the Missouri Basin.

C. POPULATION

24. There are no large cities in the Three Forks Basin, but Butte, the largest city in Montana (population in 1926, 43,100), lies just outside the basin, north and east of the Continental Divide. Butte is the center of the very important mining region of western Montana. Bozeman is the largest city in the basin, with a population of 6,183 in 1920, and is the principal center for the eastern portion of the area. It is located in the highly developed agricultural region of the Gallatin Valley. There are a number of other small towns in the basin, located principally in the northern portion, which serve as local markets and distribution centers. In the area there are a number of old and abandoned mining camps; most famous of these is Virginia City, which is reputed to have had formerly a population of over 20,000, but now contains only about 300 people. The population of the principal cities and towns of the basin is given in the table below.

Principal towns, Three Forks Basin

[Table omitted]

25. The population of the entire basin in 1928 is estimated at 33,500. Gallatin County has the highest population density with 8.4 persons per square miles. Other counties have a density of less than 3 per square mile. The mean density of the basin is 2.4 per square mile.

26. The population of the basin has remained practically stationary during the past 25 years, probably because the lessening of mining and dry farming activities has just about balanced by the normal growth of the region. (See map 4 [1] and Table 2.)

D. WEATHER

27. Owing to the very mountainous nature of the basin, with elevations varying from 4,000 to 11,000 feet, climatic conditions vary widely at different points. The normal precipitation varies from 10 inches to somewhat over 20 inches, the latter in the mountains. The lowest annual precipitation occurs mostly along the eastern and southern edge of the Continental Divide. In the mountains a considerable portion of the precipitation falls in the form of snow, which forms in great banks, remaining throughout most of the summer, and on the highest peaks throughout the year. Snowfalls of from 10 to 15 feet per year are reported as common in the mountains. The annual precipitation varies widely from year to year, departures of from 6 to 8 inches each way from normal

[1] Not printed.

not being unusual, and even greater variations have occurred in exceptional years. May is normally the month of highest precipitation. Approximately 70 per cent of the average annual precipitation falls during the period April 1 to September 1.

28. The occurrence of killing frosts is also very erratic, and growing seasons varying in length from 50 to 160 days are reported in the lower valleys where agriculture is practiced. In the higher altitudes the variations are even more marked. In the lower valleys growing seasons normally vary from about 90 to 120 days. In the higher altitudes frosts are apt to occur in any month of the year. Temperature ranges from -60° up to 112° are recorded. Normal annual temperatures vary from 34° to 44°. Throughout the region the winters are very cold, and the summers, although short, have quite high day-time temperatures. Due to the latitude, the summer days are very long. In the lower altitudes there is ordinarily no difficulty in the producing of all grain and forage crops, and also suitable root crops, provided there is sufficient moisture present for their nourishment. Above 6,000 feet hay is about the only practicable crop, although in a few instances successful grain farming is carried on in the high altitudes. The winters are frequently broken for brief periods by warm winds, known locally as Chinooks. (See maps 6 to 9,[1] inclusive, and Tables 15 to 30, inclusive).

E. TRANSPORTATION FACILITIES AND MARKETS

29. The main transcontinental line of the Northern Pacific Railway traverses the northern portion of the basin, with branches running south to Anceny, Norris,

[1] Only map No. 7 printed.

Pony, and Alder. The main transcontinental line of the Chicago, Milwaukee, St. Paul and Pacific Railway enters the basin in the vicinity of Three Forks and roughly parallels the Northern Pacific to Butte, with branch lines running from Three Forks to Bozeman and Gallatin Gateway, and from Bozeman to Menard. The branch line of the Oregon Short Line Railway from Pocatello Idaho, to Butte traverses the western portion of the basin, following generally the valleys of the Beaverhead and Big Hole Rivers, with a branch line from Armstead to West Yellowstone along the south border of the basin. A private line (not now operated) runs from Divide to Wise River Station and Coolidge. The Helena-Butte line of the Great Northern traverses the extreme northern tip of the basin. The Gilmore & Pittsburgh Railway, connecting with the Oregon Short Line at Armstead, follows Horse Prairie Creek and crosses the Continental Divide to furnish railroad facilities to the Salmon River region of Idaho.

30. The Yellowstone Trail Highway traverses the northern portion of the basin, roughly paralleling the transcontinental railroads. The Gallatin Gateway Highway runs from Bozeman through the Gallatin Valley and Canyon to the west entrance of the Yellowstone National Park at West Yellowstone. The Vigilante Trail leaves the Yellowstone Trail at Whitehall, follows the Jefferson River, goes over the divide between the Jefferson and Madison through the old mining communities around Alder and Virginia City, and follows the valley of the Madison to West Yellowstone. Other highways follow the main river valleys. Considerable parts of these highways are graveled, and there is an active program for their complete improvement, which is now in progress.

31. The existing transportation facilities are adequate for the present business, which is almost entirely confined to the northern half of the area. Kansas City, Omaha, St. Paul, Chicago, Denver, Salt Lake City, Portland, and Seattle provide ready markets for livestock. Butte and the surrounding mining section furnish an important local market. (See map 2.[1])

F. GENERAL ECONOMIC SITUATION

32. The available area of arable land in the basin is much limited by its mountainous character. Only about 865,000 acres of improved land were in farms in 1920. The mountains are too rugged and barren and their altitude too great to permit cultivation, but they afford excellent range during the summer season. Nearly half (about 6,200 square miles) of the basin is included in the Beaverhead, Deer Lodge, Madison and Gallatin National Forests and the Yellowstone National Park. The mountain slopes are generally covered with a growth of small pine timber. Farming has been carried on extensively in the basin over a longer period than anywhere else in Montana, beginning in the sixties for the supply of the mining communities. Agriculture in the basis is probably better developed and on a more prosperous basis than in most other areas in the western portion of the Missouri drainage. The irrigated region of the Gallatin Valley is particularly highly developed and successful. Stock raising is also of importance, aided as it is by abundant and accessible summer range, and by hay and forage production in the high mountain valleys on the irrigated lands.

---

[1] Not printed.

33. The region was the first section of Montana and the neighboring country to be settled. Settlement was brought about by the discovery of gold on Grasshopper Creek and in Alder Gulch in the vicinity of Bannack and Virginia City in the early sixties. The rich placer deposits yielded over $40,000,000 worth of gold in the Virginia City area alone during the sixties and seventies. These were soon worked out, but the areas were reworked for many years by means of gold dredges, some of which are still operating. Also there was considerable development in mining gold and silver from lodes. In recent years these activities have considerably diminished. At the present time mining is no longer the most important industry of the basin, but has been replaced by agriculture. The important mining districts of Montana now lie on the west side of the Continental Divide, around Butte, Anaconda and Helena.

34. Manufacturing in the basin is very limited, and such as is carried on is restricted to activities allied with the farming and stock raising industries. Butte is the important manufacturing center of the vicinity.

35. The following table gives the latest available statistics concerning crops, livestock and mining production in the basin.

[Table omitted]

G. GEOLOGY AND SOILS

36. The surface exposures of formations in the Three Forks Basin appear as a crazy-quilt mixture of large and small, rounded and banded areas of igneous and early and late sedimentary rocks and alluvial gravels.

37. The predominant exposure of igneous rock is that of the great Boulder granitic batholith (quartz-monzonite), 20 miles wide and 90 miles long, extending south 20°west from the north basin rim near Boulder, to the east of Butte and skipping the lowlands of the Big Hole River near Melrose reaches on to Polaris. This huge batholith seems to form the core of nearly all of the mountain ranges of the basin. In the Yellowstone National Park and Butte regions are exposed large areas of volcanic and intrusive rocks, such as rhyolite, porphyrite, andesite, basalt, etc.

38. Adjacent to the igneous rocks (with an overlapping margin of mixture of the two) are the older sedimentary rocks, whose surface exposure covers large areas in the Tobacco Root and Madison Ranges and adjacent mountains. Later geologists classify these rocks with the Cherry Creek group of the Algonkian system. Above these rocks in the geologic column, the Paleozoic and Mesozoic rocks outcrop in a group of narrow parallel bands scattered widely over the basin.

39. Tertiary deposits known as Bozeman lake beds are bound in large areas in the terraces along the sides of the valleys, and near Butte in the north and Donovan Ranch in the southwest they extend over the Continental Divide. Alluvium and recent gravels are found extending 3 to 5 miles in width in the valleys along the main streams.

40. Stratigraphically, the exposed formations (as given in general, by A.N. Winchell, Mining Districts of the Dillon Quadrangle, Montana, Bulletin 574, United States Geological Survey, 1914, and applying to the Dillon Quadrangle, which is in the central part of the basin) range from alluvium and glacial drift down through the Algonkian period, the actual classifications being known as Bozeman lake beds,

Colorado, Kootenai, Phosphoria, Quadrant, quartzite, Madison limestone, Three Forks shale, Jefferson limestone, Flathead quartzite and Cherry Creek group. These formations are exposed in the order named.

41. The ore deposits of the basin occur chiefly in fissure veins or in irregular bodies produced by contact metamorphism in limestone or dolomite. Secondary ores (such as have received a second concentration through mechanical sorting by stream action, e.g., placer gravels), furnished the placer gold production of the early territorial boom days. The richer of these ores were soon worked out, after which were developed the large excavator or sluice dredges, whose use extends to this day. However, paying placer deposits are practically exhausted, and future gold and metal mining in the basin must depend on the primary ores. The Butte district produces annually 90 per cent of the value of Montana mine production, but the production is all concentrated in the immediate vicinity of Butte and is outside of the basin.

42. Two types of soil occur in the valleys. The soils of the immediate stream bottoms and of the lower bench are generally a sandy or silty loam, which is excellent for agricultural purposes when provided with ample water. This includes in general the alluvium and recent gravels. On the upper benches, exposing the Bozeman lake beds, are large areas of land that are nonarable because of heavily gravel-shot soil or almost total absence of soil. In portions of the flood plains of the streams the gravel bars and cobblestones make the land nonarable.

H. FLOW OF RIVERS

43. Discharge records for the streams of the Three Forks system are available over a period of years for

some 42 stations. Most of these, however, are more or less fragmentary. Five stream-gaging stations have been established by the United States Geological Survey under the direction of this office during the past year.

44. The winter flow of the streams is ordinarily small and much affected by ice conditions. The high-water period is normally in June, when the maximum effects of the melting of snow in the mountains is combined with spring rains. The high-water peak sometimes occurs as early as March or as late as July, depending on the temperature and precipitation conditions which may obtain. After this peak the flow ordinarily drops off quite rapidly. However, since a large portion of the water supply of these streams comes from the mountains, they ordinarily have a good low-water flow. The flow of the Jefferson and Gallatin Rivers in their lower stretches is materially affected by irrigation diversions, and in the case of the Jefferson by the storage of water for irrigation purposes. The flow of the Madison River is materially affected by the storage of water in and release from the Hebgen and Madison Reservoirs for the use in the power plans of the Montana Power Co. on the upper Missouri River.

45. There is a large variation in both the instantaneous second-foot and in the annual acre-foot flow. The tables below furnish data on the more important stations. In some cases, for particular purposes, the available records have been extended by methods necessarily more or less arbitrary, and therefore the table of annual flow is perhaps in considerable error at times. The table on instantaneous flow in second-feet has been compiled from the actual recorded flow of the various streams. (Map 3, Tables 38 to 49, inclusive, and Chart 46 should be referred to in this connection.)

Annual run-off in acre-feet

[Table omitted]

Instantaneous flow in Second-Feet

[Table omitted]

I. Bank Erosion and Silt

46. Bank erosion does not occur to any noticeable extent along any of the streams of the basin. None of the streams of the Three Forks system carries an appreciable amount of silt.

II. Existing and Potential Irrigation Developments

* * *

G. Summary

176. Existing irrigation developments total about 590,000 acres. The developments are all small private projects. The only storage provided is in the Jefferson Basin, where several small reservoirs exist. The largest are the Lima Lake Reservoir, of 25,000 acre-feet, on Red Rock River, and the Delmoe Park Reservoir, of 18,400 acre-feet, on Red Rock River, and the Delmoe Park Reservoir, of 18,400 acre-feet on the Pipestone creek. The present irrigated areas are mostly confined to the mountain valley or park areas, the largest being the Gallatin Valley, where about 110,000 acres are irrigated.

177. Irrigation has been successfully practiced in the basin since the sixties. In the lower altitudes it is

intensively developed, particularly in the Gallatin Valley. In the higher altitudes, hay is almost the exclusive crop on irrigated land.

178. Very few cost data of value are available for constructed projects, since nearly all of them were built many years ago and largely by the labor of the farmers themselves. It is estimated that the average maximum total annual charge that can be successfully carried by any project as a whole is $3.50 per acre per year.

179. Water supply, topographical and soil conditions in the basin are unfavorable to the future development of irrigation except at a high cost. Practically all of the suitable land is already irrigated. The low-water flow of the streams is so small and so much utilized by present irrigation as to require storage provisions for all but one small pumping project. The topography along the streams is generally rough and the soils porous making main canals and distribution systems expensive to construct and maintain, as well as requiring a low duty of water.

180. The best appearing possibilities that could be found after thorough investigation have been studied for this report. Omitting the Crow Creek project, these total 23,771 acres for the cheapest set-up for each project, and would cost a total of $2,076,500. Crow Creek was found to be expensive beyond all reason ($436 to $451 per acre) and would conflict with existing water-power rights. The per acre construction costs on the other projects would vary from $73 to $110, except the small Valley View pumping project. The latter would have a construction cost of $45 per acre, but would have a heavy annual operation cost. The annual repayment costs plus operation and maintenance charges would vary between $8.55 and $13.15 per acre per year, which is far too much for the

lands to carry. If repayment were to be in 40 years without interest, in accordance with general practice on Federal projects, the repayment costs plus operation and maintenance charges would vary between $3.32 and $12.40 per acre per year. The former figure applies to the Whitetail project (the only one showing annual charges less than $3.50 per acre) but is based on a considerable reduction in existing obligations of the project, which has already done a small amount of construction work. If these obligations can not be reduced the annual charge would be $3.70 per acre. If the lands of the other projects were only required to pay $3.50 per acre per year, it would take from 44 to 55 years to repay the construction cost without interest.

181. All of the projects would conflict with the water rights of the Montana Power Co. to a greater or less extent. However, it is believed probable that the company would not actively oppose any of the projects except Crow Creek. The latter is so excessively expensive as to be out of the question on that score alone.

182. Some irrigated lands in the basin suffer from shortages of water available for irrigation at times. Except in the Gallatin Valley, the shortages are neither frequent nor serious enough to warrant the provision of supplemental storage arrangements. It appears that serious water shortages occur in the Gallatin Valley in most years, but there are insufficient data available to determine, with any accuracy, the number of acres that might be included in a supplemental storage project. However, it is believed that the storage of approximately 40,000 acre-feet of water would relieve the situation save in most exceptional years. Sufficient water is available for such storage, and a fair site exists on the Gallatin

River. The site has the disadvantage of being located in the Gallatin Gateway to the Yellowstone National Park.

183. Accordingly, estimates were prepared for the inclusion of 25,000, 50,000 and 75,000 acres in the project. The estimated construction costs are $115.70, $57.80 and $38.60 per acre, respectively. These costs are regarded as too great. It is doubtful that as many as 75,000 acres suffer enough from water shortages to warrant their inclusion in such a plan. Furthermore, the situation is susceptible of partial or complete solution at a lower cost, either by the rearrangement and improvement of the existing irrigation systems or by their administration as a single unit, or both. Either one of the latter plans, or for that matter a supplemental storage plan, would require the formation of a single irrigation district embracing all the lands affected. Past attempts along this line have met with strong opposition.

184. Combination of irrigation and water power (except perhaps to a very minor degree in developing secondary power) are impracticable because of insufficient water supply, except in the case of the Crow Creek project. The latter is out of the question because, even were it assumed that power could carry the entire costs of the irrigation reservoir, the irrigation distribution system would be too expensive to permit economical development.

III. Existing and Potential Power Developments

A. Existing Developments

185. *General.*—The Three Forks Basin itself is a sparsely populated area, containing no concentrations of industries requiring large amounts of power;

although the electrified section of the Milwaukee Railroad traverses the northern edge of the basin and the large mining area of western Montana, centering around Butte and Anaconda, is only a short distance away. It is probable that, for a long time to come, the power market in the basin itself will be moderate and scattered. Several points in the basin are connected with the transmission lines of the Montana Power Co., which serves the mining regions of western Montana in the vicinities of Great Falls, Helena, Butte, and Anaconda., as well as the cities and towns of the State, over an extensive area. Lines of this company extend as far east as Nashua on the Milk River in northeastern Montana; Melstone, on the Musselshell River in the central part of the State; and Colstrip south of the Yellowstone River in southeastern Montana. The company serves the 440 miles of the Milwaukee railroad that are electrified from Harlowton west to East Portal, Mont., and connects through the railroad transmission system, with power lines that ultimately extend to the Pacific coast. Hence, the power situation in the Three Forks Basin can not be considered separately from that of the area served by the Montana Power Co. (See map 19.)

186. The present developed plant capacity of the Montana Power Co. within the State totals 293,000 kilowatt-hours. This company has no steam plants in its system; all power is hydroelectric. The major portion is developed at plants along the upper Missouri River from the vicinity of Helena to that of Great Falls, and at Thompson Falls on Clark Fork, a tributary of the Columbia River in the Pacific drainage.

187. In the general area served by the transmission lines of the Montana Power Co., all electrical energy consumed is furnished by that

company, save a small amount produced by municipalities.

188. The following table summarizes data on the Montana Power Co.'s system:

Present hydroelectric generation stations

[Table omitted]

189. The company also has undeveloped sites under consideration along the main stem of the Missouri River, and at the headwaters of the Columbia River drainage in the State of Montana. The estimated aggregate capacity of these potential sites is about 180,000 kilowatts. Potential sites, all in the State of Montana, are as follows:

[Table omitted]

190. In the Three Forks Basin are the Madison plants of the Montana Power Co., as well as four privately owned minor hydroelectric plants. There are no steam plants in the basin. Data regarding the small plants are in the table below:

[Table omitted]

(See map 20. [1])

191. The Montana Power Co.'s transmission system services substations in these towns, the plants described being held for emergency or stand-by service.

192. The Hebgen Reservoir of the company, capacity 345,000 acre-feet, is located at the headwaters of the Madison River, near the western edge of the

[1] Not printed.

Yellowstone Park. It is utilized primarily to regulate the flow of the upper Missouri River in the interest of power production at the plants of the company located on that stream. The Madison plants also benefit by this regulation, and supplement it by a small amount of regulation from the Ennis Reservoir, capacity 36,000 acre-feet. (See map 19.)

193. *Existing market.*—The mining industry and the Milwaukee Railroad afford the bulk of the power market in the State, utilizing about 77 per cent of the annual output of the Montana Power Co.'s system. Most of the large cities, such as Missoula, Anaconda, Butte, Helena, and Great Falls, are in the mining area, and, except for Billings, the remaining cities and towns served by the system are small. Bozeman (population 6,500) is the only city of considerable size in the Three Forks Basin itself, other towns within that area being less than 3,000. (See table of par. 24.)

194. The total power production from the Montana Power Co.'s system in 1929 was 1,582,439,000 kilowatt-hours, 1,220,000,000 kilowatt-hours of which represent the mining and railroad load. Due to the mining load being such a large per cent of the total, the system operates on a high load factor, generally averaging about 80 per cent. No power is transmitted from the company's system to the southeast, south, or southwest, and there is very little likelihood of its being so transmitted in the future, as in these directions the adjacent territory is very sparsely populated and contains no towns of any size for distances of several hundred miles.

195. *Future market.*—The general tendency of the power market, within the area under consideration, has been studied by growth of population, power demand, and generating capacity. These studies indicate an average increase in demand of about

120,000,000 kilowatt-hours per year, which has been fairly constant, disregarding irregularities due to the World War and business depression in the two years subsequent. Since about 77 percent of the power produced in this area is used in the mining industry and by the Milwaukee Railroad, an accurate forecasting of future load requirements is difficult. Using the above figures, the annual consumption by 1940 may be estimated at 3,000,000,000 kilowatt-hours. (See chart 45.)

196. The area within economic transmission range of Three Forks Basin hydroelectric power sources is very rich in mineral deposits. The further development of the mining industry, as the exploitation of these resources becomes economical, and the electrification of railroads probably provide the greatest potentialities for large future power-market expansion. The main line of the Northern Pacific Railroad traverses the northern edge of the Three Forks Basin and the southern portion of Montana. (See map 2.) The heavy track gradients in the mountainous country are in the vicinity of the basin, and the abundance of power that might be made available from various sources would appear to be favorable for further railroad electrification. However, traffic density is not very great as yet. In the case of the Northern Pacific, moreover, a prospective competitor for water power would be steam-electric power produced from the large deposits of coal at Colstrip, in southeastern Montana, owned by the railroad. It is understood from officials of the road that some consideration has been given to electrification from steam power; but that the road is not yet sufficiently interested in the matter to have made any detailed studies. It is believed that railroad electrification represents a real and large-scale

potential demand, but one that probably will not be realized for a matter of decades.

B. POTENTIAL DEVELOPMENTS

197. *General.*—Water-power development in the basin, involving storage, would affect the operation of the several large existing plants on the Missouri River, as well as the water rights of the Montana Power Co., and in fact would have an affect upon the operation of the entire power system of the region. Therefore the complete study, at this time, of potential hydroelectric developments in the basin would involve many complications with respect to both electric-power and water-supply manipulation and would require a presentation of the entire electric-power problem of western and central Montana in this report. It is impracticable to do this at the present time. The water-power situation on the upper reaches of the Missouri River can not be properly presented until the potential irrigation and power resources of its principal tributaries have been thoroughly investigated. Furthermore, the problem may be affected to a material extent by the hydroelectric potentialities in the Yellowstone River Basin. Studies and surveys on the Yellowstone and the upper Missouri tributaries are being pushed but can not be completed for many months.

198. Therefore in this report potential hydroelectric developments will be treated individually and their possible relation to the whole electric-power fabric of western Montana analyzed in a general way only. The data developed in this report will be utilized in a study, the results of which will be submitted later, which will cover the power situation in Montana as a whole.

199. In the mountainous region of the basin, there are a number of limited water power possibilities on small tributaries. However, experience in the region has shown that such developments are generally uneconomical. The operation and transmission costs with small developments are so large per unit of output, s compared to the same costs on large projects, that any advantage of a lesser installation cost per unit is overcome and the total costs of the smaller ones become too great. In addition, in those cases where small projects must utilize low dams, they become undependable because of serious frazil ice difficulties during the severe winters of the region. As a result, with few exceptions, the small installations in the territory, utilized in the past, have been abandoned. According to available information on the subject, the few still remaining will be utilized for stand-by purposes only, or be abandoned in the near future.

200. The present indications are that additional plants, or extensions to existing plants, on the Missouri River, and additional large plants elsewhere, will supply the expanding power demand in the region for several decades. Accordingly, in this report, small developments have not been considered in any detail.

201. Consideration of possible developments in Yellowstone Park has been excluded from the report, since they could not be accomplished without alteration of existing law and of the present national policy regarding the conservation of national parks in their natural state. In all cases, they would be moderate in size.

* * *

218. *Madison River.*—The only sites for hydroelectric developments of any consequences in the

Madison Basin, which seem at all practicable, are located on the main stream in the upper canyon, and in the lower canyon below the existing plants of the Montana Power Co. The tributaries are all too small to afford possibilities of any consequence.

219. The Madison River's flow is regulated by the Hebgen and Ennis Reservoirs, although primarily for the benefit of the plants on the main stem of the upper Missouri River. It appears probable that this method of regulation will be continued, since the Missouri River plants are much larger than the existing Madison plants, and are susceptible of such further expansion that the will remain of considerably greater capacity that any additional plants that might conceivably be developed on the Madison. This condition might be altered were large storage provided in the Jefferson Basin, thereby permitting the use of Madison storage primarily for Madison plants, but the complete effect of such provision is beside the scope of this report.

220. Due to the steep fall and narrowness of the canyon and valley sections of the Madison River, further storage provisions seem impracticable. The potential developments contemplated are run-of-river type, and the studies are based on the flow of the Madison River as it has been regulated by the Hebgen and Ennis Reservoirs for the Missouri River plants primarily.

221. The best sites in the upper and lower canyon sections that would utilize a large portion of the available head in those sections (50 per cent in the upper canyon and 60 per cent in the lower canyon) were studied in detail. The only remaining possibility that has been suggested is a diversion with pressure conduit in the middle valley section along the right bank in sec. 24 or 25, T. 8 S., R. 1 W. However, there

is no dam site available at the point of diversion, and the necessary pipe line would be excessively expensive.

222. The upper and lower canyon potential developments are briefly described as follows (see map 20) [1]:

(a) *Upper canyon.*—A diversion dam located about 1 miles above the mouth of the canyon, with a 6-mile pressure-pipe conduct extending down the right side of the canyon and across a middle valley terrace to a power-plant site in the SE ¼ of sec. 24, T.11 S., R. 1 E.

(b) *Lower Canyon.*—A diversion dam located in sec. 11, T. 3 S., R. 1 E, with about 5 miles of pressure-pipe conduct extending to a plant site on the left side of the stream to sec. 30, T. 3 S., R. 1 E.

223. *Upper canyon project.*—The study of this project was based on the records of the regulated flow of the Madison River at Hebgen during a 20-year period, 1910 to 1929. Since this is a run-of-river project with long pressure conduits, it was necessary to determine values for net power production based on varying heads and water rates. Chart 41 gives the details of this determination, with friction head losses reduced to power equivalents in kilowatts. Similar assumptions were made in this case as in that of the Gallatin River development. (See pars. 207 and 209.)

224. Summarized data regarding the upper canyon development are tabulated below. (See charts 37 and 38.[1])

---

[1] Not printed.

[1] Not printed.

Upper canyon project, Madison River, run-of-river development

[Chart omitted]

225. *Lower canyon project.*—In the lower canyon section there are about 10 miles of gorge downstream from the existing Madison plant No. 2, and above the selected power-plant site. This section of the river was prospected some years ago by the Montana Power Co. and bedrock was found at too great a depth for the economical construction of a high dam. Hence the development was studied as a diversion project with pressure-pipe conduits. This may involve some difficulties, as the conduits would probably require a large amount of rock excavation for a considerable part of their length. The site being below the Hebgen and Ennis Reservoirs, it was investigated on the basis of the actual operation of these reservoirs for the 14-year period, 1916 to 1929, in the same manner and with the same assumptions as in the case of the upper canyon project. (See chart 41 and pars. 207 and 209.)

226. The results of the study are contained in the following table. (See charts 39 and 40.[1])

Lower canyon project, Madison River, run-of-river development

[Chart omitted]

227. As far as the present study can permit an opinion, the upper canyon project at least appears from the figures to offer commercial possibilities if the 90 per cent power is utilizable, and especially if a

[1] Not printed.

considerable quantity of the secondary power could be used. The lower canyon project may be too expensive for economic development in the near future, if made and utilized along the lines of the present study. However, it must be remembered that these projects were studied using the flow of the Madison River as it had been regulated in the past for the benefit of plants on the Missouri River. If the existing reservoirs on the Madison River were operated more with an eye to the best advantage of the Madison plants, both developments would appear in a more favorable light. (See par. 219 above.) As has been stated in paragraph 197, the further study will be required to settle this matter is a question for a later report.

C. SUMMARY

228. The Three Forks Basin itself is sparsely populated and affords no present or potential power market of importance. However, it is close to the mining area of western Montana and the electrified portion of the Milwaukee Railroad, which afford important markets for electric power. Practically the entire market of about the western two-thirds of Montana, as well as the Three Forks Basin itself, is served by the Montana Power Co. The system of this company is exclusively hydroelectric. Its present installed capacity is 293,000 kilowatts and the total power production of its system was 1,582-439,000 kilowatt-hours in 1929. Aside from the plants of the Montana Power Co., there are only four small plants (all municipal) in the basin, total installation of 734 kilowatts. These four plants are used chiefly for stand-by purposes.

229. Any very large increases in the future power demand in the vicinity of the basin, or elsewhere in

Montana, will probably come from a considerable increase in mining activity or in further electrification of railroads. At present, the mining and railroad load is 77 per cent of the total load on the Montana Power Co.'s system. The mining requirements for power appear at this time to offer some promise of steady, moderate growth, but none of any very large expansion. The electrification of the Northern Pacific Railroad through the mountains is a real future possibility, but one that will probably not take place for a good many years. The Northern Pacific owns large deposits of coal at Colstrip in southeastern Montana that may permit steam power to successfully compete with water power, as a prime mover in providing electricity.

230. For the lack of better data, a forecast was made of the probable future power demand in Montana by 1940 based on population and post power requirements, which indicated about 3,000,000,000 kilowatt-hours per year as the probable requirement by that time.

231. The bulk of the installed capacity of the Montana Power Co. is in plants on the Missouri River between Three Forks and Morony, 18 miles below Great Falls. It has two small plants (12,000 kilowatts) and two storage reservoirs (Hebgen, 345,000 acre-feet, and Ennis, 36,000 acre-feet) on the Madison River. The reservoirs are operated primarily in the interest of the Missouri River plants, the Madison plants taking advantage of the resulting regulation of the Madison River itself. Future hydroelectric development in the Three Forks Basin will affect the electric power situation of western Montana, with respect to both the manipulation of the available water and the disposal of the resulting electric power in the market available. For this reason, it is necessary to defer the complete

study of the hydroelectric possibilities in the Three Forks Basin to a report on the upper Missouri River that will be submitted later. In this present report, the best possibilities for development are selected and studied as individual projects.

232. the only projects of any consequence that appear at all practicable are what is known as the lower basin site on the Gallatin River about 25 miles about Salesville, the Big Hole site near Glen Station on the Big Hole River (Jefferson tributary), and the upper canyon (near downstream end of upper canyon) and lower canyon (below the present Madison No. 2) sites on the Madison River. The Gallatin development would involve storage, an installation at the storage dam, and two diversions downstream through pressure pipe. The Jefferson development would involve storage and a plant at the dam. The Madison developments would both be diversions through pipe lines and would be run of river, but would have the advantage of the storage regulation by the Hebgen and Ennis Reservoirs for the benefit of the Missouri River plants of the Montana Power Co. Data on the developments are summarized in the following table:
Summary, water power projects

[Chart omitted]

233. The projects all appear too expensive for economical development individually, except perhaps the upper canyon project on the Madison River. However, the Gallatin and Big Hole sites, particularly the latter, may afford considerable promise in connection with providing additional storage for plants on the upper Missouri River. Also, storage at the latter sites might permit an alteration in the present use of the Madison River reservoirs that might make

additional installations more attractive on that stream. These latter possibilities will be thoroughly covered in a report on the upper Missouri River to be submitted at a later date.

IV. Flood Control and Navigation

A. FLOOD CONTROL

234. *Madison, Gallatin and Jefferson Rivers.*—The river channels appear to be sufficiently large to handle all but extraordinary floods. Occasionally, there are very minor overflows of small and low areas during periods of unusually large flow. However, no records could be found of serious flood damage arising from such flows, and inquiries from many citizens during the reconnaissance indicate that such floods rarely occur in the basin, and such as do occur cause no damage.

235. The only overflows of any consequence at all are caused by ice gorges. These are neither frequent in their occurrence nor serious in their effects, on any of the streams. On the Madison River they are more frequent than on the others, and the areas that have been affected are probably larger. However, the flooding from ice gorges occurs before crops are planted, so that the only damage resulting is suffered by roads, railroads, and farm structures. Even in this case the damage is not serious. A considerable portion of the lower lands that are most frequently affected is used for pasture only.

236. No data of any value are available regarding the frequency or extent of the damage. In the spring of 1929, it is reported that one of the worst cases on record of flooding from ice gorges occurred on the lower Madison River but aside from some damage to roads

and railroads, the only result was that four or five ranchers had to move their families and livestock out of the flooded area until the waters receded.

236½. The areas affected by ice gorges, and the resultant damage, are too small to justify even a small fraction of the cost of a comprehensive flood protection scheme. There is no flood problem of any consequence in the basin, and the streams can not be said to be subject to destructive floods.

* * *

B. NAVIGATION

250. *Madison, Gallatin and Jefferson Rivers.*—As far as is known there has never been any navigation on these streams, and commercial navigation on them is entirely out of the question.

251. *Effect of water-power projects on low-water stages of the Missouri.* –In this study it is assumed that the potential Gallatin and Big Hole Reservoirs will be operated, as indicated in Part III, for the best development of power at the sites, and that the existing Hebgen and Ennis Reservoirs will continue to operate as they have the past. In the operation of reservoirs for the development of water power, the flow is stored during times of high discharge for use during low-water periods. This results in a regulated flow during the low-water periods that is generally greater than the natural low-water discharge; and unlike the irrigation use, which consumes a portion of the supply, the water passes on downstream. The operation of power reservoirs therefore tends to improve the low-water flow. The low-water period in the Three Forks Basin generally corresponds to the low-water period on the Missouri during the navigation season, which is

generally from about August 1 to November 30. However, in July, which corresponds to the (usual) August low-water period on the lower river, the Three Forks Basin is generally still contributing some flood water that would be held back under power regulation. The difference between the regulated flow and the natural flow of the stream at the reservoir sites is an index to the effect on navigation conditions.

252. In the study of the natural flow of the Gallatin, Madison, and Jefferson Rivers, at the reservoir sites, records covering the same periods were not available, although in each case the records extended over 14 or more years. Combinations were therefore made of average discharges, and comparisons were made between the average natural and regulated flows. The results are shown in the following table:

[Table omitted]

253. Therefore, water-power projects in the basin are slightly beneficial to low-water conditions on the Missouri, except during July (August on lower Missouri), when they are slightly detrimental. The amounts in either case are small, being less than an inch on the Kansas City gage.

254. *Effect of irrigation projects on low-water stages of the Missouri.*—In this connection references should be made to map 11 and Part II of this report. This study is based on the assumption that all the irrigation projects considered have been developed to the largest acreage possible, except the Whitetail and Valley View projects. These two projects were omitted from consideration on account of the meager stream flow records available and they very small area of land involved; their omission will not affect the conclusions.

The maximum acreage involved in the East Bench, South Bench, and Crow Creek projects amounts to $107,000 acres.

255. Except in years of above normal late runoff, the run-of-river flow would be insufficient for the irrigation of all land in the projects from July 1 to September 30. Therefore, in the normal case during these three months, all of the natural flow of the streams at the respective intakes plus a draft on storage is used to irrigate the lands, except flow that is passed for prior rights and used elsewhere. Eve if years would occur when the natural flow from July 1 to September 30 was sufficient for irrigation needs, any excess would be stored as insurance against the possibility of the next year being one of low spring run-off; unless, of course, the reservoirs were full that late in the irrigation season, which is most improbable.

256. During October, after the close of the irrigation season, the irrigators will store all of the flow in the streams at their reservoirs. Otherwise they would be taking a dangerous chance in expecting the next spring run-off to be high enough to make such procedure unnecessary. Therefore, in the ordinary case during the period in the Three Forks Basin equivalent to the Missouri low-water season, July 1 to October 31, the only water that would pass the new irrigation projects would be that required for prior rights (which would be used elsewhere) and return flow from the project lands.

257. No return-flow investigations of any consequence have ever been made in the Three Forks Basin, and it would take several years of such investigation to arrive at any definite conclusion. However, the results of several years of detailed return-flow investigations on the North Platte River in Nebraska and the South Platte River in Colorado area

available. Based on these investigations, it is estimated that the return flow from the projects considered in this study would be about 50 per cent of the full irrigation use; and that of the total return flow, one-half, or 50 per cent, would be distributed through the period July to October as follows: July, 10 per cent; August, 10 per cent; September, 15 per cent; and October, 15 per cent. The estimate is approximate, but is reasonable and at least of the proper order of magnitude.

258. The projects considered in this study include 107,000 acres. Using the gross or overall duty adopted in each case, they would require 449,400 acre-feet of water for the full season; and the total return flow would then be about 224,700 acre-feet. The distribution of the return flow is shown in the following table, as well as the total mean natural flow of the streams at the irrigation projects:

Return-flow distribution and mean natural flow, Missouri low-water season.

[Chart omitted]

259. It is noteworthy that the return flow in all months is considerably less than the natural flow throughout the period studied. The monthly difference in rate of flow is shown by the following table:

Comparison of mean rate of return flow and mean rate of natural flow, Missouri low-water season

[Chart omitted]

260. It is apparent that the construction of these irrigation projects would tend to have a detrimental

effect, although to a small degree, on low-water conditions on the Missouri River. The most noticeable difference would be in July, when, on the average, nearly 1,000 second-feet less water would be contributed to the Missouri after the projects were developed than are contributed naturally. This would amount to a reduction of from about one-half inch to 1 inch on the Kansas City gage.

261. *Reservoirs operated primarily to benefit Missouri navigation conditions.*—It would be physically possibly to construct and operate such reservoirs in the Three Forks Basin, It is probable that about 1,000,000 acres-feet of storage could thus be provided. This would permit the release of about 4,000 cubic feet per second during the 120 days of the Missouri low-water season, August 1 to November 30. Such a rate of release might correspond to somewhere between 2½ and 4 inches increase of navigable depth at Kansas City. However, the construction and operation of such reservoirs on this basis is seriously infringe upon existing water rights for both power and irrigation purposes, but would also retard the development of the region by preventing the full development of future irrigation and power possibilities.

V. Conclusions

262. *Irrigation.*—The most promising arrangement for future irrigation that is conceivably developable, within limitations imposed by water supply, suitability of soils, topographical conditions, and costs at all within the bounds of reason, includes 23,771 acres. The total construction costs of the projects making up this total are estimated at $2,076,500. Per acre construction costs would vary from $73 to $110, except

for the small Valley View pumping project, where the construction cost would be only $45 per acre, but the operation and maintenance cost would be heavy. Per acre repayment, operation, and maintenance costs would vary from $8.55 to $13.15 per year with private financing; under the usual practice on Federal projects, of repayment in 40 years without interest, they would vary from $3.32 to $12.40 per year. The maximum yearly water charge that any of the projects as a whole could be expected to meet successfully is estimated at $3.50 per acre per year. With the possible exception of the Whitetail project (the one with the $3.32 annual water charge under Federal development), all the projects are too expensive for the successful repayment of the construction costs unless developed by the Federal Government with a repayment term in excess of 40 years. The Whitetail project could not be developed as cheaply as indicated, unless some of its present obligations could be appreciably reduced.

263. Any material further irrigation in the basin, if and when possible at all, would involve even higher costs.

264. The water supply available during the low-water months is insufficient in most years for the full irrigation of all the existing irrigated lands in the Gallatin Valley. Elsewhere in the Three Forks Basin, water shortages are not believed to be sufficiently frequent or serious to warrant consideration of a plan for providing supplemental storage. In the case of the Gallatin, the provision of about 40,000 acre-feet of storage water would probably provide an ample supply throughout the irrigation season, save in exceptional years. The provision of this storage water is estimated to cost $115.70 per acre for 25,000 acres in a supplemental storage project, $57.80 for 50,000 acres,

and $38.60 for 75,000 acres. It is doubtful that as many as 75,000 acres suffer enough from water shortages to warrant their inclusion in such a plan. These costs are regarded as too great to permit private financing. Furthermore, the situation is susceptible of partial or complete solution at a lower cost, either by the rearrangement and improvement of the existing irrigation systems, or by their administration as a single unit, or both. Either one of the latter plans, or a supplemental storage plan, would require the formation of a single irrigation district embracing all the lands affected. There has been strong opposition by the irrigators to such a measure in the past.

265. The development of irrigation and water power in combination in the basin on any scale is impracticable because of insufficient water or excessive irrigation distribution costs.

266. *Water power.*—The further development of the potential water-power resources of the basin is so interrelated with the existing hydroelectric plants on the upper Missouri River and the further hydroelectric potentialities of the upper Missouri and Yellowstone Rivers, as to preclude full discussion and final conclusions in this report, and until studies now under way on the upper Missouri and Yellowstone have been completed.

267. Aside from some minor possibilities on small tributary streams the potential water powers of any economic possibility are confined to the "lower basin" site on the Gallatin river, to the upper and lower canyons of the Madison River, and to the Big Hole River near Glen Station. If operated as individual plans, without regard to the necessities of the existing system or possible extensions thereof, these projects could develop a total of 23,500 kilowatts of primary power and a total output, including secondary power,

of 470,000,000 kilowatt-hours per year. Costs of the project are estimated at from $150 to $340 per installed kilowatt. The projects all appear too expensive for economical development individually, except perhaps the upper canyon project on the Madison River. The Gallatin and Big Hole projects, particularly the latter, may however afford considerable promise in connection with providing additional storage for plants on the upper Missouri River. Storage at these sites might permit an alteration of the present method of operation of the existing reservoirs on the Madison River that would make the proposed projects on that stream more attractive.

268. *Flood control in the Three Forks Basin.*—The Three Forks Basin is not subject to destructive floods.

269. *Navigation on the Madison, Jefferson, and Gallatin Rivers.*—Commercial navigation is out of the question on these streams.

270. *Special data required by section 10 of the act of May 15, 1928.*—"The effect * * * of further flood control of the lower Mississippi River to be attained through the control of the flood waters in the Three Forks Basin by the establishment of a reservoir system." The effect would be from one-fifth to one-third of an inch on the Cairo gage, and the operation of reservoirs designed for the purpose would seriously infringe upon existing water rights for irrigation and water power. (See Pt. IV-A.)

271. "The benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream." There would be no benefits. There is no navigation in the Three Forks Basin, nor any prospects of any. Bank erosion is not a problem anywhere in the basin. Agriculture suffers no damage from "siltage entering the stream," other than

from the washing of soils by heavy rains. This would not be lessened by any of the works considered in this report.

272. "A determination of the capacity of the soils of the district to receive and hold water from such reservoirs." Most of the soils on lands that might be physically irrigable are of a porous character, underlain by gravel strata. They therefore have little water holding capacity, but by the provision of an ample supply of water it is believed that the areas selected for inclusion in the various irrigation projects studied are suitable for reasonably successful irrigation farming. (See Pt. II.)

273. "The prospective income from the disposal of reservoired waters." There could be no net income from the disposal of reservoired waters for irrigation purposes. Under present conditions, the irrigation projects in the basin are all so costly that the farmers could not afford even to meet payments that involve no interest; in the future, should the economics of agriculture so change as to make the projects financially practicable, the cost would still be too great to permit any payment in the excess of that required to repay the actual cost. The only prospective net income from water power would be from hydroelectric development. The amount of such income can not be stated at this time, but will be included in the later report on the upper Missouri River. (See par. 197.)

274. "The extent to which reservoired waters may be made available for public and private uses." Reservoired water may be made available, in combination with direct flow, for the irrigation of 23,771 acres, but at a cost that is too great to permit the successful repayment of the construction cost at the present, either by private capital or by Federal development, in 40 years even without interest. The

figure of 23,771 acres excludes the area of the Crow Creek project, since the latter is expensive beyond reason and would conflict with existing water rights. (See pars. 151 an 180.)

275. The extent to which reservoired waters could be made available for the production of hydroelectric power can not be definitely stated at this time, but will be included in a later report to be submitted on the upper Missouri River. (See pars. 197 and 231.)

276. "Inquiry as to the return flow of water placed on these soils from the reservoirs and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation." It is estimated that, for the proposed project studied, the return flow would be about 50 per cent of the gross water requirement for irrigation needs. The operation of reservoirs for irrigation or power purposes would reduce the average spring peaks. Return flow from irrigated lands would be less than the natural flow removed from the stream during the period of low water on the lower Missouri River from August to November, inclusive. Therefore, irrigation in the basin would generally make the low-water conditions on the Missouri worse. The amount of injury would be small, corresponding to something less than 1 inch on the Kansas City gage. (See Pt. IV-B.)

277. This stabilization would have no perceptible effect on preventing erosion and siltage or on improving navigation:

(*a*) *On the Madison, Jefferson, and Gallatin.*—Because there is no erosion of banks and no navigation nor prospect of any.

(*b*) *On the Missouri.*—As to erosion: The Three Forks Basin by itself does not contribute a sufficiently large proportion of water to the Missouri so that the

operation of any system of reservoirs would produce any material stabilization of the latter stream. Since the Missouri erodes its banks seriously at low water as well as at high water there would be no material reduction of bank erosion from such stabilization. The Missouri River up to Sioux City, Iowa, is under improvement by a navigation project which involves, as its most essential step, the protection from erosion of practically all cutting banks. This would have to be done under this project, even if there were a 100 per cent control of every tributary of the Missouri; and it would cost just as much to do it. The same procedure would be necessary were the present project extended upstream from Sioux City; and it would be economically necessary if, in the absence of such extension of the navigation project, a program were adopted for the protection of farm lands in this stretch of river from erosion. So from the point of view of striking an economic balance, bank erosion on the Missouri is irrelevant.

As to siltage and navigation: The streams of the basin all carry an insignificant amount of silt. A large system of reservoirs devoted exclusively to increasing the low-water flow of the Missouri might produce increased navigation depths at Kansas City of from 2.5 inches to 4 inches, as far as can be determined at this time, but such a system would seriously infringe upon the existing irrigation and power rights for water, and therefore is regarded as impracticable. Reservoirs utilized for irrigation or water power, together with the return flow from irrigated lands that would accompany their installation, would have a small effect upon navigation conditions on the Missouri River, which effect would be detrimental. In the case of water-power reservoirs, the average effect would be slightly beneficial, except during the first month of the

Missouri low-water season when on the average it would be slightly detrimental.

(*c*) ***On the Mississippi.*** – Similar conditions obtain but, of course, the effects would be of even less importance than on the Missouri.

VI. Plan of Development

278. The best future plan for the comprehensive utilization of the water resources of the Three Forks Basin for the future development of irrigation, within the limitations of water supply and topographical and soil conditions, includes:

(*a*) Eight thousand acres in the East Bench project.
(*b*) Two thousand and seven hundred acres in the Valley View project.
(*c*) Eight thousand acres in the South Bench project.
(*d*) Five thousand and one hundred acres in the Whitetail project.

279. Under the existing economics of agriculture, in no case could the lands proposed for irrigation above, carry more than a fraction of the cost of the work if they were to pay any interest. Even if they were not to pay interest, in no case could they, while carrying operation charges, repay the principal within a period even as great as 40 years, with an assumed total annual burden on the land of not to exceed $3.50 per acre per year; with the possible exception of the Whitetail project. However, the same would be true of the Whitetail project unless existing obligations of the project organization could be materially reduced.

280. The above plan does not contemplate the construction or operation of any reservoirs for the

specific purpose of controlling the flood waters of the Mississippi or Missouri River, or for benefiting navigation on those streams. Such reservoirs would seriously infringe upon existing water rights for irrigation and water power, and would prevent the full development of the irrigation and water power possibilities of the region. Such a procedure would upset the entire economic balance of the Three Forks Basins, which is largely based on existing irrigation rights and power developments. It would so obviously be bad economics, and would so obviously be outside the realm of "practical politics" that this office did not consider it worth while to make any detailed cost estimates. If may be stated that if such reservoirs were built and operated for the exclusive benefit of Mississippi flood control, the greatest lowering of the Cairo gage on which any reasonable dependence could be placed would not exceed one-third of an inch; and if for the benefit of Missouri navigation, the theoretical increase of stage at the Kansas City gage would be from 2.5 inches to 4 inches.

281. The above plan does, however, contemplate certain other reservoirs—designed, not primarily for the Mississippi or Missouri, but primarily for the irrigation projects of which the plan consists. But those reservoirs (pars. 242 to 247, inclusive) would have effects on the Missouri and Mississippi, as regards either floods or navigation that would be quite incalculable, minute, and undependable.

282. No plan for hydroelectric developments is proposed in this report, since, as has already been explained, the best utilization of the water resources of the basin for the further development of hydroelectric power can not be determined until after present studies on the Yellowstone and upper Missouri Rivers have been completed. This portion of the plan will be

included in a later report to be submitted on the upper Missouri River.

283. *Federal interest.*—Evidently, on the score of flood control or navigation benefits on the Mississippi and Missouri Rivers, there is no Federal interest in the work outlined above. It is to be considered purely as a group of small irrigation projects. What interest the Federal Government might have in subsidizing or cooperating in such developments, here or elsewhere in the Missouri Basin, is of course unknown to this office, being a matter of national policy for Congress to determine.

VII. RECOMMENDATIONS

284. It is recommended that the project outlined in paragraph 278 above be considered and accepted by the department, as an approved layout for the ultimate practicable utilization of the water resources of the Three Forks Basin for irrigation purposes.

G. R. YOUNG
Major, Corps of Engineers,
District Engineer.

[First indorsement]

OFFICE DIVISION ENGINEER,
UPPER MISSISSIPPI VALLEY DIVISION,
St. Louis, Mo., October 10, 1930.

The CHIEF OF ENGINEERS, UNITED STATES ARMY:

1. This report contains a careful consideration of the problems involved in determining the most practicable plan of development of the water resources

of the Three Forks Basin in the interests of all parties concerns. A clear discussion of the problems of navigation, flood control, and irrigation is given. Water-power development has been studied, the final determination of the best plan of operation of plants in this basin being withheld until a complete study of a coordinated development for the upper Missouri River has been made. A plan of development has been formulated, for irrigation purposes, which, although uneconomic at the present time, appears to be the most practicable plan for the future.

2. The division engineer concurs in the recommendation of the district engineer that this plan be considered and accepted by the department, as an approved layout for the ultimate utilization of the water resources of the Three Forks Basin for irrigation purposes, and further recommends that Federal interest in the further development of the water resources of the Three Forks Basin consist, at this time, of making available to interested parties the valuable data contained in the report.

GEO. R. SPALDING,
Lieutenant Colonel, Corps of Engineers,
Division Engineer.

[Second indorsement]

OFFICE CHIEF OF ENGINEERS,
Washington, D. C., October 16, 1930.

THE PRESIDENT OF THE MISSISSIPPI RIVER COMMISSION,
Vicksburg, Miss.:

1. This report is referred for comment and recommendation.

By direction of the Chief of Engineers:

HUGH J. CASEY,
First Lieutenant, Corps of Engineers.

[Third indorsement]

OFFICE PRESIDENT MISSISSIPPI RIVER COMMISSION,
Vicksburg, Miss., November 7, 1930.

THE CHIEF OF ENGINEERS, UNITED STATES ARMY:

1. From a consideration of the data before it relative to the Jefferson, Madison, and Gallatin Rivers, the Mississippi River Commission concludes that-

(*a*) the valleys of these streams are not subject to destructive floods and there is no flood problem to be considered.

(*b*) The effect of any existing or prospective reservoirs on these rivers on the flood heights of the Mississippi River at Cairo would be very slight and could have no material effect on the plan of flood control for the lower Mississippi River.

(*c*) There is no commercial navigation on these streams and no present need for channel improvements.

(*d*) The final determination of the best plan for water-power development on these streams should be held in abeyance until a complete study of a coordinated development for the upper Missouri River and its tributaries has been made.

(*e*) The plan of development as formulated by the district engineer is in accordance with existing development and appears to be the most practicable plan for the future ultimate utilization of the water resources of these streams.

2. The Missouri River Commission recommends that the report of the district engineer be published for the information of those interested.

For the Mississippi River Commission:

T. H. JACKSON,
Brigadier General, Corps of Engineers,
President.

UNITED STATES DEPARTMENT OF THE INTERIOR,
BUREAU OF RECLAMATION,
Washington, January 26, 1931.

Maj. Gen. LYTLE BROWN,
Chief of Engineers, War Department.

DEAR SIR: In keeping with the suggestion made in paragraph 4 of your letter of January 17 there are being returned to you reports on the Jefferson, Madison, and Gallatin Rivers, Mont., which you forwarded to this bureau for comments. I regret the necessity of so returning these reports because of the liability of this bureau to give to them the time and study necessary to justify concurrences with or objection to the conclusion drawn.

It is believed that nothing controversial need be anticipated in connection with these reports.

Very truly yours,

P. W. DENT, *Acting Commissioner.*

APPENDIX I

MAPS AND CHARTS

[Table omitted]

UNITED STATES GEOLOGICAL SURVEY
GAGING STATIONS

[Shown on map No. 3]

MADISON, GALLATIN, AND JEFFERSON RIVER BASINS

[Chart omitted]

* * *

CLIMATIC DATA

TABLE NO. 15.—*Agriculture college, Bozeman, Mont.—Gallatin River Basin*

TEMPERATURE

[Table omitted]

FROST

[Table omitted]

TABLE NO. 16.—*Agriculture College, Bozeman, Mont.—Gallatin River Basin*

PRECIPITATION

[Normal fall in inches]

[Chart omitted]

SNOWFALL

[Normal fall in inches]

[Chart omitted]

TABLE NO. 17.—*Yellowstone Park, Gallatin, Wyo.—Gallatin River Basin*

MEAN TEMPERATURES

[Chart omitted]

FROSTS

* * *

TABLE NO. 18.—*Yellowstone Park, Gallatin, Wyo.—Gallatin River Basin*

PRECIPITATION

[Normal fall in inches]

[Chart omitted]

SNOWFALL

[Normal fall in inches]

[Chart omitted]

TABLE NO. 19. – *Yellowstone Park, Riverside, Wyo. —Madison River Basin*

TEMPERATURE

[Chart omitted]

FROSTS

[Chart omitted]

TABLE NO. 20.—*Yellowstone Park, Riverside, Wyo. —Madison River Basin*

PRECIPITATION

[Normal fall in inches]

[Chart omitted]

SNOWFALL

[Normal fall in inches]

[Chart omitted]

TABLE NO. 21.—*Hebgen Dam, Mont.—Madison River Basin*

TEMPERATURE

[Chart omitted]

FROSTS

[Chart omitted]

TABLE NO. 22.—*Hebgen Dam, Mont.—Madison River Basin*

PRECIPITATION

[Normal fall in inches]

[Chart omitted]

SNOWFALL

[Normal fall in inches]

[Chart omitted]

* * *

TABLE NO. 25.—*Norris, Mont.—Madison River Basin*

TEMPERATURE

[Chart omitted]

FROSTS

[Chart omitted]

TABLE NO. 26.—*Norris, Mont.—Madison River Basin*

PRECIPITATION

[Normal fall in inches]

[Chart omitted]

SNOWFALL

[Normal fall in inches]

[Chart omitted]

* * *

DISCHARGE DATA—UNITED STATES GEOLOGICAL SURVEY GAGING STATIONS

TABLE NO. 38.—*Madison, Gallatin, and Jefferson River Basins*

[Table omitted]

* * *

TABLE NO. 46.—*Madison River Basin*

MADISON RIVER, YELLOWSTONE, MONT., STATION NO. 34

[Drainage area, 410 square miles; run-off in acre-feet]

[Table omitted]

TABLE NO. 47.—*Madison River Basin*

MADISON RIVER, RED BLUFF, MONT., STATION NO. 37

[Drainage area, 2,085 square miles; run-off in acre-feet]

[Table omitted]

* * *

Construction cost estimates, Crow Creek project

[Table omitted]

POTENTIAL POWER DEVELOPMENTS

133. *General.*- The Three Forks Basin is comprised of the combined drainages of the Gallatin, Madison, and Jefferson Rivers. (See map 1, Appendix 1.) These streams are the headwaters of the upper Missouri River which is formed by their confluence near Three Forks, Mont.

134. Winter precipitation in this region is stored on the drainage area in the form of snow and is released from such storage during the coincident season of the heaviest rainfall. This period of high runoff usually occurs in the late spring months. During the remainder of the year, the rainfall is meager. The flow through the dry season is maintained, principally, from melting snow in the highest altitudes and from ground water storage fed into the streams from springs and geysers. The flashy character of the stream flow is evidenced by the following table:

[Table omitted]

135. The wide variations of flow, during the year, require the development of the maximum economical reservoir storage. This is obviously necessary to supplement the natural stream flow during the protracted low flow season, and thus provide the prime water requirements. Ice troubles were not especially considered but it is believed that the large storage capacities provided in the case of the reservoir projects will mitigate against serious difficulty.

136. Studies of power possibilities were made in detail for sites showing promise of being within range of practicability. These sites were located by the field reconnaissance of the Corps of Engineers, examination of reports and available topographic maps made by the

United States Geological Survey and data supplied by the agricultural engineering department of Montana University. Available power was estimated by the analytic method, based on mean monthly recorded flows and available head. Water-supply values, in acre-feet of stream yield per month, either measured or extended, are available at each of the sites for continuous periods of from 14 to 20 years. The assumption was made that periods of such duration contained all characteristics of the streams' flowage cycles and thus presented a fair measure of firm and average power values obtainable.

137. Water power in this region is plentiful and cheap. Stream power is relatively expensive due to the low grade of the coal within economical transportation limits. The Montana Power Co., the largest operating system in this area, has 100 per cent hydroelectric power generation. These projects were studied, therefore, as purely hydroelectric power developments operating for the production of a maximum of firm power. Existing or forecasted market was not considered. Demand, in each study, was assumed equivalent to the firm power rating at 50 per cent load factor with secondary and off-peak power marketable at 2 mills per kilowatt-hour. The assumptions made are believed to be in no way unfavorable and to show the economic practicability of each project to a sufficient degree of accuracy.

* * *

UPPER CANYON PROJECT—MADISON RIVER

142. The existing Hebgen Reservoir of the Montana Power Co. is located in the headwaters of the Madison River. (See map 20, Appendix I.) It was built

in 1915 purely for storage of flood waters to afford stream regulation for the benefit of hydroelectric developments on the main stem of the Missouri River. It has a storage capacity of 325,000 acre-feet.

143. Some 6 miles by stream below the Hebgen Dam, the Madison River flows through what is known as the upper canyon. The upper canyon project is located at the lower end of this canyon. It is a run-of-river proposition with the diversion dam located about 1 mile above the mouth of the canyon, using a double run of about 6 miles of wood stave, steel banded pipe line to develop a relatively high head.

144. Operation of the upper canyon project must depend on water released from Hebgen Reservoir. There is no appreciable intervening drainage area. Operation of Hebgen Reservoir is not necessarily to the best advantage of this project. The height of the diversion dam provides pondage only. Studies were based on the recorded discharges in acre-feet per month during the period 1910 to 1929. (See hydrograph and duration curve, chart 38, Appendix I.) Installed capacity was set to develop 30 per cent of time flow during the period of record. Proper friction losses, involved by the long pipe line, were considered. (See chart 41, Appendix I.) Overall plan efficiency was assumed constant at 80 per cent. Monthly estimated values of available power during the period of record are shown graphically on chart 37, Appendix I.

145. Major details of the project, estimated power available and cost of output are listed in the following summary:

[Chart omitted]

LOWER CANYON PROJECT—MADISON RIVER

146. The Madison Reservoir of the Montana Power Co. is located on the Madison River, near the tow of Ennis, Mont., and at the head of the lower canyon. This reservoir has a capacity of 36,000 acre-feet. Its purpose is mainly to provide pondage for two hydroelectric plants located immediately downstream. It has very little effect on seasonal regulation.

147. The two existing plants are known as Madison No. 1 and No. 2. Both are connected to the reservoir by wood stave pressure pipe. Madison No. 1, immediately below the dam, has an installed capacity 2,000 kilowatts. Madison No. 2 is about one and one-half miles below the dam and has 10,000 kilowatts installed. Both are used to furnish energy to the Montana Power Co.'s transmission system.

148. The lower canyon project would have a diversion dam located approximately 8 miles by stream below the Madison No. 2 plant. A double run of 5 miles of wood stave pressure pipe connection to the power house would be required. It is a run-of-river project, as the 20-foot diversion dam would create pondage only.

149. Operation of this project must depend on water released from Hebgen Reservoir in the headwaters of the Madison River (see par. 142) and additional run-off from intervening drainage area. The operation of the Madison Reservoir, in providing pondage for the existing downstream plants, would prove beneficial to this project if the cycles of pondage draft coincide. Studies were based on hydrographs of flow at Madison No. 2 plant as furnished by the Montana Power Co. the period of record used extended from 1916 to 1929. A stream flow hydrograph and duration curve for this period is

shown on chart 40, Appendix I. Installed capacity was set to develop the 30 per cent of time flow. Proper friction losses due to the long fun of pipe were taken into consideration in estimating available power. (See chart 41, Appendix I.) Overall plant efficiency was assumed constant at 80 per cent. Monthly estimated values of available power are shown graphically on chart 39, Appendix I.

150. Major details of the project, estimate power available, and cost of output are summarized as follows:

[Chart omitted]

* * *

EXHIBIT N

JA 563

THE

EXECUTIVE DOCUMENTS

OF THE

HOUSE OF REPRESENTATIVES

FOR THE

FIRST SESSION OF THE FIFTY-SECOND CONGRESS.

1891-'92

IN THIRTY-EIGHT VOLUMES.

WASHINGTON:
GOVERNMENT PRINTING OFFICE
1892.

* * *

W W 13.

PRELIMINARY EXAMINATION OF CLARKE FORK OF THE COLUMBIA RIVER (BY WHATEVER NAME CALLED) FROM THE INTERNATIONAL BOUNDARY LINE TO THE MOUTH OF THE BIG BLACKFOOT RIVER, IN THE STATE OF MONTANA

UNITED STATES ENGINEER OFFICE,
Portland, Oregon, March 21, 1891.

GENERAL: I have the honor to submit the following report of the examination of "Clarke Fork of the Columbia (by whatever name called) from the international boundary line to the mouth of the Big Blackfoot River, in the State of Montana," required by your orders of September 20, 1890.

This is a stretch of river and lake about 350 miles in length. The river is naturally divided by Lake Pend d'Oreille into two parts, first from the lake southwardly up to the mouth of the Big Blackfoot, about 250 miles, and second from the lake northwardly about 100 miles to the point where it leaves the territory of the United States.

These portions of the river will be considered separately.

First, the portion of the river from the mouth of the Big Blackfoot (which is about 6 miles above the city of Missoula) to Lake Pend d'Oreille is about 250 miles in length, and has a fall in this distance of about 1,100 feet, according to the Northern Pacific Railroad levels. This is generally known in Montana as Missoula River.

It is a mountain torrential stream, full of rocks, rapids, and falls, and is utterly unnavigable, and

incapable of being made navigable except at an enormous cost.

I visited Missoula, the principal city on the river, and interviewed the mayor and prominent citizens engaged in various commercial and mining pursuits, but could not find that there was any demand for the improvement of the river. In fact the idea of making the river navigable was scouted as an absurdity. Investigation revealed furthermore the fact that even were the river navigable there would be very little use made of it, as the products of the country which would naturally be transported on it are very limited. This portion of the river is nearly all paralleled by the Northern Pacific Railroad and its branch from Missoula to St. Regis Borgia.

During the construction of the Northern Pacific Railroad an attempt was made to navigate this portion of the river from the Lake Pend d'Oreille up. Capt. George A. Pease, who commanded the steamer making the attempt, states that the river above the lake is exceedingly rough, and that in his opinion it is utterly impossible to make it a navigable river.

About 12 miles above the lake is Cabinet Cañon, where the river runs through a very narrow gorge in which there is a remarkable short turn, so short that no boat ever build could make a turn in running down the river in high water. One or two boats have been taken down through this cañon at low water. The river between Cabinet Cañon and the lake is full of rapids and jutting points of rock.

Four miles above Cabinet Cañon are the Heron Rapids, which are swift and rocky, but which could be run at high water.

About 18 miles above heron Rapids are the Rock Island Rapids, which could also be run at high water, but which are impossible at low water stretches.

From Rock Island there is a stretch of about 25 or 30 miles of comparatively good water to the foot of the cañon in which are the Thompson Falls. These falls are a complete obstruction to navigation. The river is exceedingly rapid, rough, and full of rocks.

It is my opinion that this portion of the Clarke Fork above Pend d'Oreille Lake is unworthy of improvement.

Second, the portion of the river under consideration from Lake Pend d'Oreille to the international boundary line, about 100 miles long and generally known as the Pend d'Oreille River, presents more claims to favorable consideration that the portion above the lake.

* * *

U. S. ENGINEER OFFICE,
San Francisco, Cal., April 18, 1891.

Respectfully transmitted to the Chief of engineers.

Clarke Fork of the Columbia River from the boundary to the mouth of the Big Blackfoot is, according to the facts herein stated and for reasons herein contained, not considered to be worthy of improvement.

G.H. MENDELL,
Colonel, Corps of Engineers,
Division Engineer.

EXHIBIT O

ADDRESS REPLY TO
CHIEF OF ENGINEERS, U. S. ARMY
WASHINGTON, D. C.

WAR DEPARTMENT

OFFICE OF THE CHIEF OF ENGINEERS

WASHINGTON

REFER TO FILE NO. 7074 (Columbia River-Clarks Fork.)-2

November 22, 1940

Mr. M.O. Leighton, Consulting Engineer,
Leighton and Gamble,
National Savings and Trust Building,
Washington, D.C.

Dear Sir:

Receipt is acknowledged of your letter of November 14, 1940, in which you request the opinion of this office as to the navigable status of Clark's Fork of the Columbia River between Pend O'Reille Lake, Idaho, and the mouth of Blackfoot River, a few miles above Missoula, Montana.

For the purpose of administering the laws of the preservation and improvement of navigable waters of the United States, this Department considers Clark Fork navigable from its mouth in Pend O'Reille Lake

to the Northern Pacific Railroad Bridge, a distance of only about four miles.

It should be understood, however, that this represents merely the views of the Department, since the navigable status of a stream is a question of fact which can be conclusively settled only by a judicial determination.

For the Chief of Engineers:

Very truly yours,

/s/ Mark M. Boatner, Jr.
Mark M. Boatner, Jr.,
Major, Corps of Engineers,
Chief, Miscellaneous Civil Section

I34110050

Robert L. Sterup
Kyle Anne Gray
HOLLAND & HART LLP
401 North 31st Street
Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
Telephone: (406) 252-2166
Fax: (406) 252-1669

Paul J. Lawrence
Preston Gates Ellis LLP
Suite 2900
Seattle, Washington 98104-1158
Telephone: (206) 623-7580
Fax: (206) 626-7022

Attorneys for Plaintiff PPL MONTANA, LLC

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

No. CDV-2004-846

[Dated October 23, 2006]

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; and AVISTA CORPORATION, a Washington Corporation; PACIFICORP, an Oregon Corporation,	)
Plaintiffs,	)
v.	)

STATE OF MONTANA,)
)
Defendant.)
)

AFFIDAVIT OF STANLEY A. SCHUMM IN SUPPORT OF PPL MONTANA'S OPPOSITION TO THE STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RULE 37(c) EXPENSES

STATE OF COLORADO)
) ss
COUNTY OF LARIMER)

I, STANLEY A. SCHUMM, being first duly sworn upon oath, depose and state the following:

1. Education and Credentials as a Fluvial Geomorphologist. I am the Vice President and Principal Geomorphologist at Mussetter Engineering, Inc. in Fort Collins, Colorado. I have held this position since 1994 I began my professional career in 1954 as a geologist in the Water Resources Division of the United States Geology survey. In 1967, I began my teaching career at Colorado State University as an Associate Professor of Geology. I was subsequently promoted to Professor in 1970 and to University Distinguished Professor in 1986. I also served as the Vice President and Principal Geomorphologist at Water Engineering & Technology from 1979 to 1990 and as a Senior Associate at Resource Consultants & Engineers from 1991 to 1994. A copy of my curriculum vitae is attached as **Exhibit A.**

2. I received by Bachelor of Arts degree in Geology from Upsala College in 1950 and my Ph.D in geomorphology from Columbia University in 1955. I have published thirteen books including, most recently, *River Variability and Complexity* (Cambridge: Cambridge University Press, 2005). I have also published over one hundred and fifty articles in various professional publications. I received the 1982 David Linton Award from the Briticsh Geomorphological Research Group, the 1986 G.K. Warren Prize from the National Academy of Sciences and the Distinguished Career Award fromt eh Geological Society of America in 1997. In 1999, I presented the Frost lecture at the University of Hull in the United Kingdom.

3. I am a member of the following professional organizations: American Geophyiscal Union, American Association for the Advancement of Science (Fellow), Geological Society of America (Fellow), American Quaternary Association, American Society of Civil Engineers, British Geomorphological Research Group and the Japanese Geomorphological Union.

4. During my career, I have focused on the field of fluvial geomorphology. Simply put, fluvial geomorphology is the study of the physical characteristics of a river and the manner in which river systems change over time. As a fluvial geomorphologist, I am familiar with the mechanisms through which river channel depth and width change over time. These mechanisms include forces of nature such as sedimentation, erosion, accretion and avulsion as well as man-made causes such as water withdrawals and the operation of hydroelectric power plants and reservoirs. One of the fundamental truths

of my field is that, regardless of the specific mechanism, rivers are constantly changing.

5. Previous Experience with Navigability Determinations. I served as expert witness before the Arizona Navigable Streams Adjudication Commission during their determinations on the navigability of the Gila River, the Verde River and the Upper and Lower Salt Rived. During my research for those proceedings I focused extensively on the physical characteristics of a river that impact its navigability: flow, depth, width, drop, structures and sedimentation patterns to name a few. As a result of my experience as a witness in those proceedings, I understand that the critical question in determining whether a particular stream is navigable for title purposes is whether the stream was used or capable of being used as a channel for useful commerce at the time of statehood.

6. Summary of Research on the Madison River. I was retained by PPL Montana to conduct research and form an opinion on whether the current physical conditions of the Madison River, with respect to navigability, were the same as or different than the physical conditions at the time of Montana's admission to the Union in 1889. In conducting this research I reviewed historical maps and surveys of the Madison River basin, current topographical maps of the Madison River basin, and historical flow data for the Madison River. As far as possible, I have evaluated the current physical conditions of the Madison as compared to the historical conditions at the time of statehood. Based on my review of these sources, I have formed my opinion.

7. Summary of Opinions. In my expert opinion, the current physical conditions of the Madison River, with respect to navigability, are not the same as the conditions of the river in 1889 when Montana entered the Union . First, the construction and operation of the hydroelectric projects and reservoirs have materially changed the flow characteristics in the river. It is my understanding that the Madison hydroelectric project, including the reservoir known as Ennis Lake, was constructed over a course of years in and around 1906 and that the Hebgen reservoir project, known as Hebgen Lake, was constructed over a course of years in and around 1912. Hereafter, both the Madison and Hebgen projects are collectively referred to as the "Projects." By making the flow lower during periods of high flow and higher during periods of low flow, the operation of the hydroelectric projects and reservoirs have made the river more susceptible now to commercial navigation than it would have been without them. Second, my review of the historical descriptions of the Madison River indicate that the location and number of the river channels have changed since the time of statehood and that relevant portions of the river appear to have been either anastomosing or braided at the time of statehood. Because reaches of the Madison River appear to have been either anastomosing or braided, my opinion is that it was not susceptible to navigation at the time of statehood.

8. Change in the Madison River's Flow Characteristics. The flow characteristics of a typical stream in the higher elevations of the Rocky Mountains varies widely with the season. Flows in these streams are highest during the late spring months when the streams are heavily influenced by

the melt of the previous winter's snowpack. Stream flows tend to decrease steadily over the course of the summer as the influence of the snowmelt wanes and there is limited precipitation to augment flow. Flows reach their lowest points in the fall, but remain low through the remainder of the year until the next snowmelt.

9. Typically, the existence and operation of a large reservoir, part of a coordinated hydroelectric power system, on the mountain stream described above would impact the flow characteristics of the stream by limiting the difference in flow between high and low flow periods. Flows during the high flow periods would be decreased as water that is excess to amounts needed for power development is stored in the reservoir. Flows during low flow periods would increase as water is released from the reservoir to meet power demands.

10. I have reviewed available flow data for the Madison River, from both before and after the Projects were constructed. In my expert opinion, the construction and operation of the Projects changed the flow characteristics of the Madison River. As would be expected, the construction and operation of the Projects resulted in lower flows during the high flow period (late spring/early summer) and higher flows during the low flow period (fall). These changes produce a mode level year-round flow and make the river more susceptible to navigation, During the high flow periods in late spring, less torrential flows make the river easier to navigate. Similarly, the increased flows during the low flow periods of the fall make the river more susceptible to navigation.

11. These changes can be demonstrated graphically. Average monthly flow histograms for the Madison River demonstrate, on a month by month basis, the impact that the operation of the Projects have on the flow characteristics of the river. Flow data for these histograms was obtained from gauging stations located immediately downstream of the location of the Madison Project. Flow data was not available for the years 1905-1937. Average discharge for a given month is plotted along the Y-axis of this graph and the year is plotted along the X-axis. The graphs show that post-construction flows in the Madison River are lower during the period each year of highest flow (May, June and July) and are higher during the period of lowest flow (October and November). Copies of the average monthly flow histograms for the Madison River are attached as **Exhibit B**.

12. The increase in average flow during low flow periods corresponds to an increase in water depth immediately downstream of the Madison Project of approximately two-thirds of a foot in October (an increase of approximately 25%) and nine-tenths of a foot in November (an increase of approximately 40%). This calculation was made using the stage-discharge relationship curves developed for the Madison River immediately downstream of the Madison Project. This curve shows the river "stage," or water depth, for a particular "discharge," or flow, at this particular point in the river. By comparing the river stage for this location at the pre-construction low flow values with the river stage for the same location at the higher post-construction low flow values, I determined the approximate increase in river stage during low flow periods that resulted from the construction and

operation of the Projects. The stage-discharge curves used in calculating the change in river stage for the Madison River are attached as **Exhibit C**.

13. Based on these calculations, my expert opinion is that because of the construction and operation of the Projects, especially the Hebgen Reservoir, the current flow characteristics of the Madison River are not the same as they were at the time Montana entered the Union in 1889. Because the operation of the hydroelectric facilities has resulted in higher flows during the low flow period, a corresponding increase in low flow period water depth of approximately two-thirds of a foot in October and nine-tenths of a foot in November and a decrease in flow during high flow periods, it is my opinion that these changes in the river resulting from the Projects make the Madison River more susceptible to use for navigation now than it was at the line of statehood.

14. Physical Changes in the River Channel. Not only have the flow characteristics of the Madison River changed since Montana entered the Union, but the physical characteristics of the river channel have changed as well. As part of my research, I reviewed a series of historical maps of the Madison River basin, including Government Land Office survey maps. I then compared the historical maps with current maps of the Madison Basin.

15. Based on my review of these historical maps and a comparison of the historical maps to contemporary maps of the basin, it is my opinion that the location and channel pattern of the Madison River have changed over time. Near its mouth, the Madison River is an anastomosing river. An anastamosing

river is exemplified by multiple distinct channels. An anastomosing river's flow is split among the various channels and, as a result, the river stage in an anastomosing reach at a given flow is lower than in a single channel reach. Channels in an anastomosing river often shift over time and can become closed off with sediment. In the historical maps there appears to be two distinct river channels and four smaller channels near the confluence with the Jefferson River and, currently, there exist only two short channels. In addition, historical maps of the area that is now submerged by Ennis Lake indicated that the Madison River in that area was also an anastomosing river.

16. Elsewhere, reaches of the Madison River are properly classified as braided. Braided rivers, unlike anastomosing rivers with their several distinct channels, are characterized by a single main channel with a series interlocking or tangled network of several, smaller branching and reuniting shallow channels separated from each other by islands or channel bars. Braided rivers have high width to depth ratios and relatively steep gradients. The physical characteristics of braided rivers are not conducive to navigation. Channels and bars in a braided river shift over time and, in my professional opinion, even without the creation of Ennis Lake, the Madison River in this reach would be different now than it was at statehood. That the river appears to have been a braided river at statehood leads me to conclude that significant reaches of the Madison River were not susceptible to navigation at that time.

17. During my research I found the following maps to provide both the clearest indication of the past

condition of the Madison River and how the river has changed since Montana entered the Union in 1889:

1. Three Forks, 1985, U.S. Geological survey topographical map - This map shows the anastomosing reaches of the Madison River above its junction with the Jefferson River and downstream of Ennis. The multiple channels would produce a lower stage in each channel, as compared to single channel reaches.

2. Eight Mile Creek, 1988, U.S. Geological Survey topographical map - This map shows the 1988 anastomosing and braided reaches of the river.

3. Ennis, 1988, U.S. Geological Survey topographical map - This map shows a braided river, very different from reaches upstream of this point.

4. General land Office map of T5S, R1W, 1868 - This map shows the anastomosing reach of the river downstream of Ennis. This is a similar river pattern to that shown on the 1895 Three Forks map.

5. Ennis Lake, 1988, U.S. Geological Survey topographical map - This map shows the deltaic pattern upstream of Ennis Lake. Compare with the Three Forks I 895 map and the 1868 General Land Office map to show river changes. Also, multiple channels would have reduced the river's stage in each channel.

6. Manhattan SW, 1987, U.S. Geological Survey topographical map -This map shows the braided reach upstream of Three Forks.

7. Three Forks SE, 1987, U.S. Geological Survey topographical map – This map shows the braided reach, which is very different from the single-channel reaches upstream.

8. Three Forks, 1987, U.S. Geological Survey topographical map – This map shows the junction of the Jefferson and Madison Rivers. The pattern is very different from that shown on the 1895 Three Forks map.

I selected these maps to illustrate the changes in the Madison River through time. They are important because they reflect different river behavior from reach to reach. Copies of these maps are attached as **Exhibit D**.

18. In summary, my expert opinion is that the physical characteristics of the Madison River important to the ability to navigate the stream are different now then they were at statehood. The number of channels in the river and the location of those channels have shifted over time. Further, the fact that significant reaches of the river appear to have been braided near the time of statehood indicates that the river would not have been susceptible to navigation at that time. I base this opinion on my experience in the field of fluvial geomorphology and my review of historical survey maps and current maps of the Madison River basin.

19. Conclusion. The Madison River is not the same river now that it was in 1889 when Montana entered the Union. The post-statehood construction and operation of the Projects, particularly the Hebgen Reservoir, have provided additional flows during low flow periods and reduced flow during the torrential high flow periods. This results in a marked increase in water depth during low flow periods, making the river more susceptible to navigation now than at the time of statehood. The nature of the river itself and a comparison of historical survey maps and current conditions also show that number of river channels and their location has changed since the time of statehood. In addition, the fact that the Madison River, at statehood, appears to have been braided or anastomosing in some reaches leads me to conclude that it was not susceptible to navigation at that time.

I declare under penalty of perjury under the laws of the State of Colorado that the foregoing is true and orrect.

FURTHER AFFIANT SAYETH NOT.

Dated this 23rd day of October, 2006.

/s/ Stanley A. Schumm
Stanley A. Schumm

[NOTARY SEAL]

SIGNED AND SWORN to before me on October 23, 2006, by Stanley A. Schumm.

/s/Bonnie B. Vail
Bonnie B. Vail
[Print Name]
Notary Public for the State of Colorado
Residing at 1370 S. College Avenue.
Ft. Collins, CO 80525
My commission expires: 3/31/2008

[*Certificate of Service omitted in printing this appendix*]

* * *

EXHIBIT A

Mussetter Engineering Inc.

Consultants in Water Resource Engineering & Engineering Geomorphology

STANLEY A. SCHUMM

POSITION: Vice President, Mussetter Engineering, Inc.
Principal Geomorphologist

BIRTH DATE: February 22, 1927 - Kearny, New Jersey

EDUCATION: 1947-50 Upsala College; geology, minor in chemistry; B.A., 1950
1950-54 Columbia University; geomorphology; Ph.D., 1955

SERVICE: U.S. Navy, 1945-1946

POSITIONS HELD:

1994- Mussetter Engineering, Inc., Vice President

1991-94 Resource Consultants & Engineers, Senior Associate

1986-98 Colorado State University, University Distinguished Professor

1979-90 Water Engineering & Technology, Principal Geomorphologist, Vice President

1967-86 Colorado State University, Associate Professor of Geology; 1967-1970
Professor of Geology, 1970-1986

1954-67 U.S. Geological Survey, Research Geologist, Water Resources Division.
W.A.E. status, Branch of Astrogeologic Studies, Geologic Division 1967-1980

Visiting Professor (Short-Term Appointment)

University of California, Berkeley, Visiting Lecturer 1959-60 (1 year)
American Geological Institute, Visiting Geological Scientist 1960 (2 weeks)
Visiting Scientist, Polish Academy Science 1969 (1 week)
Department of Geology, University of Texas, Austin, Distinguished Visiting Professor 1970 (2 weeks)
Department of Geography, York University, Toronto 1972 (2 weeks)
College of Forestry, University de los Andes, Merida, Venezuela 1972 (1 month)
Department of Geology, Southern Illinois University 1973 (2 weeks)
Economic Geology Research Unit, University of Witwatersrand, 1975 (2 months)
Center for Advanced Studies, University of Virginia 1980 (2 weeks)
Dept. of Geography, Louisiana State University, R.J. Russell Lecturer, 1982 (2 weeks)
5-College (Amherst, Mt. Holyoke, Smith, Hampshire, Univ. of Mass)
Distinguished Lecturer in Geology (1 week)
Taiwan National Normal University 1988 (2 weeks)

University of New South Wales 1988 (3 months)
University of Cambridge 1994 (1 week)

Fellowships:

University of Sydney, Australia, 1964-1965
University of Canterbury, New Zealand, Harkness Fellow, 1984
Japanese Society for the Promotion of Science, University of Tsukuba, 1984
Australian National University, 1988

MEMBERSHIPS:

Committees:

Member, Sedimentation, Subcommittee of Pacific Southwest
Interagency Committee, 1960-64; Chairman 1963-64
Member, Executive Committee on geomorphology, Geological Society of America, 1962-63
Member, Geomorphology Panel, Geological Society of America, 1964-66
Member, U.S. National Committee for International Union for Quaternary Research, 1962-69, 1973-1982; Vice-chairman, 1966-69
U.S. delegate to eighth International Union for Quaternary Research, Paris, Aug-Sept 1969
Member, Sedimentation Committee Section of Hydrology, American Geographical Union, 1964-69
Member, Commission on Evolution of Hillslopes, International Geographical Union, 1964-69
Member, Committee on Modern Geomorphic Processes, International Geographical Union, 1969-

Member, Subcommission of Fluvial Dynamics, International Geographical Union, 1964-1969
Member of Control Group, American Society of Civil Engineers Task Committee on Channel Characteristics and Sediment Transport Processes, 1971-73
Counselor for Applied Studies, American Quaternary Association, 1971-73
Member, Geology Panel NAS-NRC Committee on Remote Sensing (CORSPERS), 1973-77
Vice-Chairman, Geomorphology Div. Geological Society of America 1978-79
Chairman, Geomorphology Div. Geological Society of America 1979-80
Member, NAS-NRC Comm. on Disposal of Excess Spoil 1980-81
Member, NAS-NRC Comm. on Hydraulic Models 1981-82
Member, National Science Foundation, Earth Sciences Advisory Commission 1981-84
Member, NASA Lunar and Planetary Sciences Review Panel 1986
Vice President - Colorado State University Chapter, Sigma Xi 1986
President - Colorado State University Chapter, Sigma Xi 1987
Panel Chairman NAS-NRC Committee on Solid - Earth Sciences, National Research Council, 1990-1993
Member, Task Committee, Mechanics of River Banks Erosion, American Society Civil Engineers, 1991-1991
Member, Committee on Sedimentation Engineering, American Society Civil Engineers, 1992

Member, Committee on Geo-Indicators, International Union of Geological Sciences, 1994
Chairman, NAS-NRC Committee on Alluvial Fan Flooding, 1995-96

Editorships:
Advisory Editor, Progress in Geography, 1969-77
Associate Editor, Erosion and Sedimentation Water Resources Research, 1973-75
Associate Editor for Geological Society of America *Bulletin*, 1973-75
Editorial Board, Journal of Geology, 1975-95
Editorial Board, Physical Geography 1979-90

Honors:
1957 Horton Award, American Geophysical Union
1970 Honorable mention American Society of Agricultural Engineers
1974 Outstanding Educator of America
1979 Kirk Bryan Award, Geological Society of America
1980 Distinguished Alumnus Award, Upsala College
1980 L.W. Durrell Award, Colorado State University
1982 David Linton Award, British Geomorphological Research Group
1986 G.K.Warren Prize, National Academy of Science
1986 Honor Scientist, Colorado State University Chapter, Sigma Xi
1986 University Distinguished Professor, Colorado State University
1989 Fellow, American Association for the Advancement of Science

1996 Outstanding Paper Award, Society for Sedimentary Geology
1997 Distinguished Career Award, Geological Society of America
1999 Frost Lecture, University of Hull, United Kingdom

Recognition:
1973 Listing, Who's Who in the West
1979 Listing, Men of Achievement
1980 Listing, Who's Who in America
1981 Listing, Who's Who in Technology Today
1996 Listing, Who's Who in Science and Engineering

Research Grants:
Model Study of River Meanders, NSF, 1968-71
Lunar Erosion Mechanisms, U.S. Geological Survey, 1968-71
Experimental Study of Drainage Basin evolution, Army Research Office-Durham, 1970-73
Experimental Study of Incised Channel Morphology, NSF, 1971-72
Model Study of River Patterns, NSF, 1973-75
Martian Fluvial Processes, U.S. Geological Survey, 1972-73
Geomorphology of Oil Shale Region, Colorado, State of Colorado, 1972-74
Experimental Study of Geomorphic Thresholds; Army Research Office, 1973-76
Experimental Study of Meander Cutoff, NSF, 1975-77
Geomorphology of Great Sand Dunes, National Park Service, 1975-76
Salinity of Upper Colorado River, OWRT, 1974-76

Geomorphic Approach to Land Management, OWRT, 1976-79
Effect of Urbanization on Erosion, RANN, NSF, 1976-79
Gullying in Eastern Colorado, Colorado Experiment Station, 1976-79
Experimental Study of River Morphology, NSF, 1977-80
Episodic Erosion in Steeplands, ARO, 1978-80
Geomorphic Controls on Diffuse-Source Salinity, Upper Colorado River Basin, OWRT, 1979-81
Yazoo Basin Geomorphology, Soil Conservation Service, 1980-82
Effect of Neotectonics on Rivers, NSF, 1980-82
Geomorphic Approach to Mined-Land Reclamation, OWRT, 1980-83
Experimental Fluvial Geomorphology, NSF, 1983-84
Prehistory of Indus Valley, NSF, 1983-84
Active Tectonics NSF 1985-86-88
Martian Drainage Networks, NASA 1984-87
Experimental Geomorphology, ARO, 1984-87
Climatic Geomorphology, ARO, 1986-91
Anastomosing Channels Australia, NSF 1988-89
Experimental Study of Baselevel change, NSF 1988-91
Geomorphology of Lower Mississippi River, Corps of Engineers 1988-90
Geomorphology of the New Madrid Seismic Zone, U.S. Geological Survey, 1992, 1994
Geomorphology of Eglin AFB & White Sands Missile Range, Dept. of Defense, 1992-94

Co-Investigator:

Geomorphology of Middle Mississippi River, Corps of Engineers, 1972-73

Geomorphology of Pool 25, Upper Mississippi River, Fish and Wildlife Service, 1974-75
Fan-delta Processes and Depositional Models, NSF, 1977-79
Hazards in the Highway Environment, Federal Highway Administration, 1978-79
Geomorphology of Muddy Creek Indiana, SCS, 1984
Morphology and Sedimentology of an Aggrading Braided River, American Petroleum Institute, 1994-1997

Consulting:
Regional Transportation District, Denver
Colony Development Operation, Atlantic Richfield, Denver
DDI Exploration, Paris
Integral Ltd., Medellin, Colombia
Manawatu Catchment Board, Palmerston North, New. Zealand
Soil Conservation Service
U.S. Army, Corps of Engineers, Louisville District, Huntington District, Ohio River Division
Waterways Experiment Station, Sacramento District, Mobile District
U.S. Department of Justice
National Science Foundation
Dames and Moore
Office of Surface Mining
State of Ohio
Public Service Co. of Indiana
Bureau of Land Management
National Coal Association
Attorney General, State of Colorado
Attorney General, State of Texas
Attorney General, State of Idaho

Attorney Genera, State of Montana
Flood Control District, Mariposa County, Arizona
Akzo Nobel, Genesee, New York
ASARCO
National Wildlife Federation
Mountain States Legal Foundation
Snell and Wilmer, Phoenix
Exxon, Houston
New Mexico Interstate Stream Commission
Resurrection Mining Company

Foreign Travel: (Scientific)

Australia, 1 year, 1964-65, 2 weeks 1984, 3 months 1988
New Zealand, 3 weeks, 1965, 1 month 1976, 1 month 1980, 6 weeks, 1984
Belgium, 2 weeks, 1966
United Kingdom, 1 week, 1966, 1 week, 1969, 3 weeks, 1986, 1 week, 1994
East Africa, 6 weeks (Ethiopia, Kenya, Uganda, Tanzania, South Africa) 1969
Israel, 1 week, 1969, 2 weeks, 1980
Poland, 1 week, 1969
France, 1 week, 1969
Venezuela, 1 month, 1972
South Africa, 3 months, 1975, 1 month, 1985, 2 weeks, 1992
Brazil, 3 weeks, 1975
Colombia, 1 week, 1977
Jamaica, 1 week, 1977
Japan, 6 weeks, 1984
Pakistan 1 month 1987
China (PRC) 2 weeks, 1987
Taiwan 2 weeks, 1988
Egypt 5 weeks, 1990, 1 week 1992
Bangladesh, 1 week, 1993

Norway, 1 week, 1994

Memberships in Professional Organizations:
American Geophysical Union, 1955-
American Association Advancement of Science (Fellow), 1956-
Association of American Geographers, 1965-1990
American Geographical Society, 1967-1970
Colorado Scientific Society, 1956-1973
Geological Society of America (Fellow), 1955-
International Association of Planetology, 1970-80
Sigma Xi, 1955-
American Quaternary Association (AMQUA), 1970-
American Society of Civil Engineers, 1968-
British Geomorphological Research Group, 1982-
Japanese Geomorphological Union, 1984-

Publications
(Abstracts are not included)

1955 - Schumm, S.A., The relation of drainage basin relief to sediment loss: Pub. Internat. Assoc. Hydrology, I.U.G.G., v. 1, p. 216-219.

1956 - Schumm, S.A., Evolution of drainage systems and slopes in badlands at Perth Amboy, New Jersey: Geol. Soc. America Bull., v. 67, p. 597-646.

1956 - Schumm, S.A., The movement of rocks by wind: Jour. Sed. Petrology, v. 26, p. 284-286.

1956 - Schumm, S.A., The role of creep and rainwash on the retreat of badland slopes: Am. Jour. Sci., v. 254, p. 693-706.

1957 - Schumm, S.A., and Hadley R.F., Arroyos and the semiarid cycle of erosion: Am. Jour. Sci., v. 256, p. 161-174.

1959 - Langbein, W.B., and Schumm, S.A., Yield of sediment in relation to mean annual precipitation: Am. Geophys, Union Trans., v. 39, p.1076-1084

1960 - Schumm, S.A., The effect of sediment type on the shape and stratification of some modem fluvial deposits: Am. Jour. Sci., v. 258, p. 177-184

1960 - Schumm, S.A., The shape of alluvial channels in relation to sediment type: U.S. Geol. Survey Prof. Paper 352-B, p. 17-30

1961 - Schumm, S.A., Effect of sediment characteristics on erosion and deposition in ephemeral-stream channels: U.S. Geol. Survey Prof. Paper 352-C, p. 31-70.

1961 - Schumm, S.A., and Hadley, R.F., Progress in the application of landform analysis in studies of semiarid erosion: U.S. Geol. Survey Circ. 437, 14 p.

1961 - Hadley, R.F., and Schumm, S.A., Sediment sources and drainage-basin characteristics in upper Cheyenne River basin: U.S. Geol. Survey Water-Supply Paper 1531-B, p. 137-196.

1961 - Schumm, S.A., The dimensions of some stable alluvial channels: U.S. Geol. Survey Prof. Paper 424-B, p.26-27.

1961 - Schumm, S.A., and Lichty, R.W., Recent flood-plain formation along Cimarron River in Kansas: U.S. Geol. Survey Prof. Paper 424-C, p. 112-114.

1962 - Schumm, S.A., Erosion on miniature pediments in Badlands National Monument, South Dakota: Geol. Soc. America Bull., v. 73, p. 719-724.

1963 - Schumm, S.A., and Lusby, G.C., Seasonal variation of infiltration capacity and runoff on hillslopes in western Colorado: Jour. Geophys. Research v. 68, p. 3655-3666.

1963 - Schumm, S.A., The disparity between present rates of denudation and orogeny: U.S. Geol. Survey Prof. Paper 454-H, 13p.

1963 - Schumm, S.A., A tentative classification of alluvial river channels: U.S. Geol. Survey Circ. 477, 10 p.

1963 - Schumm, S.A., Sinuosity of alluvial rivers on the Great Plains: Geol.. Soc. America Bull., v. 74, p. 1089-1100.

1963 - Schumm, S.A., and Lichty, R.W., Channel widening and flood-plain construction along Cimarron River in southwestern Kansas: U.S. Geol. Survey Prof. Paper 352-D, p. 71-88.

1964 - Schumm, S.A., Seasonal variations of erosion rates and processes on hillslopes in western Colorado: Zeitschr. Geomorph., Supplementband, v. 5, p. 215-218.

1964 - Schumm, S.A., and Chorley, R.J., The fall of threatening rock: Am. Jour. Sci., v. 262, p. 1041-1054.

1964 - Schumm, S.A., A method of estimating hydrologic response to climate change: *Oondoona*, Sydney Univ. Geog. Soc., v. 6., p. 5-12.

1965 - Schumm, S.A., and Lichty, R.W., Time, space and causality in geomorphology: Am. Jour. Sol, v. 263, p. 110-119.

1965 - Schumm, S.A., Geomorphic research: Applications to erosion control in New Zealand: Soil and Water (Soil Conserv. and Rivers Control Council), v. 1, p. 21-24.

1965 - Schumm, S.A., Quaternary paleohydrology, in The Quaternary of the United States: Princeton, Princeton Univ. Press, p. 783-794.

1966 - Schumm, S.A. and Chorley, R.J., Talus weathering and scarp recession in the Colorado plateaus: Zeitschr. Geomorph., v. 10, p. 11-36.

1966 - Schumm, S.A., The development and evolution of hillslopes: Jour. Geol. Education, v. 14, p. 98-104.

1967 - Schumm, S.A., Rates of rock creep on hillslopes in western Colorado: Science v. 155 p. 560-561.

1967 - Schumm, S.A., Paleohydrology: Application of modern hydrologic data to problems of the ancient past, International Hydrology Symposium (Fort Collins, U.S.A.) Proc. v. 1, p. 185-193.

1967 - Schumm, S.A., Meander wavelength of alluvial rivers: Science, v. 157, p. 1549-1550.

1967 - Schumm, S.A., On the movement of surface markers, p. 160; Erosion measured by stakes, p. 161-162; On vegetation as a marker, p. 168; in Field Methods for the Study of Slope and Fluvial Processes, Revue de Geomorphologie Dynamique, v. 17, p. 152-188.

1968 - Schumm, S.A., Aerial photographs and water resources: in Aerial Surveys and Integrated Studies: UNESCO, Natural Resources Research Series 6, p. 70-79.

1968 - Schumm, S.A.; Weather modification and the landscape: Yale Scientific Magazine v. 43, p. 10, 11, 14, 16, 18, 23.

1968 - Schumm, S.A., Speculations concerning paleohydrologic controls of terrestrial sedimentation: Geol. Soc. America Bull, v. 79, p. 1572-1588.

1968 - Scheidegger, A.E., Fairbridge R.W. and Schumm, S.A., Badlands: in Encyclopedia of Geomorphology, p. 43-48: Rheinhold Book Corp., New York. 1295 p.

1968 - Schumm, S.A., River adjustment to altered hydrologic regimen, Murrumbidgee River and paleochannels, Australia: U.S. Geol. Survey Prof. Paper 598, 65 p.

1969 - Schumm, S.A., River metamorphosis: Jour. Hyd. Div., Proc. American Soc. Civil Engineers, HY 1, p. 255-273.

1969 - Schumm, S.A., Geomorphic Implications of climatic changes: in Water, Earth and Man (edited by R.J. Chorley) p. 525-534: London, Methuen and Co., 588 p.

1969 - Schumm, S.A., A geomorphic approach to erosion control in semiarid regions: Am. Soc. Agricultural Eng. Trans., v. 12, no. 1, p. 60-68.

1970 - Schumm, S.A., Experimental studies on the formation of lunar surface features by fluidization: Geol. Soc. America Bull., v. 81, p. 2539-2552.

1970 - Schumm, S.A., Bird, J.B., and Starkel, L., Report of work group on classification of hillslopes: Zeit. Geomorph. Supplementband 9, p. 85-87.

1971 - Schumm, S.A. and Kahn, H.R., Experimental study of channel patterns: Nature, v. 233, p. 407-409.

1971 - Schumm, S.A., Fluvial Geomorphology: The Historical Perspective, in River Mechanics, v. 1 (edited by H.W. Shen) Chap. 4, 30 p.

1971 - Schumm, S.A., Fluvial Geomorphology: Channel Adjustment and River Metamorphism, in River Mechanics, v. 1 (edited by H.W. Shen) Chap. 5, 22 p.

1972 - Schumm, S.A. and Khan, H.R., Experimental Study of channel patterns: Geol. Soc. America Bull., v. 83, p. 1755-1770.

1972 - Schumm, S.A., Fluvial Paleochannels: . Soc. Econ. Paleontologist and Mineralogists, Spec. Pub. 16, p. 98-107.

1972 - Schumm, S.A., Khan, H.R., Winkley, B.R. and Robbins, L.G., Variability of river patterns: Nature (Phy. Sci.), v. 237, p. 75-76.

1972 - Schumm, S.A., Paleohydrology, in Encyclopedia of Geochemistry and Environmental Sciences, Van Nostrand Reinhold Co., p. 876-880.

1972 - Schumm, S.A., Parker, R.S., Shepherd, R.G., Edgar, D.E. and Mosley, M.P., Anomalous behavior of model rivers: in International Geography 1972, Univ. of Toronto Press, p. 60-61.

1973 - Schumm, S.A. and Shepherd, R.G., Valley floor morphology: evidence of subglacial erosion? Area: Inst. of British Geographers, v. 5, p. 5-9.

1973 - Schumm, S.A. and Parker, R.S., Implications of complex response of drainage systems for Quaternary alluvial stratigraphy: Nature, Physical Sci., v. 243, p. 99-100.

1973 - Schumm, S.A. and Stevens, M.A., Abrasion in place: A mechanism for rounding and size reduction of coarse sediments in rivers: Geology, v. 1, p. 37-40.

1974 - Shepherd, R.G. and Schumm, S.A., Experimental study of river incision: Geol. Soc. America, Bull., v. 85, p. 257-268.

1974 - Schumm, S.A., Geomorphic thresholds and complex response of drainage systems, in Fluvial Geomorphology (edited by M. Morisawa) Publications in Geomorphology, SUNY Binghamton, New York, p. 299-310. Reprinted 1981, Allen and Unwin, London.

1974 - Schumm, S.A., Sediment yields of drainage basins: Encyclopedia Britannica, 15th Edition, v. 16, p. 474-480 (reprinted 1984).

1974 - Schumm, S.A., Structural origin of large Martian channels: Icarus, v. 22, p. 371-389.

1974 - Schumm, S.A., Geomorphology: Yearbook of Science and Technology, McGraw-Hill, N.Y., p. 13-23.

1975 - Patton, P.C. and Schumm, S.A., Gully erosion, northwestern Colorado: A threshold phenomenon: Geology, v. 3, p. 88-90.

1975 - Stevens, M.A., Simons, D.B. and Schumm, S.A., Man-induced changes of middle Mississippi River: Jour. Waterways, Harbors and Coastal Eng. Div., ASCE Proc., v. 101, p. 119-133.

1975 - Woolsey, T.S., McCallum, M.E. and Schumm, S.A., Modeling of diatreme emplacement by fluidization: Physics and Chemistry of the Earth, v. 9, p. 24-42, Pergamon Press, Oxford.

1976 - Schumm, S.A. and Beathard, R.M., .Geomorphic thresholds: An approach to river management: in Rivers 76. American Soc. Civil Engineers, New York, v. 1, p. 707-724.

1976 - Stevens, M.A., Simons, D.B. and Schumm, S.A., Geomorphic study of Pool 25: in Rivers 76, American Soc. Civil Engineers, N.Y., v. 2, p. 1655-1679.

1976 - Schumm, S.A., Episodic erosion: A modification of the geomorphic cycle: in Theories of Landform Development (editors W.N. Melhorn and R.C. Flemal). Pub. in Geomorphology, SUNY, Binghamton, N.Y., p. 69-85. Reprinted 1982 by Allen and Unwin, London.

1977 - Loronne, J.B. and Schumm, S.A., Evaluation of the Storage of Diffuse Sources of Salinity in the Upper Colorado River Basin: Colorado State University Environmental Research Center, Completion Report 79, 111 p.

1977 - Womack, W.R. and Schumm, S.A., Terraces of Douglas Creek, northwestern Colorado. An example of episodic erosion: Geology, v. 5, p. 72-76.

1977 - McCallum, M.D., Woolsey, T.S. and Schumm, S.A., A fluidization mechanism for subsidence of bedded tuffs in diatremes and related volcanic vents: Bull. Volcanologique, v. 34-4, P. 1-16.

1977 - Mosley, M.P. and Schumm, S.A., Stream junctions - A probable location for bedrock placers: Economic Geology, v. 72, p. 691-694.

1977 - Schumm, S.A., Applied fluvial geomorphology: in Applied Geomorphology (J.R. Hails, editor). Elsevier, Amsterdam, p. 119-156.

1978 - Ethridge, F.G. and Schumm, S.A., Reconstructing paleochannel morphology and flow characteristics: methodology, limitations, and assessment: in A.D. Miall, ed., Fluvial Sedimentology: Canada Soc. Petrol. Geol., Memoir No. 5, p. 703-722.

1979 - Begin, Z.B. and Schumm, S.A., Instability of alluvial valley floors: A method for its

assessment: Am. Soc. Agr. Eng. Trans., v. 22, p. 347-350.

1979 - Schumm, S.A. and Meyers, D.F., Morphology of alluvial rivers of the Great Plains: Great Plains Agr. Council Pub. 91, p. 9-14.

1979 - Schumm, S.A., Geomorphic thresholds: the concept and its applications: Inst. British Geogr. Trans., v. 4, p. 485-515.

1980 - Schumm, S.A., Plan form of alluvial rivers: International Workshop on Alluvial Rivers, University of Roorkee (India), Proc., p. 4-21-4-33.

1980 - Schumm, S.A., Kirk Bryan Award - Response: Geol. Soc. America Bull. (Part 2), p. 1101-1102.

1980 - Shen, H.W., Schumm, S.A. and Doehring, D.O., Stability of stream channel patterns: National Acad. Sci., Transportation Research Record 736, p. 22-28.

1980 - Schumm, S.A., Some applications of the concept of geomorphic thresholds in Coates, D.R. and Vitek, J.D. (editors), Thresholds in Geomorphology: George Allen and Unwin, London, p. 473-485.

1980 - Schumm, S.A. Bradley, M.T., and Begin, Z.B., Application of Geomorphic Principles to Environmental Management in Semiarid Regions: Colorado State University Colorado

Water Resources Institute, Completion Report 93, 43 p.

1980 - Begin, Z.B., Meyer, D.F. and Schumm, S.A., Knickpoint migration due to base-level lowering: Jour. Waterways, Coastal, and Ocean Div., Am. Soc. Civil Eng. Proc., v. 106, p. 369-387.

1980 - Begin Z.B., D.F. Meyer and Schumm, S.A., Sediment production of alluvial channels in response to base-level lowering: American Soc. Agr. Eng. Trans., v. 23, p. 1183-1187.

1980 - Bergstrom, F. and Schumm, S.A., Episodic behavior in badlands: Internat. Assoc. Hydrologic Sciences Pub. 132 (Christchurch Symposium), p. 478-592.

1981 - Begin, Z.B., Meyer, D.F. and Schumm, S.A., Development of longitudinal profiles of alluvial channels in response to baselevel lowering: Earth Surface Processes and Landforms, v. 6, p. 49-68.

1981 - Patton, P.C. and Schumm, S.A., Ephemeral-stream processes: Implications for studies. of Quaternary valley fills, Quaternary Res., v. 15, p. 24-43.

1981 - Schumm, S.A., Evolution and response of the fluvial system: sedimentologic implications, Soc. Economic Paleontologists and Mineralogists Spec. Pub. 31, p. 19-29.

1981 - Nadler, C.T. and Schumm, S.A., Metamorphosis of South Platte and Arkansas Rivers, eastern Colorado: Physical Geogr., v. 2, p. 95-115.

1982 - Schumm, S.A., Bean, D.W. and Harvey, M.D., Bed-form dependent pulsating flow in Medano Creek, southern Colorado: Earth Surface Processes and Landforms, v. 7, p. 17-18.

1982 - Schumm, S.A. and Harvey, M.D., Natural erosion in the USA: American Soc. Agronomy, Spec. Pub. 45, p. 15-22.

1982 - Laronne, J.B. and Schumm, S.A. Soluble-mineral content in surficial alluvium and associated Mancos Shale: Water Res. Bull., v. 18, p. 27-35.

1982 - Schumm, S.A, Costa, J.E., Toy, T., Knox, J., Warner, R., and Scott, J., Geomorphic assessment of uranium mill tailings: in Uranium Mill Tailings Management, Nuclear Energy Agency, Paris, p. 69-87.

1982 - Schumm, S.A., Costa, J.E., Toy, T., Knox, J., and Warner, R., Geomorphic hazards and uranium tailings disposal: Proc. Management of water from uranium mining and milling: Internat. Atomic Energy Agency (Vienna), p. 111-124.

1982 - Parker, R.S. and Schumm, S.A., Experimental study of drainage networks in Badland geomorphology and piping (Eds. R.

Bryan and A. Yair) Geobooks Norwich U.K., p. 153-168.

1983 - Harvey, M.D., Watson, C.C. and Schumm, S.A., Channelized streams: An analog for the effects of urbanization: Internat. Symp. Urban Hydrology Hydraulics and Sediment Control, Proc. (Lexington, Ky) p. 401-409.

1983 - Schumm, S.A. and Chorley, R.J., Geomorphic controls on the management of nuclear waste: U.SD. Nuclear Regulatory Comm. NUREG/CR-3276, 137 p.

1983 - Nelson, J.D., Volpe, R.L., Wardwell, R.E., and Schumm, S.A., Design considerations for long-term stabilization of uranium mill tailings impoundments: U.S. Nuclear Regulatory Comm. NUREG/CR-3397, 163 p.

1983 - Burnett, A.W. and Schumm, S.A., Alluvial river response to neotectonic deformation in Louisiana and Mississippi, Science, v. 222, p. 49-50.

1984 - Begin, Z.B. and Schumm, S.A., Gradational thresholds and landform singularity. Significance for Quaternary studies. Quat. Res., v. 21, p. 267-274.

1984 - Watson, C.C., Harvey, M.D. and Schumm, S.A., Neotectonic effects on river pattern: in River meandering (ed. C.M. Elliott) Amer. Soc. Civil Engs. N.Y., p. 55-66.

1984 - Schumm, S.A., River morphology and behavior: Problems of extrapolation: in River Meandering (ed. C.M. Elliott) Amer. Soc. Civil Engs., N.Y., p. 16-29.

1984 - Winkley, B.R., Schumm, S.A., Mahmood, K., Lamb., M.S. and Linden, W.M., New developments in the protection of irrigation, drainage and flood control structures on rivers. Internat. Comm. Irrigation and Drainage 12th Congress (Fort Collins) Trans Vol. C, p. 69-111.

1985 - Schumm, S.A., Explanation and extrapolation in geomorphology; Seven reasons for geologic uncertainty: Japanese Geomorph. Union, Trans., V. 6, p. 1-18.

1985 - Schumm, S.A., Patterns of alluvial rivers: Annual Rev. Earth Planetary Sci., v. 13, p. 5-27.

1986 - Schumm, S.A., and Phillips, Loren, Composite channels of the Canterbury Plain, New Zealand: A martian analog?, Geology, v. 14, p. 326-329.

1986 - Schumm, S.A., Alluvial river response to active tectonics: in Active Tectonics, National Academy Press, Washington, D.C., p. 80-94.

1987 - Schumm, S.A. and Ash, Donald, Paleohydrology: in Oliver, J.E., and Fairbridge, R.W. (eds.) Encyclopedia of

Climatology, Van Nostrand-Reinhold, New York, p:675-682.

1987 - Paine, A.D.M., Meyer, D.F. and Schumm, S.A., Incised channel and terrace formation near Mount St. Helens, Washington, Internat. Assoc. Hydrololgic Sci. Publ. 165, p. 389-390.

1987 - Harvey, M.D. and Schumm, S.A., Response of Dry Creek in California to land use change, gravel mining and dam closure. Internat. Assoc. Hydrologic Sci. Pub. 165, p. 451-460.

1987 - Jin, Desheng and Schumm, S.A., A new technique for modeling river morphology: in Gardner, V. (ed.). International Geomorphology, Wiley, Chichester, p. 681-690.

1987 - Gregory, D.I. and Schumm, S.A., The effect of active tectonics on alluvial river morphology: in Richards, K.S. (ed.) River channels: Environment and process: Blackwells, London, p. 41-68.

1987 - Phillips, Loren and Schumm S.A., Effect of regional slope on drainage networks: Geology, v. 15, p. 813-816.

1987 - Schumm, S.A. and Brackenridge, G.R., River response in Ruddiman, W.F. and Wright, H.E., Jr., North America and adjacent oceans during the last deglaciation: Geological Soc. America, v. K-3, p. 221-240.

1988 - Schumm, S.A., Variability of the fluvial system in space and time: in Rosswall, Thomas, Woodmansee, R.G. and Risser, P.G. (eds). Scales and global change: Wiley, New York, p. 225-249.

1988 - Schumm, S.A., Geomorphic hazards: Problems of prediction: Zeitschrft Geomorph. Supplementband, 67, p. 17-24.

1989 - Schumm, S.A. and Thorne, C.R., Geologic and geomorphic controls on bank erosion: in Ports, M.A. (ed.), Hydraulic Engineering: Proc. 1989 National Conference on Hydraulic American Soc. Civil Engs., p. 106-111.

1989 - Schumm, S.A. and Gellis, A.C., Sediment yield as a function of incised channel evolution: in Brush L.M. (ed.), Taming the Yellow River Silt and Floods, Kluwer Academic Publishers, N.Y., p. 99-109.

1990 - Buchanan, J.P. and Schumm, S.A., Niobrara River: in Wolman, M.G. and Riggs, H.C. (eds) Surface Water Hydrology, Geol. Soc. America, Boulder, CO, p. 314-321.

1991 - Rogers, R.D. and Schumm, S.A., The effect of sparse vegetative cover on erosion and sediment yield: Jour. Hydrology, v. 123, p., 19-24.

1991 - Gellis, Allen, Hereford, Richard, Schumm, S.A., and Hayes, B.R., Channel evolution and hydrologic variations in the Colorado

River basin: Factors influencing sediment and salt loads, Jour. Hydrology, v. 124, p. 317-344.

1992 - Schumm, .S.A., The variability of large alluvial rivers: Significance for river engineering: Nile 2000, Conf. on protection and development of the Nile and other major rivers; Proc., v. 1, p. 3-3-1 to 3-3-15.

1993 - Schumm, S.A., River response to baselevel change: Implications for sequence stratigraphy: Jour. Geology, v. 101, p. 279-294.

1993 - Schumm, S.A. and Harvey, M.D.., Engineering geomorphology: Hydraulic Engineering : 1993, Hydraulics Div. American Soc. Civil Engs., p. 394-399.

1993 - Germanoski, Dru and Schumm, S.A., Change in braided river morphology resulting from aggradation and degradation: Jour. Geology, v. 101, p. 451-466.

1993 - Orlowski, L.A., Grundy, W.D., Mielke, PW., Jr., and Schumm, S.A., Geological applications of multi-response permutation procedures: Mathematical Geol., v. 25, p. 483-500.

1993 - Wood, L.J., Ethridge, F.G., and Schumm, S.A., The effects of rate of base-level fluctuation on coastal-plain, shelf and slope depositional systems: an experimental approach: in Posamentier, H.W.,

Summerhayes, C.P., Haq, B.V., and Allen, G.P., Sequence stratigraphy and fades associations: Internat. Assoc. Sedimentologists, Spec. Pub. 18, p. 43-53.

1993 - Jorgensen, D.W., Harvey, M.D., Schumm, S.A., and Flam, Louis, Morphology and dynamics of the Indus River: Implications for the Mohen jo Daro site in Shroder, J.F., Jr. (ed.) Himalaya to the Sea: Routledge, London, p: 288-326.

1994 - Wood, L.J., Ethridge, F.G., and Schumm, S.A., An experimental study of the influence of subaqueous shelf angles on coastal plain and shelf deposits: American Assoc. Petroleum Geologists, Memoir 58, p. 381-391.

1994 - Koss, J.E., Ethridge, F.G., and Schumm, S.A., An experimental style of the effects of base-level change on fluvial, coastal plain, and shelf systems: Jour. Sedimentary Research, v. B64, p. 90-98.

1994 - Schumm, S.A., Erroneous perceptions of fluvial hazards: Geomorphology, v. 10, p. 129-138.

1994 - Schumm, S.A., Ethridge, F.G., Origin, evolution, and morphology of fluvial valleys: Soc. Sedimentary Geology (SEPM) Special Paper 51, p. 11-27.

1994 - Schumm, S.A., Rutherford, I.D., and Brooks, John, Pre-cutoff morphology of the lower

Mississippi River: in Schumm, S.A. and Winkley, B.R. (eds.) The Variability of Large Alluvial Rivers: American Soc. Civil Engineers Press, N.Y., p. 13-44.

1994 - Schumm, S.A. and Galay, V.J., The River Nile in Egypt: in Schumm, S.A. and Winkley, B.R. (eds.) The Variability of Large Alluvial Rivers: American Soc. Civil Engineers Press, N.Y., p. 75-100.

1994 - Harbor, D.J., Schumm, S.A., and Harvey, M.D., Tectonic control of the Indus River in Sindh, Pakistan: in Schumm, S.A. and Winkley, B.R. (eds.) The Variability of Large Alluvial Rivers: American Soc. Civil Engineers Press, N.Y., p. 161-175.

1994 - Harvey, M.D. and Schumm, S.A., Alabama River: Variability of overbank flooding and deposition: in Schumm, S.A. and Winkley, B.R. (eds.) The Variability of Large Alluvial Rivers: American Soc. Civil Engineers Press, N.Y., p. 313-337.

1994 - Schumm, S.A. and Ethridge, F.G., Origin, evolution and morphology of fluvial valleys: in Incised-valley systems SEPM Special Pub. 51, p. 13-27.

1995 - Schumm, S.A. and Rea, D.K., Sediment yield from disturbed earth systems: Geology v. 23, p. 391-394.

1995 - Schumm, S.A., Boyd, K.F., Wolff, C.G., and Spitz, W.J., A groundwater sapping

landscape in the Florida Panhandle, Geomorphology, v 12, 281-297.

1995 - Boyd, K.F. and Schumm, S.A., Geomophic evidence of deformation in the northern part of the New Madrid seismic zone, U.S. Geological Survey Professional Paper 1538-R, 35 p.

1995 - Ouchi, S., Ethridge, F.G., James, E.W., and Schumm, S.A., Experimental study of subaqueous fan development, in Hartley, A.J. and Prosser, D.G., (eds.) Characterization of deep marine classis systems, Geological Survey, London Spec. Pub. No. 94, p. 13-28.

1995 - Orlowski, L.A., Schumm, S.A., and Meilke, P.E., Jr., Reach classification of the lower Mississippi River, Geomorphology, v. 14, p. 221-234.

1996 - Osterkamp, W.R. and Schumm, S.A., Geoindicators for river and river-valley monitoring, in Berger, A.R. and Iams, W.J. (eds.) Geoindicators, Balkema, Rotterdam, p. 97-114.

1996 - Schumm, S.A., The variability of large alluvial rivers: Significance for river engineering, in Nakato, T. and Ettema, R (eds.) Issues and Directions in Hydraulics, Balkema, Rotterdam, p. 135-144.

1996 - Schumm, S.A., Erskine, W.D., and Titleard, J.W., Morphology, hydrology, and evolution

of the anastomosing Ovens and King Rivers, Victoria, Australia, Geological Soc. America Bulletin, v. 108, p. 1212-1224.

1997 - Schumm, S.A., Drainage density, Problems of prediction and application, in Steddart, D.R. (ed.) Process and form in geomorphology, Routledge, London, p. 15-45.

1997 - Schumm, S.A. and Spitz, W.J., Geological influences on the lower Mississippi River and its alluvial valley, Engineering Geology, v. 45, p. 245-261.

1997 - Spitz, W.J. and Schumm, S.A., Tectonic geomorphology of the Mississippi valley between Osceola,. Arkansas, and Friars Point, Mississippi, Engineering Geology, v. 46, p. 259-280.

1997 - Lagasse, P.F., Schumm, S.A., and Zevenbergen, L.W., 1997. Quantitative techniques for stream stability analysis. In Holly, F.M., Jr. and Alsaffan, Adnan (eds.), Managing water: Coping with scarcity and abundance, Amer. Soc. Civil Engs., New York, p. 147-153.

1998 - Ethridge, F.G., Wood, Leslie, and Schumm, S.A., Cyclic variables controlling sequence development: Problems and perspectives in relative role of eustasy, climate, and tectonism in continental rocks: SEPM, Spec. Pub. 59, p. 17-29.

1998 - Schumm, S.A. and Lagasse, P.F., Alluvial fan dynamics - Hazards to highways: in Abt, S.R., Young-Pezestk, and Watson, c.C. (Eds.) Water Resources Engineering '98, v. 1, Am. Soc. Civil Engs., New York, p. 298-303.

1999 - Schumm, S.A., Causes and controls of channel incision: in Darby, S.E. and Simon, Andrew (eds.) Incised River Channels: Wiley Chichestor, p. 20-33.

1999 - Holbrook, J. and Schumm, S.A., Geomorphic and sedimentary response of rivers to tectonic deformation: a brief review and critique of a tool for recognizing subtle epeirogenic deformation in moder ane ancient steetings: Tectonicophysics, v. 305, p. 287-306.

1999 - Harvey, M.D. and Schumm, S.A., Indus River dynamics and the abandonment of Mohenjo Daro: In Meadows, A and Meadows, P.S. (eds.), The Indus River: Biodiversity, Resources, Human Kind, Oxford Univ. Press, p. 333-348.

1999 - Jones, L.S. and Schumm, S.A., Causes of avulsion: An overview. Internat. Assoc. Sedimentologists, Special Pub. 28, p. 171-178.

2001 - Mosley, M.P. and Schumm, S.A., Gravel Bed Rivers-The View from the Hills. Gravel-Bed Rivers. In Mosley, M.P. (ed), Gravel-bed Rivers V, New Zealand, Hydrological

Society, Wellington, New Zealand, p. 479-505.

2003 - Piegay, H. and Schumm, S.A., System approaches in fluvial geomorphology. In Kondolf, G.M. and Piegay, H. (eds), Tools in Fluvial Geomorphology, Wiley, New York, p. 105-134.

2005 - Schumm, S.A. and Harvey, M.D., (in press). Engineering Geomorphology. ASCE *Sediment Engineering Manual*, Chapter 18.

2005 - Etheridge, F.G., Germanoski, D., Schumm, S.A., and Wood, L.J., The morphological and stratigraphical effects of base-level change: a review of experimental studies. Spec. Pubis. Int. Ass. Sediment 35, pp. 213-241.

2005 - Schumm, S.A., Forensic Geomorphology. GSA Today, v. 15, no. 12, December.

Books:

1969 - Schumm, S.A. and Bradley, W.C. (editors), United States Contributions to Quaternary Research: Geol. Soc. America Special Paper 123, 305 p.

1972 - Schumm, S.A., River Morphology: Dowden, Hutchinson and Ross, Inc., 429 p.

1973 - Schumm, S.A. and Mosley, M.P., Slope Morphology: Dowden, Hutchinson and Ross, Inc., 468 p.

1977 - Schumm, S.A., Drainage basin morphology: Dowden, Hutchinson and Ross, Stroudsburg, PA, 352 p.

1977 - Schumm, S.A., The Fluvial System: John Wiley, N.Y., 338 p.

1980 - King, P.B. and Schumm, S.A., The physical geography (geomorphology) of W.M. Davis: Geobooks, Norwich, U.K., 174 p.

1984 - Schumm, S.A., Harvey, M.D. and Watson, C.C., Incised Channels: Morphology dynamics and control: Water Resources Pub., Littleton, CO, 200 p.

1985 - Chorley, R.J., Schumm, S.A. and Sugden, D.E., Geomorphology: Methuen, New York, 605 p.

1987 - Schumm, S.A., Mosley, M.P., and Weaver, W.E., Experimental fluvial geomorphology: John Wiley, N.Y., 413 p.

1991 - Schumm, S.A., To interpret the Earth, Ten ways to be wrong: Cambridge Univ. Press., Cambridge, 133 p.

1994 - Schumm, S.A. and Winkley, B.R. (editors), The Variability of Large Alluvial Rivers: American Society of Civil Engineers Press, N.Y., 467 p.

2000 - Schumm, S.A., Dumont, J., and Holbrook, J. *Active Tectonics and Alluvial Rivers*. Cambridge University Press, 276 p.

2005 - Schumm, S.A., *River Variability and Complexity*. Cambridge University Press, 220 p.

Reviews and Discussions:

1961 - Schumm, S.A., The effect of sediment type on the shape and stratification of some modem fluvial deposits–A reply: Am. Jour. Sci., v. 259, p. 234-239.

1964 - Schumm, S.A., Review–Fluvial processes in geomorphology: Jour. Geol. Education, v. 12, p. 109.

1965 - Schumm, S.A., Seventh INQUA Congress, The contribution to hydrology: Am. Geophys. Union Trans., v. 46, p. 649.

1967 - Schumm, S.A., Discussion; Paleohydrology: Internat. Hydrology Sym. Proc., v. 2, p. 194.

1967 - Schumm, S.A., Discussion; On the development of stream meanders (Paper A47) Internat. Assoc, Hydraulic Research, 12th Cong. Proc., v. 5, p. 146-147.

1968 - Schumm, S.A., Review - Landform studies from Australia and New Guinea (edited by J.N. Jennings and J.A. Mabbutt): Jour. Geology, v. 76, p. 369-370.

1968 - Schumm, S.A., Review - The cycle of erosion in different climates by Pierre Birot: Science, v. 161, p. 876-877.

1969 - Schumm, S.A. and Simons, D.B., Lunar rivers or coalesced chain craters?: Science, v. 165, p. 201.

1969 - Schumm, S.A., Review - Landforms of Australia by V. Seventy: Jour. Geology, v. 77, p. 502.

1969 - Schumm, S.A., Review - Principles of Geomorphology by W.D. Thornbury: Jour. Geology, v. 77, p. 737-738:

1969 - Schumm, S.A., Review - Deserts or the world (edited by W.G. McGinnis, B. J. Goldman, and P. Paylore): Jour. Geology, v. 77, p. 737.

1970 - Schumm, S.A., River metamorphosis (closure): Jour. Hydraulics Div., Proc. ASCE, v. 96, HY 8, p. 1714-1716.

1972 - Schumm, S.A., Review - Hillslope form and process, by M.A. Carson and M. J. Kirkby: Science, v. 178, p. 1083-1084.

1973 - Schumm, S.A., Review - Drainage Basin Form and Process by Gregory, K.J. and Walling, D.E.: Jour. Geol. Education, v. 21, p. 130.

1973 - Schumm, S.A., Review - The surface features of the land, trans. by Philip Tilley: Jour. Geological Educ., v. 21, p. 35.

1975 - Schumm, S.A., Review - Rates of denudation in selected small catchments in eastern

Australia: by Ian Douglas, Earth Science Rev.

1978 - Schumm, S.A., Review- Arroyos and environmental change in the American Southwest by Cooke, R.V. and Reeves, R.W., Earth Science Reviews, v. 13, p. 211-213.

1978 - Schumm, S.A., Review - Geomorphology and Time by Thornes, J.B., and Brunsden, D., American Jour. Science, v. 278, p. 608.

1981 - Schumm, S.A., Review - Geomorphology: Geotimes, v. 26, p. 32-33.

1984 - Schumm, S.A., Review - Alluvial Mining: the geology, technology and economics of placer, by Macdonald, E.H., Progress in Physical Geography, v. 9, p. 152.

1985 - Schumm, S.A., Review - Modern and ancient fluvial systems, by Collinson, J.D. and Lewin, J.: Jour. Geology, v. 97, p. 623.

1985 - Schumm, S.A., Review - Groundwater as a geomorphic agent, by LaFleur, R.G.: Jour. Geology, v. 93, p. 222.

1986 - Schumm, S.A., Comment on "Buffers, energy storage, and the mode and temp of geologic events," Geology, v. 12, p. 265.

1997 - Schumm, S.A., Review - Global Continental Paleohydrology: Earth Surface Processes and Landforms, v. 22, p. 189-192.

Reprints:

1972 - Schumm, S.A., Fluvial Geomorphology: The Historical Perspective, in River Mechanics (edited by H.W. Shen) Water Resources Pub., Fort Collins, Colorado (1971). Reprinted in River Morphology: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 429 p. (edited by S.A. Schumm).

1972 - Schumm, S.A., Fluvial Geomorphology:. Channel Adjustment and River Metamorphosis in River Mechanics (edited by H.W. Shen) Water Resources Fort Collins, Colorado (1971). Reprinted in River Morphology: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 429 p. (edited by S.A. Schumm).

1973 - Schumm, S.A., Seasonal variations of infiltration capacity and runoff on hillslopes in western Colorado: Jour. Geophys. Research, v. 68, pp. 3655-3666 (1962). Reprinted in Slope Morphology: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 454 p. (edited by S.A. Schumm and M.P. Mosley).

1973 - Schumm, S.A., Tempo, espaco e causalidade en geomorfologia: Nat. Geomorfol. Campinas (Brazil), v. 13, pp. 43-63. Reprint and translation of Schumm and Lichty, 1965.

1973 - Schumm, S.A., The role of creep and rainwash on the retreat of badland slopes:

Amer. Jour. Science, v. 254, pp. 693-706 (1956). Reprinted in Slope Morphology: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 454 p. (edited by S.A. Schumm and M.P. Mosley).

1973 - Schumm, S.A., Rates of surficial rock creep on hillslopes in western Colorado: Science, v. 255, pp. 560-561 (1967). Reprinted in Slope Morphology: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 454 p. (edited by S.A. Schumm and M. P. Mosley).

1975 - Schumm, S.A., Geomorphology: McGraw-Hill Yearbook of Science and Technology, 1973, pp. 13-23, McGraw-Hill, New York (1974). Reprinted in Plantation Surfaces: Dowden, 'Hutchinson and Ross, Stroudsburg, Pennsylvania, 480 p. (edited by G.F. Adams).

1975 - Schumm, S.A., Erosion on miniature pediments in Badlands National Monument: South Dakota: Geol. Soc. America Bull., v. 73, pp. 719-724 (1962). Reprinted in Plantation Surfaces: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 480 p. (edited by G.F. Adams).

1976 - Schumm, S.A., Geomorphic implications of climate change: in Water, Earth and Man, Metheun Ltd. (edited by R.J. Chorle) pp. 525-539 (1969). Reprinted in Landforms and Geomorphology: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 404 p. (edited by C.A.M. King).

1976 - Schumm, S.A., Time, space, and causality in geomorphology: Amer. Jour. Sci., v. 263, pp. 110-119 (and R. W. Lichty) (1965). Reprinted in Landforms and Geomorphology: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 44 p. (edited by C.A.M. King).

1976 - Langbein, W.B. and Schumm, S.A., Yield of sediment in relation to mean annual precipitation: Amer. Geophys. Union Trans., v. 39, pp. 1076-1084. Reprinted in Landforms and Geomorphology: Dowden, Hutchinson and Ross, Stroudsburg, Pennsylvania, 404 p. (edited by C.A.M. King).

1977 - Schumm, S.A., Evolution of drainage systems and slopes in badlands at Perth Amboy, New Jersey (1956): Geol. Soc. America Bull., v. 67, p. 597-646. Reprinted in Drainage Basin Morphology: Dowden, Hutchinson and Ross, Stroudsburg, PA, 352 p., (editor, S.A. Schumm).

1977 - Hadley, R.F. and Schumm, S.A., Sediment sources and drainage basin characteristics in upper Cheyenne River basin: U.S. Geol. Survey Water-Supply Paper 1531-B, p. 169-177 (1961). Reprinted in Drainage Basin Morphology: Dowden, Hutchinson and Ross, Stroudsburg, PA, 352 p., (editor, S.A. Schumm).

1977 - Schumm, S.A., Geomorphic thresholds and complex response of drainage systems (1973) in Fluvial Geomorphology, Pub. In

Geomorphology, SUNY, Binghamton, N. Y., p. 299-310, (editor, M. Morisawa). Reprinted in Drainage Basin Morphology, 352 p.: Dowden, Hutchinson and Ross, Stroudsburg, PA, (editor, S.A. Schumm).

1982 - Langbein, W.B. and Schumm, S.A, Yield of sediment in relation to mean annual precipitation 0958), Am. Geophys. Union, Trans, v. 39, p. 1076-1084. Reprinted in Erosion and Sediment Yield: Hutchinson and Ross, Stroudsburg, PA (edited by J.B. Laronne and M.P. Mosley).

1982 - Schumm, S.A., The disparity between present rates of denudation and orogeny: U.S. Geol. Survey Prof. Paper 454-H, 13 p. (1963). Reprinted in Erosion and Sediment Yield, Hutchinson and Ross, Stroudsburg, PA (edited by J.B. Laronne and M.P. Mosley).

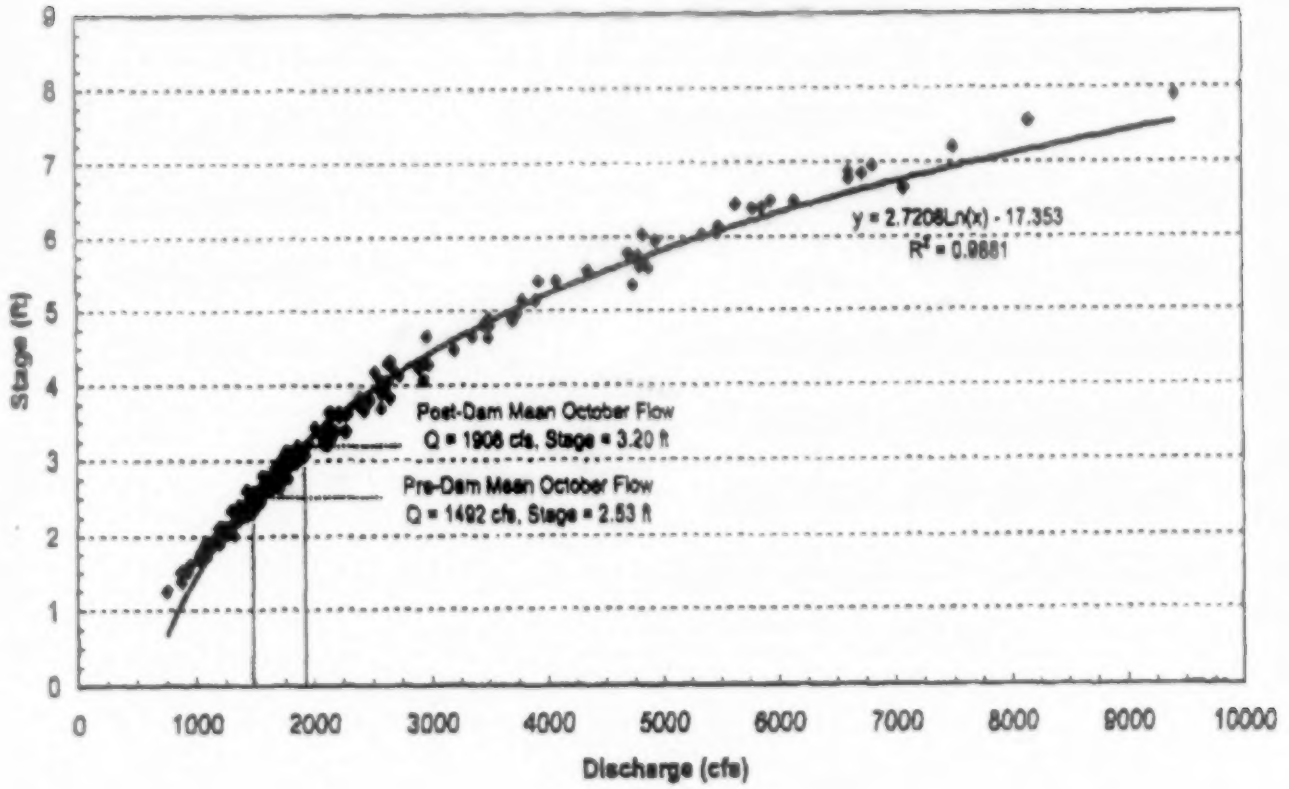
EXHIBIT C

Stage - Discharge Relationship

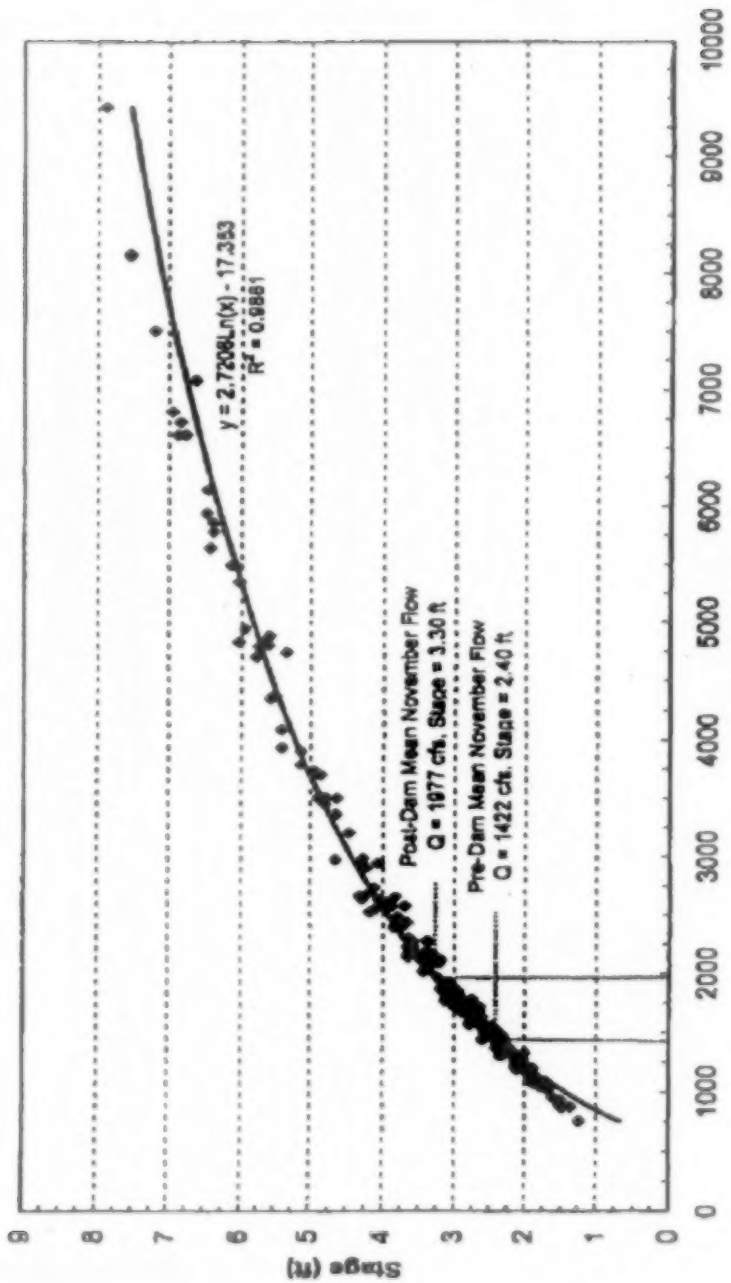
Comparison of Pre- and Post - Dam Mean October Discharge

USGS Gauge No. 06041000, 1952 - 2006

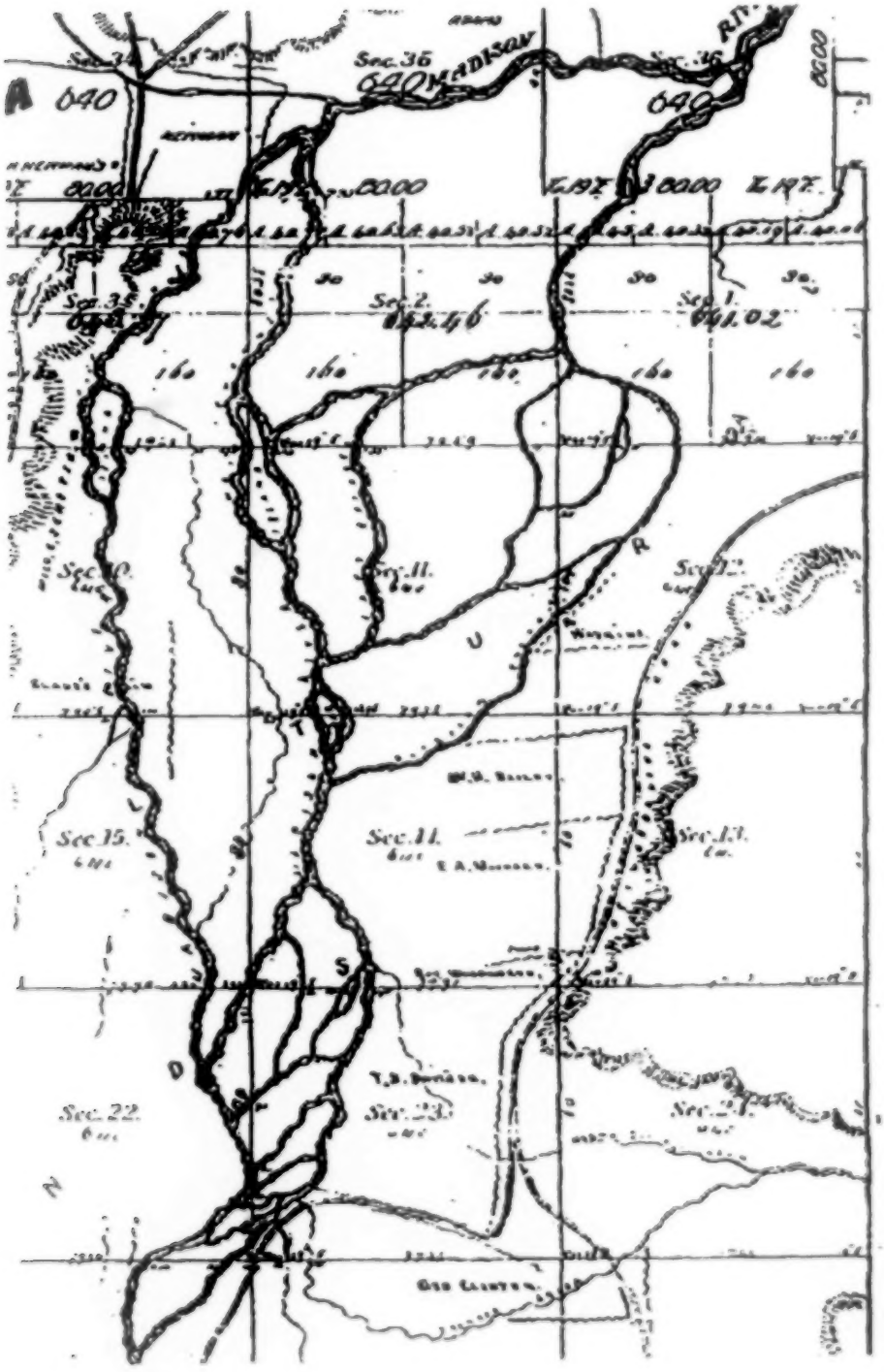
Madison River below Ennis Lake near McAllister, MT



OTH 001930


Stage - Discharge Relationship
Comparison of Pre- and Post - Dam Mean November Discharge
USGS Gauge No. 06041000, 1952 - 2006
Madison River below Ennis Lake near McAllister, MT
y = 2.7208Ln(x) - 17.353
R² = 0.9881
Post-Dam Mean November Flow
Q = 1977 cfs, Stage = 3.30 ft
Pre-Dam Mean November Flow
Q = 1422 cfs, Stage = 2.40 ft
Stage (ft)
Discharge (cfs)
0
1
2
3
4
5
6
7
8
9
0
1000
2000
3000
4000
5000
6000
7000
8000
9000
10000

[Excerpt from Exhibit D]



MIKE McGRATH
Montana Attorney General
ANTHONY JOHNSTONE
JON ELLINGSON
Assistant Attorneys General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Telephone: (406) 444-2026
Fax: (406) 444-3549

COUNSEL FOR STATE OF MONTANA

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

Cause No. CDV 2004-846

[Dated November 1, 2006]

PPL MONTANA, LLC, a Delaware Limited Liability Corporation; AVISTA CORPORATION, a Washington Corporation; and PACIFICORP, an Oregon Corporation,	)
Plaintiffs,	)
v.	)
STATE OF MONTANA,	)
Defendant.	)

SUPPLEMENTAL AFFIDAVIT OF JODIE FOLEY

STATE OF MONTANA)
: ss.
County of Lewis and Clark)

JODIE FOLEY, State Archivist of the Montana Historical Society, being first duly sworn upon oath, deposes and says:

I attach a true copy of the following publication from the collection of the Montana Historical Society, 225 North Roberts, Helena, Montana:

1. David Thompson's *Journals Relating to* Montana and Adjacent Regions, 1808-1812, at 97-98, 102-03, 108-11, 215-17, 221-22, and the index entry for "Clark Fork (river)" (M. Catherine White ed., Montana State University Press, 1950).

These pages were omitted from Exhibit 2 of my previous affidavit in this case, sworn on May 10, 2006.

Further affiant sayeth not.

/s/Jodie G. Foley
JODIE FOLEY

Subscribed and sworn to before me this 1st day of Nov., 2006.

(SEAL)

/s/ Katherine E. Stelling
NOTARY PUBLIC for the State of Montana.

Printed Name: Katherine E. Stelling
Residing at Helena, Montana.
My Commission Expires: 07/31/07

[*Certificate of Service omitted in printing this appendix*]

* * *

[p.97]

to keep their Provisions - Spoke to them all to kill / Beaver &c but with what effect Time only can show - Early this / Morning, Le bon Vieux & the Singer arrived with a small assort- / ment of Goods from Fort Saleesh for the Trade here but from / the poverty of the Indians, little will be wanted but Tobacco - /

March 13th Tuesday - A night of heavy snow, which lasted 'till / 11 AM - At Noon have left a small assortment of Good to trade / what Provisions can be got I embarked with the 2 Kullyspels / for the House, to see how all goes on - not finding myself at my / Ease for noting the Course of the River, I did not take for a small dis- / tance, the Canoe being leaky, we put ashore to gum it, & re-loading / I had a better birth of it - Co S 55 E 1/4 M S 80 E 1/6 So 1/4 S 20 W 1/4 S 40 W 1/3 / S 75 W 1/2 mid of Co the Crossing Place for Horses &c - [Co] The River clear of Islands always 120 to 150 yds / wide & deep withal -[Co . . .] beg~ of last Co opposite the / Root Plain[90] S 35 W 1/4 S 10 W 1/4 S 25 W 1 M S 50 W 1/2 M S 15 W 1/2 mid of Co a strong short / Rapid good 1/4 N 60 W 1 M all very rocky & now on both Sides West 3/4 mid of / Co saw about a dozen of Sheep, sorely wounded one of them with Shot / but the Rocks were too steep & the cold & Snow too bad as I was all wet / put up at 1/4 past ○ set - a cold day, with heavy showers of Snow & / every where the Snow a full foot deep. /

March 14 Wednesday. A little Snow in the Night & this Morng. At 7 AM / set off. Co as yesterday - then S 80 W

[90] Camas Prairie.

1/2 M [Co .] mid of Co the south Branch[91] falls in from the left it is full as / large as this River, but not so deep - N 65 W 1/3 M N 52 W 1/5 N 62 W 1/4 R beg~ of / Co the Road from the North Plains N W 2/3 + 1/2 + 1/2 M N 65 W 1/5 N W 1/4 N 32 W 1/3 / I think a good estimation of the present state of the River is 120 or 130 yds / wide by 5 ft deep at 4 M per Hour. N 60 W 1/3 latter end of Co a Brook from the Right Itch qua Koo[92] N 72 W 1/2 M S 58 W 3/4 N W 2/3 N 25 W 1/4 N 20 E 1/4 25 E / 1/4 N 10 W 1/2 S R; near end of Co a few Tents of Kullyspels . we staid abt 50' / N 58 W 1/5 S 85 W 1/4, end of Co very strong Rapid handed abt 150 yds cannot be / run Co N 72 W 1/2 M end of Co a strong Rapid but good close all along / on the left N 85 W 1/2 M end of Co a strong Rapid,[93] we carried on the right // about 400 yds of the following Co where as the Portage would have been much / better had we carried on the left & not more than 100 yds long or so, & good - / I think this Rapid may be shot from left to right, but always keeping to / the left of the waves, indeed it is best to keep as close as possible on the left / Co N 80 W 1/2 M at 2..40 PM N 58 W 1/2 M Wt 1/4 S 40 W 1/2 M

---

[91] Thompson has been descending the Flathead River. On his map, the Clark Fork above its confluence with the Flathead River is shown as a continuation of the Bitterroot River. This is the stream referred to as the "south Branch." The Clark Fork above its confluence with the Bitterroot River is designated "Courters River" and is considered a tributary to the "south Branch."

[92] Possibly Deemer Creek. On Thompson's map three creeks, flowing into the Clark Fork from the north (the right as he descends the stream), are shown between the Flathead River and the Thompson River. These from their position with relation to the sinuosities of the Clark Fork, are evidently the creeks now known as Deemer, Lynch, and Weeksville.

[93] Below the railroad siding of Eddy, Montana.

2 Rapids S 75 W 1/3 + 2/3 M / N 62 W 1/3 N 65 W 1 M - near end of Co the steep high Rocks – N 72 W 1/4 S 80 W 1/4 / N 75 W 1/2 + 1/2 N 65 W 1/2 + 1 M NW 1/4 Wt 1/2 So 1/3 N 86 W 3/4 S 70 W 1 M + 1/5 S 25 W 1/4 R /S 55 W 1/5 S 80 W 1/5 + 1/7 M to the House thank Heaven at 5 1/2 PM all well /

* * *

day. in the / afternoon a shower of Snow - Early collected the Horses & by 9 AM / they were all loaded & sent off with 4 Men & 2 Indians - All the Saleesh / & Shaw ap a tin pitched away also to the Root Plains where they are / to pass the Spring - We gummed the Canoe & by Noon set off - Co / down the River ... ;[104] opposite the Root Plain Road / Co N 80 W 2/3 S 63 W 3/4 + 1/4 M S 22 W 1/3 S 35 W 2/3 S 63 W 1/3 S 22 W 3/4 1/4 M gone the / strong Rock Rapid - a little beyond the end of Co camped at 5 1/2 PM - good Campment / every way .. abt 2 M back saw abt 50 or 60 Sheep in a Herd -Warm at / times & times Showers of Hail & Snow - Saw a few Geese & a Flock of / Swans with a few Ducks, but killed none, they are too Shy, & the Canoe / too rolling to admit turning in it - the first Foal in the Saleesh Camp / fell abt 6 days ago - there are several & all do well. the Geese are all / paired, the Ducks mostly the same, but the Swans are still in small / Flocks. /

March 25 Sunday. A very cold Night. At 7..10 AM set off Co S 40 W 1/5 / N 80 W S 78 W 2/3 end of Co where we camped - Co 1/3 M S 75 W 1 1/2 M S 88 W 2/3 / S 72 W 3/4 + 1/4 N 62 W 1/2 N 50 W 1/2 mid of Co the South Branch from the SEd [Co]... Co to the Indians / say N

---

[104] Courses omitted.

30 W 3/4 M N 50 W 1/2 N 80 W 1/6 S 75 W 2/3 end of Co Islet Rapid line & hand / on the left 100 yds Co N 80 W 3/4 M end of Co lined & handed 300 yds then Co S 80 W / 3/4 M to a very bad Rapid carried on the left Side[105] abt 200 yds tolerable much / Ice over which was our Portage - made a Fire & gummed the Canoe & at / 1 3/4 PM arrived & at 314 PM set off. bad loading. Co N 80 W 1 M N 65 W 1/2 M / N 58 W 3/4 M S 70 W 1/2 M end of Co where I obsd last Fall [Co] . . . // S 10 W or 10 1/3 M R. here it became dusk so that I cannot well see the figures / distce 1/5 M to the Brook + 1/4 R. ± 1/5 M to the House Road, thank Heaven. all well / we have had a very bad afternoon of Weather - heavy head Wind with showers / of thick Snow & very cold - Many of the Indians are ill with a violent / Cold which generally ends in a Rash breaking thro' the Skin. a Purge / of Salts with a little Paregoric Elixir soon eases them entirely. /

March 26 Monday - A moderate fine Morng but a day of changeable / Weather. Snow & Gales of Wind - Early had the Canoe gummed & sent up / with 2 Men to bring down the Furrs &c a Load of which they returned / with in the Evening - Beaulieu arrived - also 4 Kootanae Men to trade / with abt 1 1/2 Packs of Furrs.

March 27 Tuesday. 6 PM 14+ NE 1/4 Clear 2 PM 34+ Var 1 – fly– Clouds 26+ SE 3/4 / Clear at times Showers of Snow - Sent 2 Men with the Canoe for the rest of / the Furrs & Provisions - which in the evening thank Heaven all arrived well / say abt 10 1/2 Packs & 13 Pieces of dried Provisions - thank Heaven for / this

---

[105] Cf. entry for Mar. 14.

good Success - Traded with the Kootanaes & they went away /

March 28th Wednesday. 6 AM 19+ ENE '/ Cloudy 32+ do 1 1/4 do 9 PM /28+ do 1 1/2 Thick Snow - Several little Job. Press &c &c with the Furrs / Jaco arrived. I engaged him in his old Capacity of Clerk & Interpre /- ter -Bellaire delivered in abt 2 3/4 Packs of Beaver. - / Sent Beaulieu & Roberge to look for Birch Rind

March 29 - Thursday - 6 AM 28+ ENE 3/4 light Snow. now 3 In deep / 2 PM 39+ Calm light Snow & Sleet 9 PM 30 Wind Varb /2 Cloudy - / - Working at tying up Packs ready for the Press. /

March 30 Friday 6 AM 25+ Calm fine - 2 PM 23+ East 1 fly~ Clouds / 9 PM 32+ East 1/4 Cloudy. tied up

* * *

[*April 19th Thursday* - A rainy day - could do very little in the / afternoon fine Weather - had all the Horses brought /]

April 19th Thursday[109] - rained all Night 7 AM 36+ Southly 1/4 Cloudy / 2 PM 50+ Wtly 3/4 Clear Employed all day in collecting the Horses & sending / [MS. illegible] the Packs below the Rapids[110] - The Men returned & took down the / rest with my Baggage - in all 28 packs & 5 parcels of Provisions - at 4 PM set off

[109] Repeated in the manuscript.

[110] Now known as Thompson Falls.

& arrived there at ○ set. Co from the Ho[111] S 70 W 1/2 M / S 88 W 1/2 M N 70 W 3/4 N 20 W 3/4 carry on the right 40 yds N 60 W 1/4 N 50 W 1/5 / R Line N 30 W 1/2 M S 6O W 1/2 M N 80 W 1/2 M to the Portage - Co of the River ./ S 18 W 1/4 N 65 W 3/4 - this passes the lower end of the Portage - the Co of / the Portage is S 80 W full 1/2 M) [N 50 W 3/4 R.] N 50 W 1/4 N 42 W 1/4 R. N 80 W 2/3 M / camped short of end of Co -

April 20 Friday - A frosty Night to Ice, fine Morng Jaco & / Michel went a huntg - separated the Baggage - Joseph 13 Packs / 2 Bags of Pemmican - Jos Delcour 9 Packs 1 Cossete - 3 parcels of / Provisions obliged to send 4 Packs back - & 2 got wetted by the / awkward negligence of Vandette - Jaco killed a Chevruil / At 7 1/2 AM set off Co . . . this Co to the high white Banks / N 30 W 1/4 S 70 W 1/2 M N 60 W 1/3 N 55 W 1/8 end of Co the Brook where I think / I obsd for Latde last Octr[112] -Co NW 1/2 M N 82 W 1/2 M N 85 W 1/5 N 20 W 1 M / N 60 W 1/4 Wt 1/5 N 32 W 3/4 N 52 W 1/4 end of Co where we camped in Octr.[113] / near the River Co N 80 W 1/3 M S 77 W 2/3 - from this all the way [below] / downwards there is Cedar on the left Bank West 1/4 on the Right / the Weir Rivulet[114] 20 yds ∞ say its Co North 10 M then from NW 6 M / Co N 25 W 2/3 N 77 W 1/4 N 68 W 1/3 S 55 W 1/4 N 60 W 1/4 X S 85

---

[111] House, —Saleesh House.

[112] See p. 48, entry for Oct. 14, 1809.

[113] The night of Oct. 13, 1809.

[114] Probably Swamp Creek. See p. 47, entry for Oct. 13. There Thompson notes that the width of the brook with the fishing weir is ten yards wide, but that was in the fall when the water would have been lower than in April.

W 3/4 N 80 W 1/2 M the / River all along is seldom more than 80 yds wide, sometimes 100 yds / & often only 60 yds -Near Noon put ashore to [gum] gum the Canoe / / the Canoe.[115] Obsd for Latde 106° ..41 1/4' G - the 0 was just on the Merid when I began - Obsd place is mid of Co 47..53..2 N Dec 11..29..44 N - At 1 1/4 AM set off Co . . . to a Portage & Rapid[116] of / 300 yds on the right - very bad with large broken disjointed Rock & / 3 feet of Snow. Men can carry only 1 Pack & with this they are / always getting fast in the Snow or tumbling down - began at 2 1/10 / PM & set off at 4..10 PM Co N 40 W 1 M N 57 W 1 M + 1/3 N 82 W 3/4 S 75 W 2/3 X S 85 W 1/2 N 58 W 3/4 S 88 W 2/3 a little of Co gone where we baited Octr. / an Isle[117] with a dry Channel - see Chart. N 70 W 1/4 M N 52 W 1/4 N 82 W / 3/4 + 1/4 M NW 3/4 + 1/4 N 72 W 1/4 S 82 W 1 M a little short of Co / camped at 5..50 PM to gum the Canoes - the major part of the day / Snow along the Sides of the River, but continual & deep on the / left Side -the River frequently washes near the [Rocks] foot of / the Rocks of the Hills, but the Mountains now recede a little / yet still the Ground is hilly to the very sides of the River - / Current very strong & 'till 2 Hours past the Rapids very frequent / & many very heavy - some few dangerous - since the Island / Portage the Current strong, but mostly even - Cold strong head / Wind almost all day - Looking over the estimated Distances / I think they are all too short by

---

[115] Repeated in the manuscript.

[116] Probably the rapids at Rock Island, below Furlong, Montana. This may be the place recorded as the "Stony Island portage" in John Work's journal entries for Jan. 5 and 18, and Feb. 21, 1826. See Wash. Hist. Quart., V, 265, 268, 274.

[117] Probably near Noxon, Montana.

perhaps a 1/4 or 1/5 of the / whole but the Observations will remedy this /

April 21st[118] *Saturday* Snow in the Night - cloudy blowy Morng - At 5 1/2 AM / set off Co as yesterday + 1/4 M N 65 W 1/3 S 85 W 1/2 S 10 W 1/4 SW 1/6 S 70 W 1/2 West 1/2 M / First part with the Line then carried 450 yds on the right Side at the Herring Rapid[119] / bad large Stones & Snow, but not so bad by many degrees as yesterday's Portage / the Snow bore us up pretty well - began at 5.50 AM & set off at 8 3/4 AM havg / breakfasted S 88 W 1/3 M N 25 W 1/3 Wt 3/4 R. S 85 W 1 M S 70 W 1 1/4 M S 25 W 1/5 S 15 E/ 1/6 these last 2 Co among winding narrow perpend Rocks on each Side[120] S 10 W 1/5 M / West 1/5 M X S 40 W 1/6 do S 77 W 1/3 do S 70 W 1/4 opens into low Points &c N 85 W 1 M put / ashore for abt 1 3/4 Hour & made a Fire for heavy Wind & Snow - the Wind / calming set off & soon after the Shower of Snow ceased.[121] Co . . . obliged to put ashore for high wind &

---

[118] The journal entries for Apr. 21-24, ed. by Mr. T. C. Elliott, have been published in the *Wash, Hist. Quart*. See the Chronology, p. clx.

[119] Heron Rapids.

[120] Cabinet Gorge.

[121] The following excerpt is from Ross Cox's account of his first descent of this part of the Clark Fork River in 1812: "When the house [Pacific Fur Company's fort, located about forty miles below Saleesh House] was finished I got a good canoe built of cedar planks, in which I embarked with six men, and taking leave of Farnham, on the 18th of December, descended the Flat-head river on my return to Spokan. Our progress was slow and full of danger, from the great number of rapids, and the force of the current. The land on each side was high, and the banks in some places so

frequent heavy / Showers of Snow. we set off but was obliged to put back again, near O set / got off Co S 85 W 1 M S 85 W 1 1/4 M N 42 W 3/4 got to the House[122] thank Heaven / abt 7 1/4 PM - the wind rose & the small Canoe slightly wetted 3 Packs. - /

April 22nd Sunday - A very fine Easter Sunday[123] - rested all day . /

April 23 Monday. A frosty Morng but very fine day. Sewed the / Gunwales of the Canoe with Wattup[124] - timbered it up & gummed // both Canoes. Took an Inventory of all the Goods & sent the [Goods] Canoes off with / what Goods is wanted at the upper Fort - Mr F McDonald Delcour Methode / Delcour Junr. Crepeau Joseph Pierre & old Beau Pere[125] - at 2 3/4 PM - [Mr] / 1 Chevruil from an Indian -- Obsd for Latde 108..3..45 G Varn 10' East good / In the evening Beaulieu arrived he has seen plenty of very fine Birch / but the Rind is

---

precipitous, that for three nights we could not find room enough to make our beds on shore, and were constrained to sleep in a standing position, rolled up in our cloaks and blankets: leaving the canoe in the water, fasten ed to poles driven some distance into the ground." *Adventures on the Columbia*, p. 103.

[122] Kullyspel House.

[123] This, so far as is known, is the first record of an Easter spent in the Inland Empire.

[124] Spelled also watape; a Canadian French term of Algonquian origin used to designate the stringy roots of pine, spruce and other coniferous trees, used principally for sewing birch bark canoes.

[125] See p. 56, note 38. The person referred to as "old Beau Pere" may be the Jacques Hoole mentioned on p. 106, note 107.

very thin but such as it is we must put up with it / [126]
Latde 48..12..38 N

* * *

[126] The entries for Apr. 24 and 25 and part of 26 are included in the photostatic copy, but they have been omitted from the transcript given here.

[p.215]

Sortie of the Saleesh River[118] bears from me S 80 W 6 M the river then makes / a Curve to the Westd & bends round to the bitter Root Rivulet[119] &c as my former / remarks -ranges of Woody Hills lie all the way on the left Side, except the Gap / of the above Rivulet - The Defile by which we join the Ecttooway Plains[120] / is in the 3rd range of Hills - they appear high, bold, many conical; & unbroken / to the ranges that come along McGillivray's River[121] - all the ranges have / many hollows, swellings - & Lawns more or less sloping - - the Scenery on / the east Side the Lake is not striking, a sameness of Hills appears to the / Scenery I drew off 2 years ago - to the southd of which last a bold wide / Gap[122] formed one common Road to the Buffaloe a few years ago, but from / its vicinity to the Peagans, disused for many Years - the line of Hills &c / is sketched off as per Map - marked NE View of the NE defile &c -at 3 PM / we set off & held on very smartly, stopped abt 1/4 M to eat a mouthful at / the wooded Brook, we took 1 M..54' to this place, mostly on the Gallop - stopped / abt 1/2 M at the first Camp then set off & at 9 PM arrived, thank Heaven / at our Tents - all well /

---

[118] Flathead River, flowing out of Flathead Lake.

[119] Now called the Little Bitterroot River.

[120] Camas Prairie.

[121] Kootenai River.

[122] Probably the old Jocko trail, an easy natural trail leading from the north fork of the Jocko River through the Mission Range. The Salish had used this route in going to the Sun River country for buffalo.

March 2nd Monday - A very sharp Night & Morng - fine Day - light Airs / Northly & Easily - sent off a Canoe with 25 Bales of Meat of 100 lbs they / by no means loaded the Canoe - the other Men tying up the rest of the Meat / &c - the Canoe returned & we all set off havg paid our Debts to the Ind / ians for loan of Horses &c - at 4.23 AM set off Co N 74 W 1/2 M the Brook is / abt 1 M above us [Co] . . . end of Co camped abt 1/2 / PM showers of Rain & high cold Winds from the Westd Clear Night //

March 3rd Tuesday A sharp cold Morng - At 8 1/2 AM set off Co N 83 W 1/2 M 85 W / 1 M N 80 W 3/4 M N 75 W 1/2 N 18 W 1/5 N 85 W 1/2 ∞ ing place N 80 W 2/3 - another do S 78 W 1/2 N 67 W / 3/4 S 67 W 1 M + 3/4 beg~ of Co the road to the Ectooway Plains[123] [Co] . beg~ of Co the Forks[124] N 48 W 1/2 -say / the Fork comes 6 M from the foot of the far Hills, & winds round as per range of / Hills, at 1/2 PM N 67 W 3/4 - Mr McDonald put ashore staid 1/2 Hour & set off / alone - Co N 56 W /4 N 76 W /3 N 50 W 1 M+ 1/4 N 42 W 1 1/2 M N 80 W 1/7 N 70 W 1/3 NW 1/4 / N 30 W 1 M the left Side is now woody rocky Knowles -at the foot of the high / continuous Hills by which I passed to the So Branch [Co] ... beg~ of Co the road of the Defile,[125] by the lead of the Road bears N 45 E, exact / from the Defile southd a range of low swelling Hills meets those from the / River - to the westd the Hills swell for abt 6 M - then from high Snowy Hills / as per Map - then run off to the westd lowering in a Point up the Brook

---

[123] Camas Prairie.

[124] The confluence of the Flathead and Clark Fork rivers.

[125] Near Lynch Creek the Clark Fork trail left the river and turned northeast and entered Camas Prairie from the north.

/ to the Wtd of the Brook a bold range of Woody & lawn Hills follow the Brook / but keeping a bold Defile - N 40 E 1/6 North 1/6 N 25 W 1/4 N 15 W 1/3 N 42 W 1/2 N 60 W / 1/4 S 62 W 1/2 to the first Rapid at 3..10 PM - discharged a few Pieces then ran / down with the Line on the (3..55 PM N 78 W 1/4 + 1/4 M to the next Rapid lined on / the (but it can be run down with safety on the same Side Co N 83 W 1 M / to the bad Rapid - Portage abt 200 yds on the (uneven Stones, but not very / bad -4 1/2 PM to 5 1/2 PM when we set off Co West 1/2 M - mid of Co camped at 5..35 / PM - good Campment - heavy rain soon came on, after which heavy / gusts of Wind, abt Midnight tore up the Tent, tossed the Canoe over / & over, split it in several places & we often thought to be buried under / the Trees, good providence took care of us - - 1 Swan - could not fly & yet not / fat /

March 4th Wednesday - A very stormy Night, cloudy Morng & fine / day, partly clear - gummed the Canoe & set off at 8..7 AM Co N 72 W 1/4 / N 55 W 1/3 the Brook S 72 W 1/4 end of Co where I obsd for Latde 1809 Co / . . . beg~ of Co the Ho[126] at 11 AM thank Heaven. --- put the / Cargoe in the Warehouse, & the Men gummed the Canoe, & again set off / by 2 1/2 PM to meet Mr F McDonald - - yesterday [MS. illegible] & a Kootanae / Man, the Fool, arrived with Letters from Mr Jo McDonald - these, this / Morng, were sent off to meet me by Mr McMillan - but the Man / missed seeing us -9 PM 28+ - these Courses of the Voyage, tho' well taken / are only a supplement to those of 1810 as the Hills & Scenery were the principal Object /

---

[126] Sateesh House.

March 5th Thursday - Ther 27+ - Wind Southly Cloudy - 2 PM 28 WSW 1 1/2 / Snow - 9 PM - 22+ - NWtly Clear - arranging for pressing Provisions & Packs / &c - could do nothing for the bad Weather - Line for Packs cut - /

March 6th Friday -9 PM 22+ NNWtly 1/8 Clearing - 2 PM 36+ do Snow in Showers / 9 PM 22 Calm - Clear. Men with Mr McDonald[127] arrived, with the rest of the / Provisions - 2 Cargoes &c-/

March 7th Saturday 6 AM 16+ NWtly 1/4 Clear -2 PM 32+ do - 9 PM 28+ do - Clear / Made up 13 Bales of Meat, ready for pressing - Made abt 20 Wedges & 4 Mallets // State of the Thermometer since went away -/

* * *

up my things, &c &c &c - too bad Weather to gum the Canoe -/

March 12 - Thursday 6 AM 30+ Calm / Very small Rain - 2 PM 48+ Wtly 1/4 Clear at / times 9 PM 29+ do 1/8 Clear - Gummed & arranged the Canoes - the day was wet & misty / for a long time - drew off the North view of the Plains & Hills - [MS. illegible] from the / Kootanaes /

March 13 [Thursday] Friday 7 AM 25+ Calm Cloudy - at 8 AM we / got all ready & set off pray Heaven to send us a good Voyage - one Canoe has / 24 Pieces of Sorts & a leather Lodge - the other 18 do & my Lumber & Person - / - Michel with us - Co S 85 W 2/5

---

[127] Finan McDonald.

M N. 60 W 1/2 M N 32 W 1/4 N 65 W 3/4 M this Co in degrees / is quite rubbed out I guess 65° N 28 W 3/4 S 55 W 2/3 to the Portage - Co of the Falls[130] &c S 6 E 2/5 - the Co of the Portage is N 70 W 560 yds to the Bank - Co to the River S 85 W / 480 yds = 1040 yds - they run the Rapid, lined down the 2nd on the) in doing which both / Canoes received a severe blow, by the Waves dashing them against a Rock - but only / the new Canoe was broken - a little in the Side, which at the Portage we repaired with / Gum & [MS. illegible][131] - the 3rd Rapid was run - at end of the Portage both Canoes gummed / [2 3/4 ft] Co of the River above is S 76 E or N 76 W 2/3 M — Co below is N 65 W 1/2 M at 11 3/4 AM / N 40 W 1/3 strong bad Rapid, in [doing] running which the old Canoe struck a Rock so violently / as to break one of the bottom planks in - two - we put ashore & mended it at end / of Co to 1 1/2 PM - then N 68 W 1/2 M this is the place at beg of Co where I started from 1810 -/- NW 1/4 N 20 W 1/3 R G - N 28 W 1/5 then 2 Co like Dalles, very rough Rock on both Sides / N 85 W 1/4 N 50 W 1/2 N 15 W 3/4 N 10 E 3/5 N 20 W 2/5 R N 15 W 3/4 - 1/4 of Co where the Road comes / on the River by a Brook, now dry - N 30 W 3/5 N 70 W 1 M N 25 W 3/4 SR then 2 Cos rough / steep Rock N 50 W 1/3 do N 30 W 1/4 do on) North 1/3 N 20 E 1 M end of Co very high do & / of a white Earth, bold high Hills on the) which at end of Co come down on the River / Margin - on (a low pt - the Scenery cannot be drawn, as the River Banks / prevents it almost every where, they are all high bold swelling Hills, & / leave bold Defiles along the Brooks. [Co] . high w Banks on) / at end of Co / camped at 5 PM - many

---

[130] Thompson Falls, just below Saleesh House.

[131] Word appears to be Hair.

Rapids today, but mostly bold leads of Water - / the Hills all turn boldly up the Brooks, & at all the most concave / Sinuosities come boldly down to the Water Edge - where the Brooks // take their Passage they round boldly up the Brooks swelling from top / to bottom with many steep descending ridges, especially to the Westd Woods & / Snow in Patches scarce any rock - but on the (Hills /[132]

* * *

[132] This is the end of Thompson's journeys in Montana. The journal entries for March 14-29, edited by Mr. T. C. Elliott, have been published in the *Washington Historical Quarterly* (see the Chronology, p. clxi). On March 24, Thompson reached Spokane House. For an account of his last trip across the mountains and his subsequent activities, see the Introduction, pp. cxix ff.

Chin - Chay - Nay - Whey, Kalispel chief, daughter of, married to Finan McDonald, 235
China, trade with, xciii, cvi*n*, 247, 251, 251*n*-52*n*
Chipewyan (Northern) Indians, *xxxviii*n*, xliii; accompanied D.T. to L. Athabaska, lx, lxi
Chippewa Indians, *see* Ojibwa Indians
Chissels, 132, 161
Cho pun nish, *see* Nez Perces Indians
Chouteau, Pierre, 229
Christmas, at Saleesh Ho, in 1809, 74, 74n; in 1811, 190, D.T.'s remarks on, in *Narrative*, 190*n*; in 1813, clvi, Ross Cox quoted on, 74*n*; at H.B.C.'s Flathead Post, 1825, John Work quoted on, 190*n*
Christ's Hospital, *see* Blue Coat School
Churchill, mentioned in D.T.'s journal, 156; 156*n*
Churchill Factory, founding of, *xxiv*n*-xxvii*n*; conditions at, quoted from D.T.'s *Narrative*, xxv-xxvi; S. Hearne at, xxvi, xlvii, lv; competition with York Factory, lvii; mentioned, xxxviii, xxxix, xlii, liii, xcv*n*; *see also* Prince of Wales Fort
Churchill River, settlement at mouth of, *xxiva-xxviin; A. Henry and the Frobishers at, xlii, lxiii*n*; P. Pond at, xlix; mentioned, lix, lix*n*, lx*n*, xcv
Clark, Dr. W. P. xviii
Clark, Capt. William, return route through Mont., 205*n*; quoted concerning Flathead Indians, 220*n*; *see also* Lewis and Clark Expedition
Clark Fork, Ida., ci*n*, 45*n*
Clark Fork (river), xix, official name for, xix*n*; D.T.'s reference to navigation on, 47; steamboats on, 47*n*; rapid rise of, 174; descent of, described by R. Cox, 110*n*, by D.T., 97-98, 102-3, 108-11 215:17, 221-22; referred to by D.T. as Courter's Branch or River (part above mouth of Bitterroot R.), 89*n*, 203, 203*n*, 207, as Flat Head River, 38, as Saleesh River, ciin, 170, 171, 172, 172*n*, as South Branch, 97, *97*n*,

102, 187, 187*n*, 188, as Southern Branch, 203, 203*n*, 205, 207, 216; *see also* Cabinet Gorge; Cabinet Rapids; Heron Rapids; Island Portage; Rock Island; Thompson Falls
Clarke, John, cvi*n*, 129*n*
Clearwater River (Alta.), lxxxii*n*
Clearwater River (Ida.), 204*n*; D.T.'s "Lewis's Fork," 204
Clement, with D.T., 1808, 5*n*; returned to Kootanae Ho., 8, *8*n*
Clerks, equipment of, 58; value of, *58*n*; apprenticeship and promotion to partnership in N.W.C., lxviii, cxxx
Climate, east and west of Rocky Mountains, D.T.'s remarks on, 75*n*; *see also* Weather
Cloth, preferred by Indians, 39; green, checked cotton, scarlet, in inventory, 147; value of, in skins, 148
Clothes, box for, see Box
Cochrane River (Manit.), lx*n*
Cocking, Matthew, biography of, 225-6; at Cumberland Ho., xl, xlii; journals of, xl*n*, xliii*n*
Cody Creek (Mont.), 54*n*
Coeur d'Alene Indians (Interior Salish), xcix*n*; origin of name, *43*n*-44*n*; called "Pointed Hearts" by D.T., 43, 44; Catholic missions among, cl*n*
Coffee, 74*n*
Cokalahishkit, see Blackfoot River
Cole, John, murder of, xliv*n*
Colen, Joseph, excerpts from D.T.'s letters to, xxiii*n*, lxii*n*; relation to Tomison and failure of the

* * *

EXHIBIT C

JA 651

State of Montana

[SEAL]

Report

of the

Commissioner of State Lands and Investments

For the Two Fiscal Years
Beginning July 1, 1930, and
Terminating Jun 30, 1932

TO
THE HONORABLE J. E. ERICKSON
GOVERNOR

I. M. BRANDJORD
Commissioner of State Lands and Investments

NANITA B. SHERLOCK,
Assistant Commissioner

L. E. CHOQUETTE,
State Land Agent

State of Montana

Report

of the

Commissioner of State Lands and Investments

For the Two Fiscal Years
Beginning July 1, 1930, and
Terminating Jun 30, 1932

OFFICERS OF THE DEPARTMENT OF STATE LANDS AND INVESTMENTS

The State Board of Land Commissioners is the governing board created by Section 4 of Article XI of the Constitution, and consists of the following officers:

Hon. J. E. Erickson, Governor, President
Hon. Elizabeth Ireland, Superintendent of Public Instructions
Hon. W. E. Harmon, Secretary of State
Hon. L. A. Foot, Attorney General

Officers Under This Board:

I. M. BRANDJORD
Commissioner and secretary to the Board

NANITA B. SHERLOCK,
Assistant Commissioner

L. E. CHOQUETTE,
State Land Agent

RUTLEDGE PARKER,
State Forester
(Address Missoula)

L. L. WHITE
Forest Warden

AMENDMENT TO ENABLING ACT PERMITTING SALE OF GRAZING LANDS AT $5.00 PER ACRE REMOVING THE LIMITATION OF 640 ACRES ON THE QUANTITY OF LAND THAT MAY BE LEASE TO ONE PERSON OR COMPANY, AND MAKING OTHER CHANGES

(Public — No. 124 — 72d Congress S. 2396)

An Act to amend section 11 of the Act approved February 22, 1889 (25 Stat. 676), relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington.

Be it enacted by the senate and house of representatives of the United states of America in Congress assembled, that section 11 to the Act approved February 22, 1889 (25Stat. 676), be, and the same is hereby, amended to read as follows:

"That all lands granted by this act shall be disposed of only at public sale after advertising - tillable lands capable of producing agricultural crops for not less than $10 per acre and lands principally valuable for grazing purposes for not less than $5.00 per acre. Any of the said lands may be exchanged for others lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the State.

"The said lands may be leased under such regulations as the legislature may prescribe; but leases for grazing and agriculture purposes shall not be for a term longer than five years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty years; and leases for development of hydroelectric power for a term not longer than fifty years.

"The state may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: Provided, however, That none of such lands nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

"With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various State institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments, on land sold, interest on funds arising from these lands and all other actual income shall be available for the maintenance and support of such schools and institutions. Any State may, however, in its discretion add a portion of the annual income to the permanent funds.

"The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted."

Sec. 2. Anything in the said Act approved February 22, 1880 inconsistent with the provisions of this act is hereby repealed

Approved, May 7, 1932

* * *

Search for Other Power Sites on State Lands

There are other power sites and parts of power sites on State lands and the work will continue of locating such power sites so that they may be reserved by the State for future developments as demand arises.

Attention is here called to Lots 2, 3,4,5 and 6 of Section 36, Township 22 North, Rang 30 West, Sanders County. This section of land is located between two and three miles west of the town of Thompson Falls and the Clark Fork of the Columbia River runs through it. At this point the Clark Fork is a meandered non navigable stream and such being the case the State owning both banks also owns the bed of the stream.

* * *

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 31 201
OFFICE OF THE CL

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Montana

JOINT APPENDIX, Vol. 3 of 3

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS, LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M St. NW, Ste. 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

STEPHEN C. BULLOCK
ATTORNEY GENERAL
Office of the
Attorney General
215 North Sanders
Helena, MT 59620-1401
Counsel for Respondent

ASHLEY C. PARRISH
PAUL A. MEZZINA
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
Counsel for Petitioner

August 31, 2011

Additional counsel on inside cover

Petition for Writ of Certiorari filed August 12, 2010
Petition for Writ of Certiorari granted June 20, 2011

Library of Congress
Law Library

ANTHONY JOHNSTONE
Solicitor
MONTANA DEPARTMENT
OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Additional counsel
for Respondent

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St., Ste. 1500
Billings, MT 59101
(406) 252-2166

Additional counsel
for Petitioner

TABLE OF CONTENTS

VOLUME 1

PPL Montana, LLC v. State of Montana,
No. DV-25-2004-0000846-DK,
Lewis & Clark County District Court,
Relevant Docket Entries . . . . . JA 1

PPL Montana, LLC v. State of Montana,
No. DA 08-0506, Montana Supreme Court,
Relevant Docket Entries . . . . . JA 42

Affidavit of B. McFarland (no exhibits)
May 11, 2011 (Dkt. # 85) . . . . . JA 45

Affidavit of J. Foley
May 10, 2006 (Dkt. # 86) . . . . . JA 50

Exhibit 1,
M. Burlingame & K. Toole,
A History of Montana, Vol. II
Excerpted materials . . . . . JA 55

Exhibit 2,
M. White,
David Thompson's Journals Relating to Montana and Adjacent Regions, 1808–1812 (1950)
Excerpted materials . . . . . JA 59

Exhibit 3,
M. E. Hahn,
In Retrospect:
A History of Mineral County
Excerpted materials . . . . . JA 92

Exhibit 4,
J. Hamilton,
From Wilderness to Statehood
A History of Montana 1805–1900
Excerpted materials . . . . . JA 98

Exhibit 5,
O. Johnson,
Flathead and Kootenay:
The Rivers, the Tribers, and the
Region's Traders (1969)
Excerpted materials . . . . . JA 102

Exhibit 6,
The Montana Almanac
(1959–1960 ed.)
Excerpted materials . . . . . JA 110

Exhibit 7,
Rocky Mountain Gazette
Excerpted materials
from August 18, 1866 publication . JA 115

Exhibit 8,
The Helena Herald,
Excerpted materials from
May 2, 1867, June 5, 1867,
September 12, 1867, and
February 13, 1868 publications . . . JA 117

Exhibit 9,
Sanders County Ledger,
Excerpted materials from
February 6, 1958, April 19, 1907,
July 22, 1910, and
March 13, 1914 publications . . . . . JA 123

Exhibit 10,
The Missoula Pioneer,
Excerpted materials from
March 2, 1871, and July 13, 1872
publications . . . . . JA 130

Exhibit 11,
Missoula and Cedar Creek Pioneer,
Excerpted materials from
December 8, 1870 publication . . . . . JA 134

Exhibit 12,
Unnamed newspapers,
Excerpted materials from
June 9, 1882, June 30, 1882,
July 7, 1882, August 18, 1882,
September 8, 1882, and
February 24, 1883 publications . . . JA 136

Exhibit 13,
The Journals of the Lewis & Clark Expedition, Vol. 4, April 7–
July 27, 1805 (Moulton, ed.)
Excerpted materials . . . . . JA 144

Exhibit 14,
The Madisonian, Virginia City, Montana, Excerpted materials from May 9, 1913, July 4, 1913, July 25, 1913, and September 19, 1913 publications ..... JA 150

Exhibit 15,
The Journals of the Lewis & Clark Expedition, July 28–November 1, 1805 (Moulton, ed.)
Excerpted materials ..... JA 157

Exhibit 16,
Hiram M. Chittenden, *History of Early Steamboat Navigation on the Missouri River* (New York 1903)
Excerpted materials ..... JA 166

Exhibit 17,
Montana: the Magazine of Western History (April 1959)
Excerpted materials ..... JA 171

Exhibit 18,
The River Press,
Excerpted materials from April 13, 1881 publication ..... JA 179

Exhibit 19,
Great Falls Tribune,
Excerpted materials from November 9, 1887 publication .... JA 180

Exhibit 20,
Contributions to the Historical Society of Montana, Vol. 8 (1917)
Excerpted materials ..... JA 182

Exhibit 21,
General Thomas James,
Three Years Among the Indians and Mexicans (Douglas, ed. 1916)
Excerpted materials ..... JA 187

Affidavit of M. Mason Affidavit
May 15, 2006 (Dkt. # 87) ..... JA 190

Exhibit A,
Montana Navigable Water Study
(December 1986) ..... JA 196

Exhibit B,
Report on the Navigability of the Clark Fork of the Columbia River, Idaho and Montana ..... JA 225

Exhibit C,
Madison River Navigation Study
(October 25, 1974) ..... JA 245

Exhibit D,
Missouri River Navigation Study
(August 12, 1974) ..... JA 293

VOLUME 2

Affidavit of R. Blair Strong
October 4, 2006 (Dkt. # 156) . . . . . JA 347

Exhibit 4,
Report of Navigability of the Clark Fork River Above Pend Oreille Lake, Idaho and Montana, April 15, 1932;

Letter from Montana Department of State Lands to Corps of Engineers, re navigability of Clark Fork River, September 9, 1932 . . . . . JA 352

Exhibit 5,
Letter from Corps of Engineers to Montana Board of Land Commissioners regarding navigability of Clark Fork River, September 20, 1932 . . . . . JA 362

Exhibit 6,
Letter from War Department, Office of the Chief of Engineers to the Division Engineer, Pacific Division, San Fran., California, February 9, 1933 Excerpted materials . . . . . JA 364

Affidavit of D. Emmons
November 1, 2006 (Dkt. # 169) . . . . . JA 367

Exhibit A,
Curriculum Vitae . . . . . JA 383

Exhibit F
Letter from Historical Research Associates to Montana Resource Development Bureau, February 14, 1986 ..... JA 393

Exhibit H,
The Journal of the Lewis & Clark Expedition, Vol. 4, April 7–July 27, 1805 (Moulton, ed.)
Excerpted materials ..... JA 396

Exhibit I,
Elevation map of Missouri River prepared by Captain W. Clark .... JA 436

Exhibit J
The Journals of the Lewis & Clark Expedition, Vol. 5, July 28–November 1, 1805 (Moulton, ed.),
Excerpted materials ..... JA 438

Exhibit K
War Department memorandum, dated November 2, 1896, enclosing United States Engineers Office report regarding maintenance of dam, Black Eagle Falls, Missouri River, October 24, 1896 ..... JA 470

Exhibit L
War Department, Report of the Chief of Engineers, for fiscal year ended June 30, 1898
Excerpted materials ..... JA 473

Exhibit M
Report from the Chief of Engineers on the Jefferson, Madison, and Gallatin Rivers, Montana, December 16, 1931
Excerpted materials ..... JA 478

Exhibit N
Executive Documents of the House of Representatives for the First Session of the Fifty-Second Congress 1891-1892, Excerpt: Report of Chief of the Engineers, U.S. Army, March 21, 1891 ..... JA 562

Exhibit O
Letter from U.S. Corps. of Engineers to M.O. Leighton, Consulting Engineer, November 22, 1940 ..... JA 567

Affidavit of S. Schumm
October 23, 2006 (Dkt. # 170) ..... JA 570

Exhibit A,
Curriculum Vitae ..... JA 583

Exhibit C,
Charts Comparing Pre- and Post-Dam Discharge on Madison River below Ennis Lake ..... JA 625

Exhibit D,
Historical Map of Area that Today Includes Ennis Lake
Excerpted material ..... JA 628

Supplemental Affidavit of J. Foley
November 1, 2006 (Dkt. # 175) . . . . . JA 629

Exhibit,
David Thompson's Journals Relating to Montana and Adjacent Regions, 1808–1812 . . . . . JA 632

Exhibit C to PPL Montana's Reply Brief in Support of Motion in Limine, October 8, 2007 (Dkt. # 336) — Report of the Commissioner of State Land and Investments for fiscal years beginning July 1, 1930 and ending June 30, 1932 Excerpted materials . . . . . JA 650

VOLUME 3

Report of S. Schumm — Navigability of Three Rivers (Madison, Missouri, and Clark Fork), June 15, 2007 (Dkt. # 420) . . JA 656

Fig. 1 (p. 1.3)
Channel classification based on pattern and type of sediment load . . . . . JA 665

Fig. 2 (p. 1.4)
Types of anastomosing rivers . . . . . JA 668

Fig. 7 (p. 2.6)
Madison River: View of Flume, March 10, 1905 . . . . . JA 674

Fig. 8 (p. 2.7)
Madison River: Power House Site, September 23, 1905 . . . . . JA 675

Fig. 13 (p. 2.14)
Pre- and post-dam mean monthly discharge (Madison) . . . . . JA 684

Chart (p. 3.1–3.2)
Listing obstructions and features upstream from the Fort Benton bridge . . . . . JA 686

Fig. 16 (p. 3.3)
Missouri River System profile . . . . JA 690

Fig. 17 (p. 3.4)
Missouri River in T11N, R2W upstream of Trout Creek, GLO map, 1870 . . . . . JA 691

Fig. 20 (p. 3.7)
Ryan Dam at Great Falls, 2007 . . . JA 694

Fig. 21 (p. 3.8)
Clark's map of Great Falls reach . . JA 695

Fig. 22 (p. 3.9)
Rainbow Falls, 1908 . . . . . JA 696

Fig. 23 (p. 3.10)
Great Falls, 1908 . . . . . JA 697

Fig. 24 (p. 3.11)
Black Eagle Falls, 1883 . . . . . JA 698

Fig. 25 (p. 3.12)
Crooked Falls, circa 1900 ..... JA 699

Fig. 27 (p. 3.18)
Pre- and post-dam mean
monthly discharge (Missouri) ..... JA 710

Fig. 31 (p. 4.3)
Thompson Falls, view looking
north, showing Powerhouse location,
circa 1912 ..... JA 715

Fig. 32 (p. 4.4)
Thompson Falls, Montana,
January 11, 1914 ..... JA 716

Chart (p. 4.5)
List of impediments to
navigation between St. Regis
and Thompson Falls ..... JA 717

Exhibit D
Location Maps ..... JA 723

Report of D. Emmons — Navigation Report:
A Study of the Historic Uses of the Missouri,
Madison, and Clark Fork Rivers in Montana
June 2007 (Dkt. # 420) ..... JA 729

note 12,
The Journals of the Lewis & Clark
Expedition, Vol. 4, April 7–
July 27, 1805 (Moulton, ed.)
Excerpted materials ..... JA 824

note 13,
The Journals of the Lewis & Clark Expedition, Vol. 4, April 7–July 27, 1805 (Moulton, ed.)
Excerpted materials ..... JA 827

note 15,
The Journals of the Lewis & Clark Expedition, Vol. 4, July 28–August 19, 1805 (Moulton, ed.)
Excerpted materials ..... JA 831

note 16,
The Journals of the Lewis & Clark Expedition, The Journals of Joseph Whitehouse, May 14, 1804–April 2, 1806
Excerpted materials ..... JA 836

note 31,
Acts, Resolutions and Memorials of the Territory of Montana, First Legislative Assembly, December 12, 1864
Excerpted materials ..... JA 842

note 33,
Samuel Barker, *Examination of Missouri River from Hauser Lake to Cascade with Respect to Navigability*, September 6, 1916
Excerpted materials ..... JA 845

Sheet No. 9 —
Map of Missouri River ..... JA 859

Photograph (No. 12)
Bear Tooth Rapids, mile 104 . . . JA 860

Photograph (No. 25)
Lower Half Breed Rapids . . . . . JA 861

Reports from the War Department
Excerpted materials from notes 20, 21, 26, 28, 37, 38, 41, 42, 43, 45, and 46 . . . . . JA 862

Report on the Construction of a Military Road from Fort Walla-Walla to Fort Benton (1863) . . . JA 862

Report of a Reconnaissance from Carroll, Montana Territory on the Upper Missouri to the Yellowstone National Park and Return Made in the Summer of 1875 (1876) . . JA 868

Report of the Chief of Engineers: Examination of the Missouri River above the Mouth of the Yellowstone (1875) . . . . . JA 871

Report of Chief Engineers: Special Report on Improvement of the Missouri River Above the Mouth of the Yellowstone (1878) . . . . . JA 874

Report of the Chief of Engineers, U.S. Army (1880) . . . . . JA 876

H.R. Ex. Doc. No. 1, 47th Cong.,
Report of the Secretary of War,
Appendix T: Improvement of the
Missouri River Above the Mouth
of the Yellowstone (1882) . . . . . JA 879

H.R. Ex. Doc. No. 1, 48th Cong.,
Report of the Secretary of War,
Appendix V: Improvement of the
Missouri River from Sioux City,
Iowa to Fort Benton, Montana
(1883) . . . . . JA 883

H.R. Ex. Doc. No. 1, 40th Cong.,
Report of the Secretary of War,
Appendix XX: Report of the Chief
of Engineers, U.S. Army (1885) . JA 890

H.R. Ex. Doc. No. 1, 40th Cong.,
Report of the Secretary of War,
Appendix XX: Reports of the
Missouri Rivers Commission
(1885) . . . . . JA 893

H.R. Ex. Doc. No. 1, 52d Cong.,
Report of the Secretary of War,
Improvement of Missouri River
Above Sioux City, Iowa, and of
Yellowstone River, Montana and
North Dakota (1891) . . . . . JA 898

H.R. Ex. Doc. No. 1, 52d Cong., Annual Report of the Chief of Engineers, Preliminary Examination of Missouri River, Montana, between Great Falls and Cañon Next Below Stubbs Ferry (1892) . . . . . JA 900

H.R. Ex. Doc. No. 1, 54th Cong., Report of the Secretary of War, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1895) . . . . . JA 905

Letter from Secretary of War regarding Maintenance of Dam, Black Eagle Falls, Missouri River (1896) . . . JA 908

H.R. Ex. Doc. No. 1, 54th Cong., Report of the Secretary of War, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1896) . . . . . JA 910

H.R. Ex. Doc. No. 2, 55th Cong., Annual Reports of the War Department for the Fiscal Year ended June 30, 1898, Improvement of Missouri River at and Above Sioux City, Iowa, and of Yellowstone River, Montana and North Dakota (1898) . . . . . JA 913

Annual Reports of the War Department for the Fiscal Year ended June 30, 1915, Historical Summary Giving Scope of Previous Projects for Improvement of Rivers and Harbors in the Kansas City, Missouri, District (1915) . . . . . JA 918

Rebuttal Report of S. Schumm July 13, 2007 (Dkt. # 420) . . . . . JA 922

Exhibit A, River Map of the Madison . . . . . JA 951

Exhibit B, River Maps of the Missouri . . . . . JA 953

Exhibit C, River Maps of the Clark Fork . . . . . JA 956

PPL Montana, LLC v. State of Montana, No. DA 08-0506, Montana Supreme Court, Amicus Brief of School Trust Representatives, April 20, 2009, Excerpted materials . . . . . JA 959

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

PPL Montana, LLC v. State of Montana,
No. DA 08-0506, Opinion of the
Supreme Court of Montana,
dated March 30, 2010 . . . . . Pet.App.1

PPL Montana, LLC v. State of Montana,
No. CDV-2004-846, Memorandum of
Decision of the Montana First Judicial
District Court, Lewis & Clark County,
dated June 13, 2008 . . . . . Pet.App.118

PPL Montana, LLC, et al. v. State of Montana,
No. CDV-2004-846, Memorandum and
Order on the Navigability of the Missouri,
Madison and Clark Fork Rivers of the
Montana First Judicial District Court,
Lewis & Clark County,
dated August 28, 2007 . . . . . Pet.App.130

PPL Montana, LLC, et al. v. State of Montana,
No. CDV-2004-846, Memorandum and
Order of the Montana First Judicial
District Court, Lewis & Clark County,
dated April 14, 2006 . . . . . Pet.App.145

NAVIGABILITY OF THREE RIVERS
(Madison, Missouri, and Clark Fork)

[OMITTED IMAGE]

/s/ Stanley A. Schumm
By: Stanley A. Schumm, Ph.D., P.G.

Mussetter Engineering, Inc.
1730 S. College Avenue, Suite 100
Fort Collins, Colorado 80525
MEI Project: 06-17

Prepared for PPL Montana, LLC

June 15, 2007

[TABLES OMITTED]

EXECUTIVE SUMMARY

As a geomorphologist with a specialty in river studies, I was hired to determine, if possible, the condition of the relevant reaches of the Madison, Missouri and Clark Fork of the Columbia Rivers at the time Montana entered the Union in 1889. The critical question is whether the rivers were navigable at statehood. For a river to be navigable it must have been used or capable of being used for commercial navigation.

In order to accomplish this objective, I studied historical maps and surveys, current topographic maps, photographs and historical hydrologic data. In addition, on April 24, 2007, I took a low-level helicopter flight over the Madison and Missouri Rivers, which provided me with a close look at these rivers. I also visited the Clark Fork River from St. Regis to Thompson Falls the next day by car. Reviewing these sources gave me the best possible understanding of the physical characteristics of the rivers, as they relate to navigability that existed in 1889.

These investigations revealed the great variability of the rivers. From reach to reach, they can be braided, meandering, anastomosing, and confined in canyons. Portions of each river, therefore, can be fixed in position or changing in the braided, meandering and anastomosing reaches. Because of this variability, the condition of the rivers should be evaluated on a reach-by-reach basis.

My review of the historic maps of the Madison River shows that the river was not navigable in 1889. In particular, the historic maps show three anastomosing reaches of the river where flow would have been divided among several channels reducing water depth to a point where commercial navigation would not have been feasible. The observations of General Land Office surveyors and Corps of Engineers personnel support my conclusion that the Madison River was not navigable in 1889.

For the Missouri River, my review of the historical maps and explorations of the river revealed the existence of numerous ripples, rapids, and waterfalls in the portion of the Missouri River between Fort Benton and Canyon Ferry Dam near the time of statehood. The existence of these impediments leads me to conclude that commercial navigation on this river would not have been feasible in 1889.

Additionally, the construction of dams on the Madison and Missouri Rivers has significantly altered the flow characteristics of these rivers. The peak flows have been significantly reduced and the low flows increased. These changes tend to make these rivers more susceptible to navigation now than they were in 1889, when – in my opinion – there were not navigable.

Finally, my review of historical materials relating to the Clark Fork River shows that, for much of its length, the river is confined in canyons and the gradient is very steep and rocky. Additionally, between St. Regis and Thompson Falls, there are numerous rapids. These impediments would have made commercial navigation on the Clark River

between St. Regis and Thompson Falls not feasible at the time of statehood.

In summary, it is my opinion that the Madison River was clearly not navigable when Montana entered the Union in 1889, and both the Missouri River above Fort Benton and the Clark Fork River above Thompson Falls contained so many impediments to navigation that commercial navigation on those reaches of the rivers in 1889 was not feasible.

1. INTRODUCTION

Geomorphology is the science of the earth's surface (slopes, rivers, glaciers, etc.). My specialty is fluvial geomorphology, the study of river characteristics and behavior. I began my professional career in 1954 as a geologist in the Water Resources Division of the United States Geological Survey. In 1967, I began my teaching career at Colorado State University as an Associate Professor of Geology. I was subsequently promoted to Professor in 1970 and to University Distinguished Professor in 1986. During this time, I developed a research program of international stature. Currently, I am Vice President and Principal Geomorphologist at Mussetter Engineering, Inc. in Fort Collins, Colorado. I have held this position since 1994. My resume and list of publications are attached as Exhibit A.

Regarding navigability, I served as expert witness before the Arizona Navigable Stream Adjudication Commission during their determinations on the navigability of the Gila, Verde, and Salt Rivers for title purposes. During my research for those proceedings, I became familiar with the physical characteristics of a

river that impact its navigability, such as discharge, depth, width, gradient, and sedimentation patterns to name a few. As a result of my experience as a witness in those proceedings, I understand the critical question in determining whether a particular stream is navigable for title purposes is whether the stream was used or capable of being used for commercial navigation at the time of statehood.

I was hired to conduct research and form an opinion on whether the physical conditions of the Madison, Missouri, and Clark Fork Rivers at the time Montana entered the Union in 1889 were such that the rivers would be navigable for title purposes. Location maps of the relevant reaches of the rivers are attached as Exhibit D. In conducting this research, I reviewed historical maps and surveys, current topographical maps, photographs and historical flow data. The information contained in these sources provided me the best picture of the conditions of the rivers, with respect to navigability, at the time of statehood. In addition, a low-level helicopter flight over the Madison and Missouri Rivers on April 24, 2007, provided me with a detailed look at these rivers. I also visited the Clark Fork River from St. Regis to Thompson Falls by car, which enabled me to view that reach of the river.

In my opinion, commercial navigation was not feasible on these rivers at the time of statehood. Based on my research, the rivers contained numerous features such as rapids, riffles and waterfalls at the time of statehood that would have acted as impediments to commercial navigation in 1889. (A glossary of geomorphological terms is found in Section 6 of this report.) The gradient of these rivers was also quite steep. In addition to the existence of impediments, the

fact that significant portions of the Madison River was anastomosing is further evidence that the river would not have been susceptible to navigation.

Note that the current physical conditions of the three rivers, with respect to navigability, are not the same as the condition of the rivers in 1889 when Montana entered the Union. First, the construction and operation of the hydroelectric projects and reservoirs have materially changed the flow characteristics of the rivers. There are two PPL Montana dams on the Madison River, seven on the Missouri River and one on the Clark Fork. Other dams have been constructed on the Missouri and Clark Fork Rivers as well. By making the flow lower during period of high flow and higher during periods of low flow, the operation of the hydroelectric projects and reservoirs have made the rivers more susceptible now to commercial navigation than they would have been without them. Second, my review of the historical descriptions of the rivers indicate that the location and number of the river channels have changed since the time of statehood and that portions of the river appear to have been anastomosing and braided at the time of statehood.

1.1. River Types

In order to understand the navigable character and the behavior of the three rivers, it is necessary to consider the range of river types that exist and a river's place within the continuum of river types. Depending on the nature of the materials through which a river flows, there are three major categories of stream channels: (1) confined, (2) constrained, and (3) alluvial. The confined channel is fixed in position, and it is stable over long periods of time. The constrained channel is

controlled only locally by bedrock or resistant alluvium. The alluvial channel has bed and banks composed of sediment transported by the stream. Therefore, the alluvial channel is susceptible to major pattern change and to significant shifts in channel position, as the alluvium is eroded, transported, and deposited, and as the sediment load and water discharge change. The three rivers, which are the subject of this report, all contain reaches that are confined, constrained, and alluvial.

For simplicity and convenience of discussion, the range of common alluvial channel patterns can be grouped into five basic patterns (Figure 1). These five patterns illustrate the overall range of channel patterns to be expected in nature. Figure 1 is more meaningful than a purely descriptive classification of channels because it is based on cause-and-effect relations and illustrates the differences to be expected when the type of sediment load, flow velocity, and stream power differ among rivers. It also explains pattern differences along the same river (Schumm, 1981).

Numerous empirical relations demonstrate that channel dimensions are largely due to water discharge, whereas channel shape and pattern are related to the type and amount of sediment load moved through the channel. As indicated by Figure 1, when the channel pattern changes from 1 to 5, other morphologic aspects of the channel also change; that is, for a given discharge, both the gradient and the width-depth ratio increase. In addition, sediment size and sediment load increase from Pattern 1 to Pattern 5. With such geomorphic and hydrologic changes, hydraulic differences can be expected, and flow velocity, tractive force, and stream power also increase from Pattern 1

to Pattern 5. Therefore, the stability of a stream decreases from Pattern 1 to Pattern 5, with Patterns 4 and 5 being the least stable. A brief discussion of the five basic patterns is presented as follows.

1.1.1. Pattern 1

The suspended-load channel is straight with a relatively uniform width (Figure 1). It carries a very small load of sand and gravel. Gradient is low, and the channel is relatively narrow and deep (low width-depth ratio). The banks are relatively stable because of their high silt-clay content. Navigation is possible depending upon discharge.

1.1.2. Pattern 2

The mixed-load straight channel has a sinuous thalweg (Figure 1). The thalweg is the deepest part of a channel. This river is relatively stable and carries a small load of coarse sediment, which may move through the channel as alternate bars. Navigation is possible depending upon discharge.

1.1.3. Pattern 3

This pattern is represented by two channel patterns. Pattern 3a shows a suspended-load channel that is very sinuous. It carries a small amount of coarse sediment. The channel width is roughly equal and the banks are stable. Pattern 3b shows a less stable type of meandering stream. Mixed-load channels with high bed loads and banks containing low-cohesion sediment will be less stable than the suspended-load channels. The sediment load is large, and coarse sediment is a significant part of the total load. The channel is wider

at bends, and point bars are large. The channel is relatively unstable. Navigation is possible depending upon discharge.

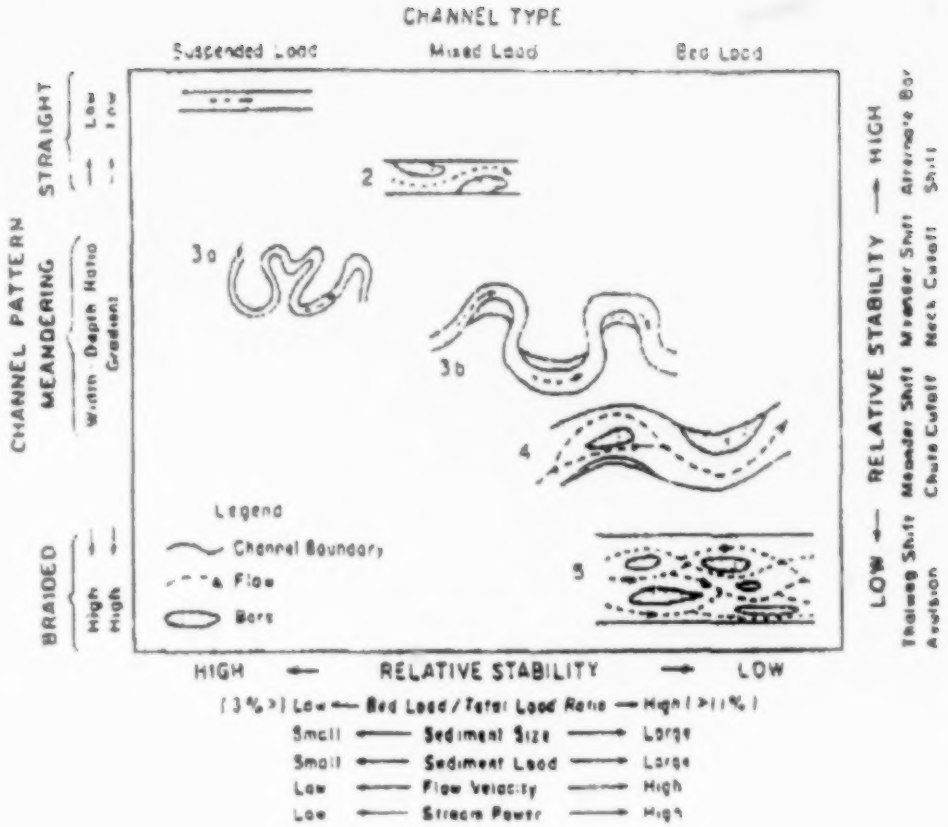


Figure 1. Channel classification based on pattern and type of sediment load, showing types of channels, their relative stability, and some associated variables (after Schumm, 1981).

1.1.4. Pattern 4

This pattern represents a meander-braided transition (Figure 1). Sediment loads are large, and sand, gravel, and cobbles are a significant fraction of the sediment load. The channel width is variable, but it is relatively large compared with the depth (high width-depth ratio), and the gradient is steep. Chute cutoffs, thalweg and meander shift, and bank erosion are all typical of this pattern. Navigation would be difficult.

1.1.5. Pattern 5

This bed-load channel is a typical braided stream (Figure 1). The bars and thalweg shift within the unstable channel, and the sediment load is large. Steep gradients reflect a large bed load. Bank sediments are easily eroded; gravel bars and islands form and migrate through the channel. Therefore, the channel is relatively unstable and the location of bars and low-water channels can shift during floods. Navigation would be difficult or impossible.

The braided Pattern 5 is of most interest because the braided pattern is observed along all three rivers. A braided river is defined by the American Geological Institute (1972) as a "*stream that divides into or follows an interlacing or tangled network, of several, small branching and reuniting shallow channels separated from each other by branch islands or channel bars, resembling in plan the strands of a complex braid.*" Braided rivers have a high width-depth ratio (shallow depth) and relatively steep gradient, as a result of high bed load and large floods, which produce a relatively unstable pattern and a relatively variable channel in time and location.

A pattern superficially similar to the braided river is the anastomosing pattern with multiple distinct channels (Figure 2). It is an interlacing network of branching and reuniting channels (AGI, 1972). This pattern forms an important part of the Madison River. An anastomosing river's flow is split among the various channels and, as a result, the river stage in an anastomosing reach at a given flow is lower than in a single channel reach, which could cause serious problems for navigation.

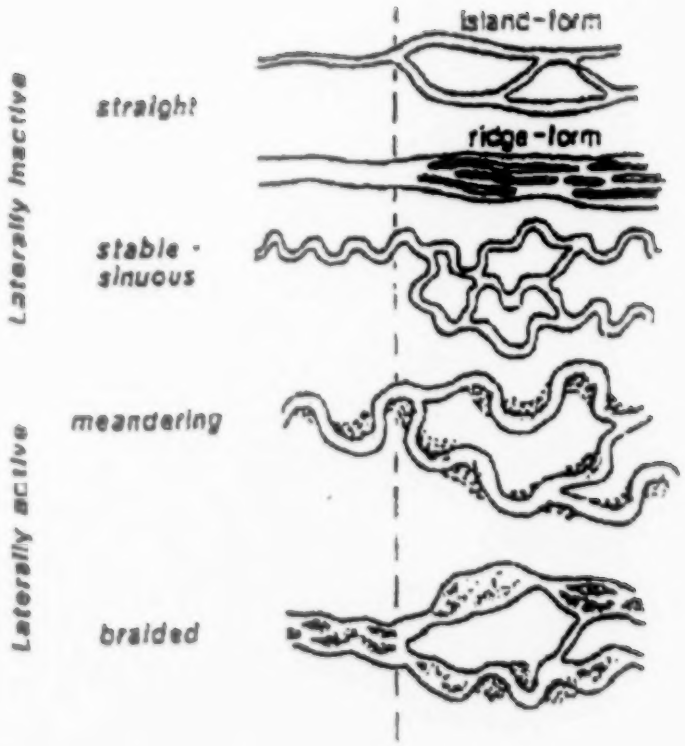


Figure 2. Types of anastomosing rivers (from Nanson and Knighton, 1996).

1.2. Factors Affecting Navigability

Rivers usually become narrower, shallower and steeper in an upstream direction. In addition, sediment size increases upstream from silt and sand to cobbles and boulders with an important impact on navigation.

Variations in dimensions are important. For a given discharge, a wider channel will have shallower flow and a high value of a width-depth ratio (>40) with a braided character (Figure 1, Pattern 5) characterized by many bars and islands. Obviously, the greater the number of bars and islands, the more difficult will be navigation on such a river.

The multi-channel anastomosing river (Figure 2) also creates problems for navigation. For example, for a given quantity of discharge in a single channel, the depth of flow will be decreased as the discharge is distributed among several branches of an anastomosing channel.

Through time, the flow in these multiple branches of the anastomosing river changes as channels are abandoned and new channels form. As Figure 2 shows, a single channel can become multiple and the character of the river changes dramatically. In fact, the variability of a river can be very great with changes of width, depth, gradient, and pattern, producing a complex system that is difficult to navigate (Schumm, 2005).

Local anomalies, such as rapids, waterfalls, and ripples clearly are major impediments to navigation, as is gradient. Gradient, of course, largely determines

the velocity of flowing water in a channel, which, in turn, determines sediment transport and channel stability (Figure 1) and navigation.

Gradient is important for navigability because at some value of stream gradient, and therefore, velocity of flow, navigation is impossible.

For example, Captain John A. Mellon, a steam boat captain, who had over 40 years experience on the Colorado River (Lingenfeiter, 1978, p51) stated in a letter to the Commissioner of Corporations (1909) that "*I have come to the conclusion that any river that has over 4 feet fall to the mile cannot compete with a railroad for freight or passengers*" (Littlefield, 1997, p137). If at 4 feet per mile commercial navigation is inhibited, then at steeper gradients, navigation would be unlikely. The average fall on the Madison from Three Forks to Quake Lake (immediately downstream of Hebgen Dam) is 23 feet per mile. The average fall on the Missouri River between Townsend (immediately upstream of the Canyon Ferry Reservoir) and Fort Benton is 5.6 feet per mile, with an average fall between Fort Benton and Great Falls of 17 feet per mile. The average fall on the Clark Fork from Deer Lodge to immediately below Thompson Falls is 8.5 feet per mile. These are steep mountain rivers whose gradient alone would severely impede navigation.

2. NAVIGABILITY OF THE MADISON RIVER

In this chapter, the Madison River will be considered from Three Forks to Hebgen Dam. The character of the river will be described as determined from historical maps, the most recent U.S. Geological Survey (USGS) topographic maps and General Land Office (GLO)

surveys and notes, and from a low-level helicopter flight.

The maps closest to statehood, prepared in 1885, along with the notes accompanying pre-statehood surveys provide the best possible information on the river at statehood. It shows three reaches (Figure 3) that have multiple channels that divide the flow, reduce depth and make these reaches less likely to be navigable. In addition, there are numerous statements by General Land Office surveyors and Corps of Engineers personnel that the Madison River was not navigable at statehood.

As detailed below, my analysis of this information leads me to conclude that the Madison River was not navigable at Statehood.

2.1. The 1885 River

The 1885 U.S. Geological Survey (USGS) Three Forks Quadrangle provides information on the character of the river near statehood, and it is a basis for determining if the modern river was similar to the 1885 river (Figure 3).

In 1895, the river divided into two major channels and these channels divided into four additional channels at the junction (Figure 3, Location 1; Figure 4).

A major change of river morphology also occurred at the area which, when dammed in 1906, would become Ennis Lake. The river divided into numerous delta-like channels (Figure 3, Location 2). This pattern is clearly shown on the General Land Office map of 1869 (Figure 5), and also on the Madison Survey Map of 1903 (MD

02168) (Figure 6). Also, a long reach of divided channel (Figure 3, Location 3) was present in 1895. These three anastomosing reaches dispersed flow from the main channel, reduced the stage through the anastomosing reaches and created impediments to navigation.

The physical characteristics of the river in the area of the Madison Project near the time of statehood are shown in photographs of the vicinity taken in 1905 included as Figures 7 and 8.

The 1885 maps (Figure 3) and the General Land Office maps do not show the braided reaches because the maps are not sufficiently detailed. Nevertheless, based on the physical characteristics determined from other sources, it is my opinion that the braided reaches were present near statehood, and that they acted as impediments to navigation.

[OMITTED IMAGE]

Figure 3. Three Forks map showing three locations (circled above) where the river was anastomosing in 1895. (OTH 001865)

[OMITTED IMAGE]

Figure 4. Junction of the Madison and Jefferson Rivers in 1885 (Figure 3, Location 1) at Three Forks. Note that the Madison River had four mouths at that time. (OTH 001865)

[OMITTED IMAGE]

Figure 5. 1869 map showing the anastomosing pattern downstream of Ennis (Figure 3; Location 2). (OTH 001835)

[OMITTED IMAGE]

Figure 6. Madison River at its mouth at Three Forks. USGS Topographical Map, Three Forks Quadrangle, 1987. Note that the Madison River only has two mouths. (OTH 001936)

Figure 7 Madison River: View of Flume, March 10, 1905 (MDP 0228)

Figure 8. Madison River: Power House Site, September 23, 1905 (MDP 0229)

2.2. Statements Regarding Navigability

Regarding navigability at statehood, comments by GLO surveyors and Corps of Engineers personnel strongly support a conclusion of non-navigability. Because of the nature of the work performed by these individuals, their statements provide valuable insight into the historical conditions of the Madison. GLO surveyors observed the river at many locations as they were establishing township, range and section lines. Corps of Engineers personnel also saw the river at many locations as they were evaluating the river for commercial use. GLO survey information also describes an extremely steep, fast and rocky river. This gradient also would have been a serious impediment to navigation. Indeed, in my opinion, commercial navigation on such a steep river, particularly in combination with the other impediments of braiding, anastomosing, rocks and rapids, would not have been possible.

Descriptions of the river taken from GLO notes for several townships follow. Note the descriptions of multiple channels forming an anastomosing network, and the repeated descriptions of a rocky bed and swift current.

General Land Office Surveyors Notes:

T2N, R2E (1868)

p 203 *"The Madison Fork not navigable"* (MD 02089)

p 241-242 *"The Gallaton and Madison Forks are rapid streams about 100 yards wide from bank to bank not navigable. The Madison*

is larger than the Gallatin Fork, but is divided in its course through this township by several bayous, all of which as well as the mainstream on the west are fordable." (MD 02109)

Between T1S and T2S, R2E (1868)

p 521 *"The banks of this river intersected by this line are low, the water about 5 feet deep, very swift current, and rocky bed, not navigable."* (MD 01905)

T3S, R1E (1868)

p 461 *"the stream (Madison) not navigable"* (MD 01638)

T5S, R1W (1868)

p 85 *"The Madison River passing through the township is not navigable."* (MD 01435)

T5S, R1W

p 155 *River runs N 35° East – about 18 inches deep being very rocky in bottom and swift current. Thence on island."* (MD 01447)

T1.2.3.4.5S, R1W (1869)

p 85 *"The Madison River passing through the Township is not navigable; it is a bold rapid mountain stream."* (MD 01495)

T5S, R1W (1868)

p 11 *"The Madison River not navigable."* (MD 01422)

T7S, R1W (1870)

p 571 *"The Madison River, which is a wide rocky shallow stream with swift current, not navigable."* (MD 01316)

T6S, R1W (1869)

p 107 *"The Madison...spread into wide bars"* (MD 01397)

p 130 *"The Madison River is a rapid shallow mountain stream, not being navigable."* (MD 01408)

T6S, R1W (1868)

p 11 *"The Madison River not navigable."* (MD 01356)

U.S. Army Corps of Engineers

In the 1931 report from the Chief of Engineers (1931) on the Jefferson, Madison, and Gallatin River (Three Forks Basin) (OTH 00884-970), there are repeated descriptions of the Madison as being not navigable as follows:

p 1 *"There never has been any navigation on these rivers and their improvement for the purpose is impracticable."* (OTH 00888)

p 5 *"There never has been any navigation on the stream in the Three Forks Basin and commercial navigation on them is impracticable."* (OTH 00890)

p 8 *"...bank erosion is not a serious problem, there is no navigation..."* (OTH 00892)

p 66 *"As far as is known, there has never been any navigation on these streams, and commercial navigation on them is entirely out of the question."* (OTH 00921)

p 70 *"Commercial navigation is out of the question on these streams."* (OTH 00923)

p 72 *"...no navigation or prospect of any."* (OTH 00924)

p 74 *"There is no commercial navigation on these streams and no present need for channel improvement."* (OTH 00925)

The comments of both the GLO surveyors and Corps of Engineers personnel indicate that the Madison River was not navigable in 1889.

2.3. The Modern River

The topographic maps of the modern river are useful because they show how the river varies from reach to reach. For example, starting at Three Forks and continuing upstream, the river is anastomosing and braided for about 18 miles (Figure 6). Gradient in this stretch is about 26 ft/mi. Moving upstream the river is straight, with the exception of two large channels, for about 8.5 miles, arid then enters Beartrap Canyon for about 8 miles to Ennis Lake (Figure 11). Gradient in this stretch is about 33 feet per mile, and the canyon is filled with rapids.

Upstream of Ennis Lake, there are about 14 miles of essentially braided channel (Figures 9 and 10). Immediately upstream of Ennis Lake is a wide delta

with three main channels. The large middle channel is braided, and it is choked with islands and bars. Further upstream, the river remains braided with a major side channel. Gradient in this reach is about 26 ft/mi. Finally, the River changes again to about 34 miles of a single channel (Figure 12) to Hebgen Dam. Gradient in this final reach varies from 21 to 42 feet mile.

[OMITTED IMAGE]

Figure 9. Anastomosing Madison River, upstream of Ennis.

[OMITTED IMAGE]

Figure 10. Island braided reach of Madison River downstream of Quake Lake. Note rapids.

[OMITTED IMAGE]

Figure 11. Madison River in canyon.

[OMITTED IMAGE]

Figure 12. Madison River, downstream of Quake Lake. Note rapids.

2.4. Hydrology

The flow characteristics of a typical stream in the higher elevations of the Rocky Mountains vary widely with the season. Discharge is highest during the late spring months when the streams are heavily influenced by the melt of the previous winter's snowpack. Stream flows tend to decrease steadily over

the course of the summer as the influence of the snowmelt wanes and there is little precipitation to augment flow. Flows reach their lowest points in the fall, and remain low until the next snowmelt.

Typically, the existence and operation of a large reservoir on a mountain stream impacts the flow characteristics of the stream by limiting the difference in flow between high and low-flow periods. Flows during the high-flow periods would be decreased, as water is stored in the reservoir. Flows during the low-flow periods would increase as water is released from the reservoir to meet power demands.

These changes can be demonstrated graphically. Plots of average monthly flow for the Madison River demonstrate, on a month-by-month basis, the impact that the operation of the Hebgen Reservoir and Madison hydropower facility have on the flow characteristics of the river. The graphs show that post-construction flows in the Madison River are lower during the period each year of highest flow, and they are higher during the period of lowest flow (Figure 13). The average monthly flow graphs for the Madison River are attached at Exhibit B. These changes produce a more level year-round flow and make the river more susceptible to navigation. During the high-flow periods in late spring, less discharge makes the river easier to navigate.

Similarly, the increased flows during the low-flow periods of the fall make the river more susceptible to navigation.

Figures 14 and 15 show the increase in average flow of up to 40 percent in November during low-flow periods,

which corresponds to an increase in river depth immediately downstream of the Madison Project of approximately two-thirds of a foot in October and nine-tenths of a foot in November.

Based on these calculations, my opinion is that because of the construction and operation of the hydroelectric facilities, especially the Hebgen Reservoir, the current flow characteristics of the Madison River are not the same as they were at the time Montana entered the Union. Because the operation of the hydroelectric facilities has resulted in higher flows during the low-flow period, a corresponding increase in low-flow period depth of approximately two-thirds of a foot in October (Figure 14) and nine-tenths of a foot in November (Figure 15) and a decrease in flow during high-flow periods, it is my opinion that these changes in the river resulting from the hydroelectric facilities make the Madison River more susceptible to use for navigation now than it was at the time of statehood.

2.5. Summary and Conclusions

In my opinion the Madison River was not navigable at the time of statehood in 1889. Historical maps of the area that is now submerged by Ennis Lake indicate that the Madison River in that area was anastomosing (Figure 5). Elsewhere, the river is braided. Braided rivers have high width to depth ratios and relatively steep gradients (Figure 1). The physical characteristics of braided rivers, where channels and bars shift over time, are not conducive to commercial navigation. The anastomosing reaches were also not suited for navigation as the water flow was divided among the multiple channels. Finally, the steep fall and rocky bed

of this river were not conducive to commercial navigation.

The opinions of the GLO surveyors and the Corps of Engineers officers that the Madison River was not navigable support my opinion that the Madison River was not navigable at the time of statehood. It was too steep, shallow and braided, and its flow was too variable to support commercial navigation.

Additionally, the Madison River is not the same river now that it was in 1889 when Montana entered the Union. The post-statehood construction and operation of the hydroelectric projects on the river, particularly the Hebgen Reservoir, have provided additional flows during low-flow periods and reduced flow during the high-flow periods. This results in an increase in river depth during low-flow periods, making the river easier to navigate now than at the time of statehood. The physical characteristics of the Madison River important to the ability to navigate were even worse at statehood than they are now. Also, the number of channels in the river and the location of those channels have shifted over time.

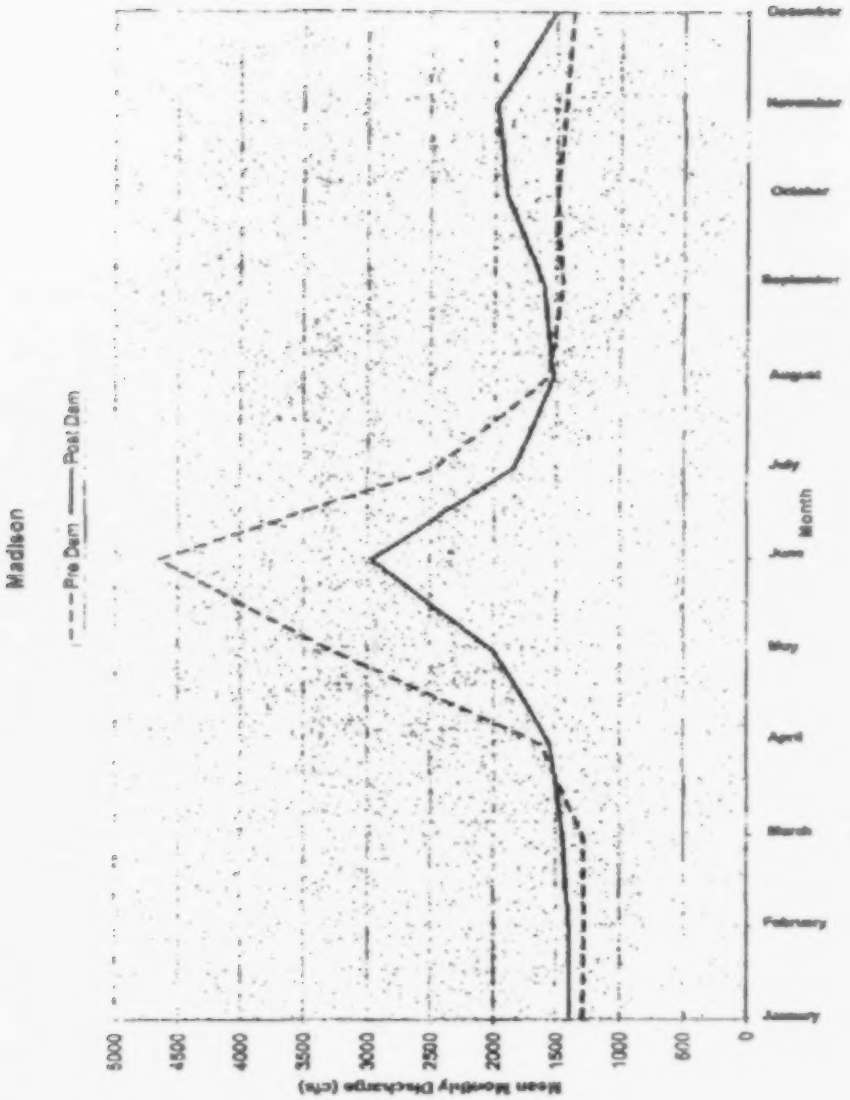


Figure 13. Pre- and post-dam mean monthly discharge.

[OMITTED CHART]

Figure 14. Stage-discharge relationship, pre- and post-dam October discharge. Madison River below Ennis Lake near McAllister, Montana (USGS Gage Number 06041000, 1952-2006).

[OMITTED CHART]

Figure 15. Stage-discharge relationship, pre- and post-dam November discharge. Madison River below Ennis Lake near McAllister, Montana (USGS Gage Number 06041000, 1952-2006).

3. NAVIGABILITY OF THE MISSOURI RIVER

In this chapter, the Missouri River will be considered from Fort Benton to Canyon Ferry Dam upstream. The character of the river will be described as determined from the most recent USGS topographic maps, 1914 maps (USGS, 1914), and 1893 Missouri River Commission maps, as well as from Samuel Barker's (1916) report, and GLO surveys. The 1893 maps are actually based on a comprehensive survey conducted by Army Corps of Engineers personnel in 1880, and adjusted in 1890, thus we have very good information regarding the river right at the time of Montana's 1889 statehood, and before dams began to be constructed. The 1914 maps and the 1916 report also provide sufficient information that conclusions can be reached concerning the 1889 river. In particular, the 1893 maps identify numerous ripples, rapids, and waterfalls in the river between Fort Benton and Canyon Ferry Dam. These features are impediments to navigation.

As detailed below, my analysis of this information leads me to conclude that commercial navigation on the reach of the Missouri River between Fort Benton and the location of the Canyon Ferry Dam was not feasible at the time of statehood.

3.1. The 1890 River

A series of maps of the Missouri River from its junction with the Mississippi River to Three Forks was published by the U.S. Army Corps of Engineers in 1893. (BX03 0895-0915) These maps were produced from surveys conducted in 1880, and then adjusted in 1890 and are very useful because they show the Missouri River without dams in the condition the river would have been in at the time of statehood. They reveal the complexity of the Great Falls portion of the river, and the river now beneath upstream reservoirs.

Commencing at Fort Benton headed upstream, a variety of rapids, waterfalls, and ripples (see Glossary) are identified on the 1893 maps. A ripple is defined as *"a shallow reach of running water in a stream, roughened or broken into small waves by a rocky or uneven bottom"* (AGI, 1972). All three features are impediments to navigation. Perhaps the simplest way to illustrate the variability of the Upper Missouri and to identify impediments to navigation is to list the various obstructions and a few other features with approximate river miles upstream from the Fort Benton bridge (RMO) as follows.

River Mile	Location
RM 3	Crescent Ripple
RM 10	Rapids
RM 14	Little Cottonwood Ripple

River Mile	Location
RM 16	Blacktail Deer Ripple
RM 20.5	Black Eagle Ripple
RM 26	Antelope Ripple
RM 30 to RM 48.6	Continuous rapids
RM 37.2	Great Falls
RM 41.5	Crooked Falls
RM 42-RM43	Rainbow Falls and Coulters Falls
RM 45	Black Eagle Falls
RM 49	Sun River
RM 19 to RM 103.6	The Long Pool
RM 111	Blackbird Ripple
RM 114	Halfbreed Rapids
RM 114.5	Flennikens Rapids
RM 118	Brunots Rapids
RM 125	Dearborn River
RM 129	Cone Ripple
RM 134	Nettleton Ripple
RM 143	Wide Ripple
RM 145- RM 150	Oxbow Bend
RM 151	Buck Rapids
RM 153	Beartooth Rapids
RM 156	White Rock Rapids
RM 167	Rock Rapids
RM 168	Prickley Pear Creek
RM 176	Flume Ripple
RM 178.5	Rapids and Trout Creek Ripple
RM 180	Stubbs Ferry
RM 181-RM 182	Rapids
RM 184	Rapids
RM 185	St. German Rapids
RM 186	Canyon Ferry

There are about 30 impediments to navigation in the form of waterfalls, rapids, and riffles as shown on the 1893 maps, from Fort Benton to Canyon Ferry. The fact that there are impediments to navigation, on average, every 6 miles in the Missouri River, suggests that navigation would be impractical except perhaps in the reach between Great Falls and Cascade (the Long Pool). In fact, if the 55 miles of the Long Pool is subtracted from the 186 miles between Fort Benton and Canyon Ferry, the average distance between the impediments to navigation is 4 miles. In addition to these impediments to navigation, there are reaches with numerous islands that modify the hydraulics in these reaches and appear to partly block the channel (Figure 17).

In addition, the number of islands and their shape change with time. For example, the four large islands upstream of the Sun River (Figure 18) changed shape. In addition, the third and fourth islands south of the Sun River are now attached to the bank, and are no longer islands. Numerous islands near Cascade, as shown on the 1871 GLO maps have changed dramatically.

This reach of the Missouri is steep. Information regarding the gradient from Fort Benton to Canyon Ferry can be derived from an analysis prepared by the Montana Power Company in 1930. (MO 03871). This gradient is shown graphically in Figure 16. From Townsend (immediately upstream of Canyon Ferry) to Cascade, the average fall of the river is 4 feet per mile. From Great Falls to Fort Benton, that average fall is 17 feet per mile. This gradient would have seriously impeded navigation, particularly at the Great Falls, but also at such rapids as the Beartooth and Half

Breed Rapids. On the Great Falls portion of the river—the head of the Falls to Fort Benton—the falls would make any kind of navigation quite impossible.

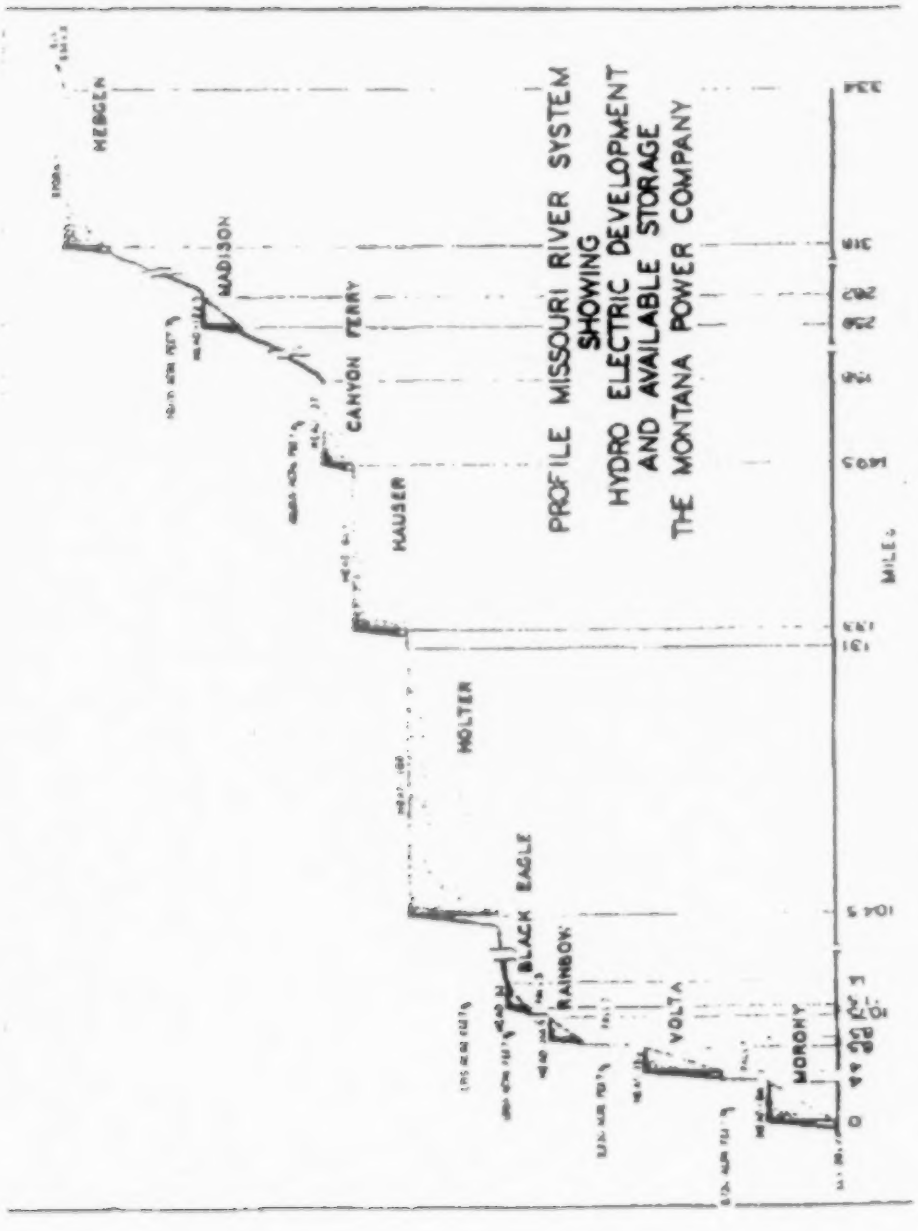


Figure 16 Missouri River System profile (PP-14444)

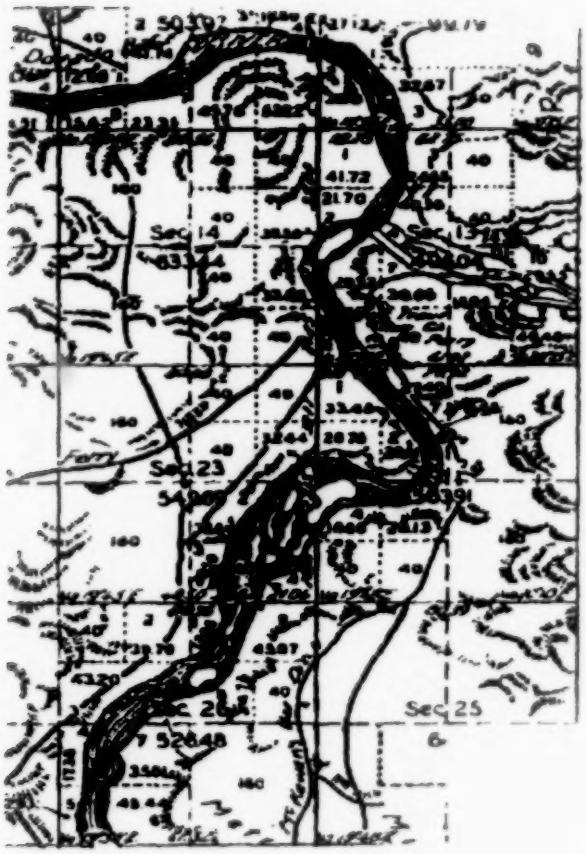


Figure 17. Missouri River in T11N, R2W upstream of Trout Creek. GLO map, 1870. Note numerous islands. River is now submerged under Hauser Lake. (MO 02731)

[OMITTED IMAGE]

Figure 18. Islands upstream of Sun River, GLO map, 1871. (MO 00864)

3.2. The 1914 River

Using the 1914 maps (USGS, 1914a) and recent USGS topographic maps, the river can be described from Fort Benton to Canyon Ferry. Above Fort Benton, the gradient of the river begins to steepen fairly rapidly to about 10 and even 17 feet per mile with rapids downstream Morony Dam (Figure 19). Upstream, the river is in a canyon. Canyon conditions continue through the Great Falls area.

Ryan Dam was constructed at Big Falls (Figure 20), which indicates a major bedrock feature at this location. Cochrane Dam is located in the canyon, but apparently no large waterfalls are associated with it. Upstream, Rainbow Dam is associated with Crooked Falls (also known as Horseshoe Falls), Rainbow Falls and Coulter Falls. Black Eagle Dam is located at the head of the Great Falls rapids reach at Black Eagle Falls. The dams and reservoirs prevent observation of the river and its variability, but William Clark (Allen, 1814) prepared a map of the Great Falls reach illustrating the numerous falls and rapids in this reach (Figure 21). Prior to dam construction, the falls were spectacular (Figures 22 through 26).

Upstream of Great Falls, the river is very sinuous and the gradient is low for about 55 miles to Cascade. The flat gradient is probably the result of deposition in a lake that was formed as glacial ice blocked the channel (Fenneman, 1931, p78; Fisher, 1909). In addition,

bank erosion is occurring throughout this reach. From Cascade to Hauser Darn [River Mile (RM) 55 to River Mile 118.5], observations made on recent topographic maps, the 1914 maps (USGS, 1914a), and especially the 1893 maps, are used to corroborate Samuel Barker's descriptions of the river in 1916 from Cascade to Hauser Dam.

[OMITTED IMAGE]

Figure 19. Rapids and waterfall downstream of Morony Darn, 2007.

Figure 20 Ryan Dam at Great Falls, 2007

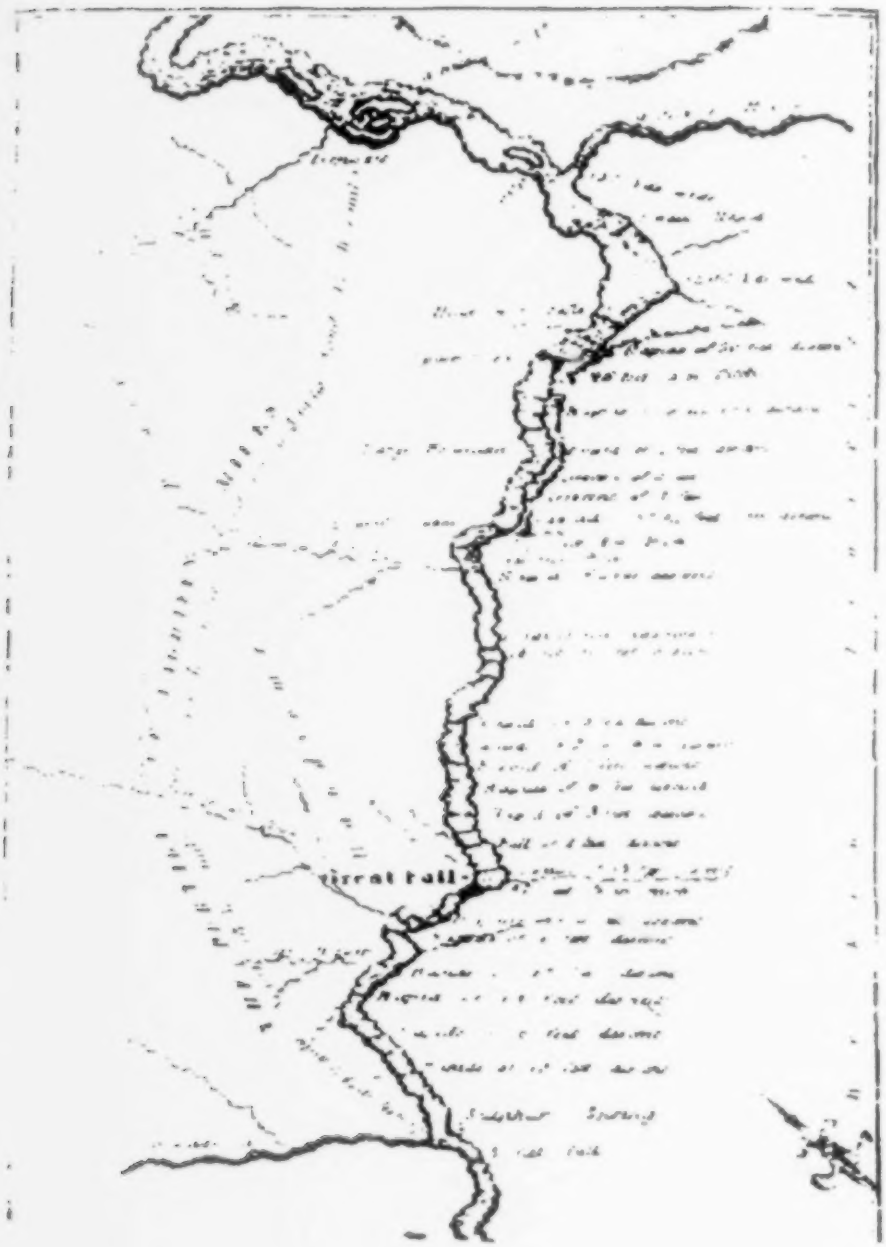


Figure 21 Clark's map of Great Falls reach (OTH 01739)

Figure 22. Rainbow Falls, 1908. (MDP 0012)

Figure 23. Great Falls, 1908 (MDP 0024)

Figure 24. Black Eagle Falls, 1883 (MDP 0230)

Figure 25 Crooked Falls, circa 1900. (MDP 0231)

[OMITTED IMAGE]

Figure 26. Coulter Falls, 1908. (MDP 0016)

3.3. The 1916 River

In April 1916, Samuel Barker of Barker-Wilson Company, a Montana civil and mining engineering company, undertook a reconnaissance survey of the Missouri River from Cascade to Hauser Dam (RM 55 to RM 118.5, USGS, 1914a). An 18-foot boat was used. The work was "*undertaken to determine conditions of the channel, depth and velocity of water, bearing on the navigability of the stream.*" (Barker, 1916). Mr. Barker's notes provide an important picture of the historic conditions of the Missouri River above Cascade.

The 1916 river, as described by Barker, from Cascade to Hauser Dam follows:

"*The river continues to flow rapidly for two miles below Half Breed Rapids, and in three miles, one mile above and two miles below the rapids, the total fall of the river is 25 feet. From here to Cascade the boat ran on shoals and into submerged rocks without warning because of the muddy water. Opposite mile 64.5 the canyon ends...In the whole distance covered the river contained a great number of islands and innumerable bars and shallows, which with muddy water made it difficult to even float down the river although much care was exercised to keep the boat in the deepest channel.*" *(11910011-12)*

"*Beginning at mile 66 and extending downstream for about a half-mile are the Half Breed rapids which*

constitute the worst section of the river covered by this examination. They are two and one-half times as long as the Beartooth rapids, and present a far more dangerous situation because of rocks, islands, shoals, and a winding crooked channel of extremely swift water. The boat had to be unloaded and lowered down stream, which proved to be a difficult task for the members of the party. Beginning just above the rock breakwater, which has been built out into the stream about 250 feet and at an angle of 45° to protect the west bank from erosion, the water begins to run swiftly, and opposite the breakwater several large rocks project above the water surface." (I1910009)

"The lower portion of these rapids are the worst because of the large rocks across the entire channel. The passage of the river is made more dangerous also for the reason that there are quick changes in direction along the line of the greatest water channel which would have to be used if any attempt should ever be made to utilize the river at all for navigation. Going up stream, where the deepest water would have to be following, would be attended with greater dangers when the wind blows hard." (I1910010-11)

"At mile 66.5, another of the numerous dangerous places is encountered because of swift water and immense projecting rocks for at least one third of the way into the river from the north bank." (I1910009) and there are rapids at RM 74.

"...at mile 76.3, the Dearborn River empties into the Missouri. This is the largest stream so far encountered... So much detrital material has been carried out into the river that the channel has been narrowed to a width of about 50 feet, where the river is

deep enough to float a boat. The current is also swift here for 200 or 300 feet, with a sheer rock wall along the south bank where the water is swiftest making this point dangerous, especially when strong winds prevail." (I1910007)

"Rock Creek at mile 86.5, also, shows that in flood water season a width of 100 feet is needed to carry the water, which flows into the river at nearly right angles. A great deal of gravel wash is now visible which has spread out in fan shape for at least 200 feet along the river front. Below Rock Creek the river is cut into several channels by a series of islands, it being difficult to determine which was the deepest flow to float the boat through. The boat grounded or struck rocks continually for some distance. The river is swift, slowing large riffles owing to the rocky bottom. A reef of highly tilted rocks is eroded by the river at this point, which probably accounts for the semi-rapids and swift current." (I1910006)

"At mile 90 the river has a drop of 7 feet in a distance of 1,000 feet, and from this point down stream rapids occur...From the character of the rapids, the river bottom must consist of large rocks, which feature, added to a great many others, makes any plan looking toward the navigability of the river out of the question." (I1910005)

"Below mile 90 this country for some distance is more open, with grazing and ranch lands extending back from the river. Little Prickley Pear Creek is the first stream of any considerable size flowing into the river below mile 119, the point of beginning this survey. Its course is at right angles to the river, and at its mouth shows a large amount of detritus, the bar formed

narrowing the channel. From the width of the creek bottom and the nature of the material I should infer that a great amount of gravel and wash is carried down into the river in flood season by it, as gravel extends into the stream of over 100 feet from Its bank. This creates a bad condition because of its volume and carrying capacity during the high water period." (I1910005-06)

"At mile 93 the river drops sharply about 1.5 feet over a reef of rocks, the south end of which projected at least 3 feet out of water [now submerged by the Halter Reservoir]. *But one break appears along this reef near the north bank and at a point where the greatest flowage and swiftest current occurs. About 30 feet below this break is another reef of rocks which seem to have been moved from the opening above so that the entire stream is made impassable. After examination on it was decided to lower the boat by ropes along the north bank. Another feature at this point is, that an island is located about 200 feet below the rapids and to the north side of it a bar shows for 50 feet northerly, making the channel here only about 50 feet in width... These rapids have the appearance as if a small dam had been constructed across the river, and with the tortuous course [sic] of the channel make them a formidable barrier to navigation. Below this point for 1,000 feet the current is very swift."* (I1910004-05)

"At Log Gulch, mile 94.4, [now submerged by the Holter Reservoir] *the river has a restricted width, because of islands, and a right angled turn, with a water velocity of 3.5 feet per second."* (I1910004)

"The Beartooth rapids [now submerged by the Holter Reservoir] *are encountered at mile 104.5. From the*

standpoint of navigability, they present a very serious and dangerous problem, not only from swiftness and shallowness of water, but from the length of rapids and submerged rocks, and even after passing over the swiftest portion the boat struck a great many rocks that could not be seen because of the muddy water. Some idea can be had of the conditions at these rapids when one considers the river dropping 5.5 feet in a distance of 850 feet over a boulder strewn river bottom. In the upper portion of the falls, velocities of 7 feet per second were recorded, and in the last 280 feet current readings of 10 feet per second were made. Of course these readings taken near the shore gave a slower velocity than would be obtained if one could get current readings nearer the middle of the river." (I1910003-04)

"From these rapids to the north end of the Ox Bow Bend [now submerged by the Halter Reservoir] *the river flows swift, the difference in elevation being about 40 feet in 8 miles. There are places in this distance where rocks project out of the water, generally where the current is fast and in the deepest portion of the channel. A number of rocks just submerged were noted."* (I1910004)

Beginning at mile 107.5 rapids [now submerged by the Hotter Reservoir] *begin...The difference in elevation of the river in [sic] 865 feet in 2.5 feet. The river is rather difficult of passage and large rocks show below the water surface."* (I1910003)

"At mile 111 the river again enters a canyon at the Gate of the Mountains where it is quite swift. The canyon walls are limestone, rising almost vertically for some distance... There are not banks along the river for stretches of many hundreds of feet, the river being

practically inaccessible in places. Above the vertical canyon walls immense limestone cliffs are seen on either hand for several miles, in fact this condition exists almost to mile 90, the site of the Holter dam." (I1910002-03)

"For a mile below Hauser Lake the river runs very swift, with shallow water in many places, as evidenced by riffles, which just cover the rocks and by large rocks projecting above the water. The river flows in a canyon cut through the quartzite and schist rocks, which has very precipitous walls." (I1910001-02)

At mile 117 just upstream of Beaver Creek rapids were encountered. *"At this point for 40 feet from the west bank the water is very rough, then for 50 feet very swift current, the next 150 feet having small rapids with rocks appearing above water surface, and from thence to the east bank rapidly flowing water. This condition exists for several hundred feet down stream."* (I1910002)

The Hauser Dam (RM 118.5) forms Hauser Lake which floods the channel on the 1914 maps from RM 118.5 to about RM 135.5. Based on the 1893 maps, the river was in a canyon from Little Prickley Pear Creek (RM 88) to Canyon Ferry, but is now submerged beneath the waters of Hauser Lake.

Barker's exploration took place after the construction of the first dams on the Missouri including Hauser Dam. As described below the construction of these dams changed the hydrology of the river in a manner that would make it more susceptible to commercial navigation. Regardless, Barker's description of the river in 1916 and the difficulty in bringing a boat

downstream indicates that commercial navigation was not feasible at statehood.

3.4. Hydrology

The flow characteristics of a typical stream in the higher elevations of the Rocky Mountains vary widely with the season. Discharge is highest during the late spring months when the streams are heavily influenced by the melt of the previous winter's snowpack. Stream flows tend to decrease steadily over the course of the summer as the influence of the snowmelt wanes and there is little precipitation to augment flow. Flows reach their lowest points in the fall, but remain low through the remainder of the year until the next snowmelt.

Typically, the existence and operation of a large reservoir on a mountain stream would impact the flow characteristics of the stream by limiting the difference in flow between high and low-flow periods. Flows during the high-flow periods would be decreased as water is stored in the reservoir. Flows during the low-flow periods would increase as water is released from the reservoir to meet power demands.

The hydrologic characteristics of the Missouri River are affected by the hydrology of the Gallatin, Jefferson, and Madison Rivers, especially the impact of Hebgen Dam (1915). The incomplete records at six gages make analysis of the hydrologic record of the Missouri River difficult. Nevertheless, if we take the break in the record (1916-1922) as the beginning of dam impacts, the record is very similar to that for the Madison River. That is, there is reduced discharge April through August and increased discharge December

through February with the remaining months having little or no change (Figure 27).

These changes produce a more level year-round flow and make the river more susceptible to navigation at present. During the high-flow periods in late spring, less discharge makes the river easier to navigate. Similarly, the increased flows during the low-flow periods of the fall make the river more susceptible to navigation.

These changes can be demonstrated graphically. Plots of average monthly flow for the Missouri River show, on a month-by-month basis, the flow characteristics of the river. Copies of the average monthly flow plots for the Missouri River are attached as Exhibit C.

The increase in average flow of up to 30 percent during low-flow periods corresponds to an increase in river depth of approximately four-tenths (0.44) of a foot in January and one-third (0.35) of a foot in December. This calculation was made using the stage-discharge plots (Figures 28 and 29). These plots show the river stage, or elevation of the water surface, for a particular discharge.

Based on these calculations, my opinion is that because of the construction and operation of the hydroelectric facilities, especially the Hebgen and Canyon Ferry Reservoirs, the current flow characteristics of the Missouri River are not the same as they were at the time Montana entered the Union. The operation of the hydroelectric facilities has resulted in higher flows during the low-flow period, and a corresponding increase in low-flow period depth. Although small, the increase would improve the

opportunity for navigation at present. These changes in the river resulting from the hydroelectric facilities make the Missouri River more susceptible to use for navigation now than it was at the time of statehood.

3.5. Summary and Conclusions

It is my opinion that the number and type of impediments existing in the Missouri River between Fort Benton and the site of the Canyon Ferry Dam at the time of statehood would have made commercial navigation on that reach not feasible. Barker's report confirms my conclusion. According to Barker, *"I therefore conclude...that constant dredging would have to be done to keep the channel clear where the bars are being formed; that wherever the river is wide a channel would have to be cut in low water periods because of the shallowness of the water; that because of the numerous rocks and rapids an immense amount of work would be necessary to clear these obstructions... Therefore, from every standpoint, navigation would be attended by so many difficulties that such is not feasible or practicable."* (I1910013-14)

Barker's statements post-date the construction of the earliest dams. Thus, the flows were somewhat more conducive to navigation then that at the time of statehood. The physical features he observed nevertheless prevented navigation on the river between Cascade and Canyon Ferry. The portion of the river from Fort Benton to Great Falls likewise contained far too many impediments to navigation, including the immense Great Falls of the Missouri, for it to have supported commercial navigation at statehood.

The Missouri River above Fort Benton is not the same river now that it was in 1889 when Montana entered the Union. The post-statehood construction and operation of the hydroelectric projects on the Madison River, Hebgen Dam, and Canyon Ferry Dam, have provided additional flows during low-flow periods and reduced flow during the torrential high-flow periods. This results in an increase in river depth during low-flow periods, making the river easier to navigate now than at the time of statehood, when–in my opinion–commercial navigation was not feasible.

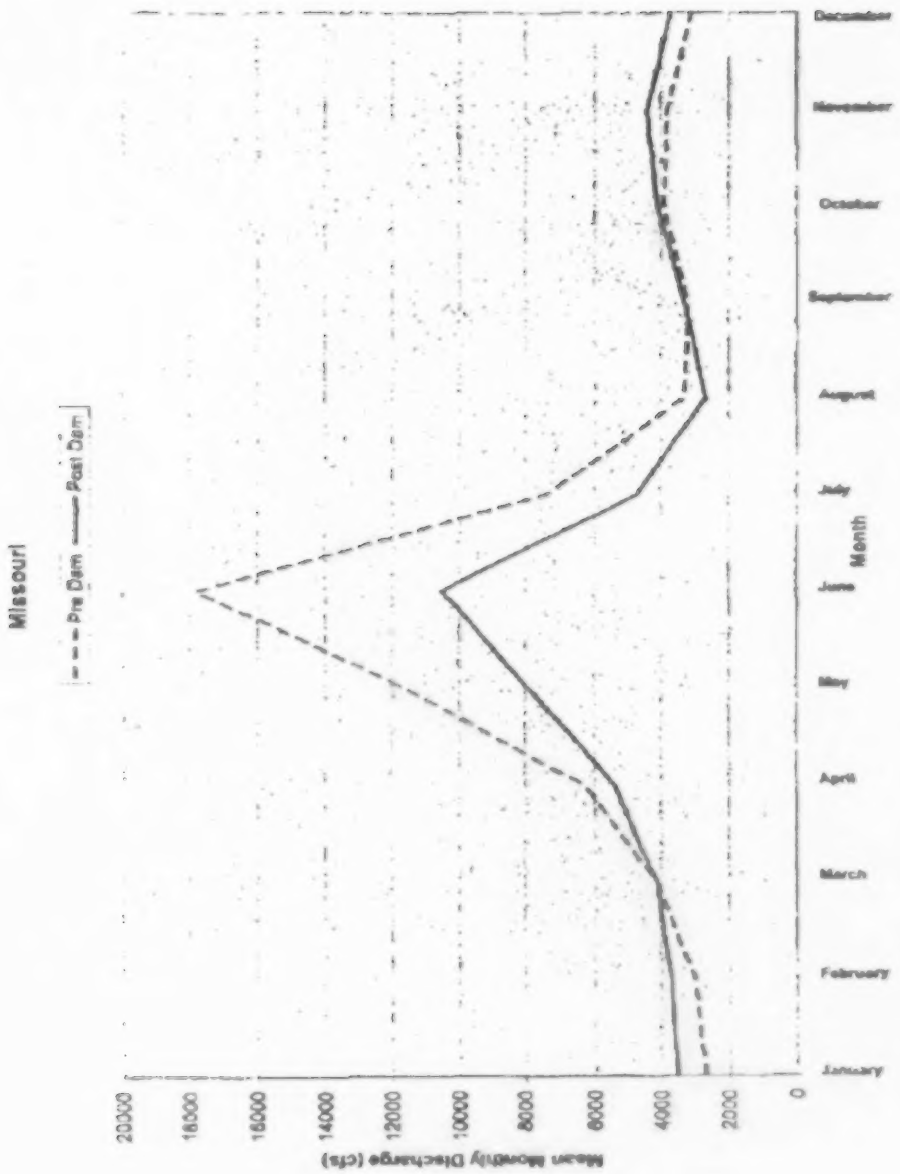


Figure 27. Pre- and post-dam mean monthly discharge.

[OMITTED CHART]

Figure 28. Stage discharge relationship, pre- and post-dam December discharge, Missouri River.

[OMITTED CHART]

Figure 29. Stage discharge relationship, pre- and post-dam January discharge, Missouri River.

4. NAVIGABILITY OF THE CLARK FORK RIVER

This description of the Clark Fork River is based upon recent U.S. Geological Survey topographic maps, 1914 surveys of the river (USGS, 1914b), and General Land Office (GLO) maps. River mile zero (RM 0) is at Deer Lodge and the survey continues downstream to St. Regis (RM 189.5). St. Regis is also RM 0 for surveys from St. Regis to RM 130 downstream at the town of Clark Fork. The 1914 surveys provide the best possible insight into the physical characteristics of the river at the time of statehood.

From St. Regis to immediately below Thompson Falls, there are numerous rapids and, of course, a major waterfall. On average, there is an impediment to navigation every 10.5 miles, which would have made commercial navigation not feasible at the time of statehood.

4.1. Description

The Clark Fork is a river with a complex history, which determines local variability of the channel and its sediment character. About 15,000 years ago, the Pleistocene age ice sheet blocked the Clark Fork valley at Lake Pend Oreille. This formed glacial Lake Missoula which extended from the ice dam to "a bit beyond Garrison in the Clark Fork valley" (Alt, 2001). The lake at its maximum contained 500 cubic miles of water that was 950 feet deep in the Missoula valley. Failure of the ice dam released torrents of water that scoured and deepened Hellgate Canyon and Alberton Narrows. The lake filled and failed many times during the Pleistocene epoch leaving the present Clark Fork to flow in valleys, narrow canyons, and in gravel deposits and lake bed sediments. Sediment was stored in tributary valleys during high lake levels and then scoured and deposited in the main valley during and following ice dam failures.

In order to present a description of a river, as variable as the Clark Fork, a simple statement of river character is possible using the U.S. Geological Survey topographic maps (quadrangles). For each quadrangle, the nature of the river can be stated. For example, the river can be identified as canyon-controlled, where the valley is very narrow. It can be identified by river pattern (braided, meandering, anastomosing) where the valley is sufficiently wide for the river to develop an appropriate pattern. The number of quadrangles in each category provides a crude description of the river. Of the total of 47 quadrangles, 31 are canyon-controlled, 4 are braided, 3 are anastomosing, and 9 are meandering or low sinuosity.

A more accurate assessment of channel type for the entire river is a measurement of the valley length of each type as follows: canyon-controlled 196 miles; braided 39 miles; meandering 18 miles; anastomosing 0.38 miles. Clearly, the Clark Fork is canyon-controlled. The great variability of the Clark Fork is demonstrated by the channel descriptions. In addition, in the canyon-controlled reaches, bedrock may occur in the bed and banks.

The maps provide additional information on the river. For example, the abrupt change in pattern upstream of Garrison (Figure 30) may be the result of the southernmost extent of glacial Lake Missoula (Alt, 2001).

At Bearmouth, the river has been straightened by the railroad and highway and this is the case upstream of Bonner. At RM 96, the Blackfoot River, a large tributary, joins the Clark Fork. The river is in Hellgate Canyon between RM 100 to RM 102, east of Missoula. West of Missoula, the river enters a wide open valley and the river braids probably as a result of sediment contribution from the Blackfoot and Bitterroot Rivers or as the result of the Lake Missoula floods. Downstream of Huson (RM 130), the valley narrows and braiding is less obvious. Moving downstream, there are rapids in the narrow valley from Cyr (RM 150,) to RM 164. The profile is irregular and between RM 160 and RM 161, the gradient is 28 ft/mi.

[OMITTED IMAGE]

Figure 30. Change of pattern of Clark Fork near Garrison. (USGS Topographical Map, Garrison Quadrangle, 1989.

At St. Regis, a new survey begins (RM 0). There are rapids at 4-Mile Rapids (RM 6), 7-Mile Rapids (RM 9), and Quinns Rapids (RM 19).Quinns Hot Springs is located at RM 23. The canyon is narrow at Quinns Hot Springs, but it widens at the junction of the Flathead River (RM 26).From RM 26 to RM 39, the river is braided as a result of back water from Thompson Falls (RM 63). There is a fall of about 22 feet at the Falls. Thompson Falls *"are a complete obstruction of navigation."* (Abercrombie, 1891) (MDH 013718) The impact of these falls can be seen in Figures 31 and 32.

Figure 3: Thompson Falls view looking North, showing Powerhouse location, circa 1912. (MDP 0232)

Figure 32 Thompson Falls, Montana—diversion dam showing first cribs in place, January 11, 1914. (MDP 0233)

The location of rapids is identified on the 1914 maps. The impediments to navigation between St. Regis and Thompson Falls are as follows:

River Mile	Location
RM 1	St. Regis
RM 6	4-mile Rapids
RM 9	9-mile Rapids
RM 19	Quinn's Rapids
RM 41	Rapids
RM 41.5	Rapids
RM 42.5	Rapids
RM 63	Thompson Falls

Gradient is also an important factor on the Clark Fork. This river is on the western side of the Continental Divide. It falls rapidly from its Rocky Mountain heights. From its headwaters near Deer Lodge to St. Regis the average fall of the Clark Fork River is 10 feet per mile. From St. Regis to Thompson Falls, the average fall is 4 feet per mile. The Clark Fork is a steep, fast-flowing, rocky river which would not have been conducive to commercial navigation.

4.2. Conclusions

In summary, in the 63 miles from St. Regis to immediately below Thompson Falls, there are 6 impediments to navigation. On average, there is an impediment every 10.5 miles. Moreover, this reach is characterized by a steep gradient and rocky bed. These factors make commercial navigation infeasible at the time of Montana's statehood.

The Clark Fork is highly variable in pattern, gradient, and dimensions between Deer Lodge and Thompson

Falls. In my opinion, the numerous rapids, narrow canyon reaches, waterfalls, steep gradients, and braided reaches made commercial navigation above Thompson Falls infeasible at the time of statehood.

5. REFERENCES

Abercrombie, W.R., 1891. Preliminary examination of Clark Fork of the Columbia River from the International Boundary line to the mouth of the Big Blackfoot River in the State of Montana. Executive documents of the House of Representatives, First Session 52nd Congress, 1881-1892 (MDH 13716-22).

AGI, 1972. *Glossary of Geology*. American Geol. Institute, Washington, D.C.

Allen, Paul (ed), 1814. History of the expedition under the command of Lewis and Clark. Bradford and Inskeep, New York, 469 p.

Alt, D., 2001. *Glacial Lake Missoula*. Mountain Press, Missoula, 197 p.

Barker, S.J., 1916. Examination of Missouri River from Hauser Lake to Cascade with respect to navigability. Unpublished manuscript.

Chief of Engineers, U.S. Army, 1931. Jefferson, Madison, and Gallatin Rivers, Montana. House Document 193.

Commissioner of Corporations, 1909. Report on transportation by water in the United States,

Water-borne traffic. U.S. Government Printing Office, pp. 370-371.

Fenneman, N.M., 1931. *Physiography of Western United States*. McGraw Hill, New York.

Fisher, C.A., 1909. Geology and water resources of the Great Falls Region, Montana. U.S. Geological Survey Water-supply Paper 221, 87 p.

Lingenfelter, R.E., 1978. *Steamboats on the Colorado River*. Univ. Arizona Press, Tucson, Arizona, 195 p.

Littlefield, D.R., 1997. Assessment of the Verde River's Navigability Prior to and on the Date of Arizona's Statehood. Unpublished report, Littlefield Research Assoc., Oakland, California, 199 p.

Nanson, G.C. and Knighton, A.D., 1996. Anabranching rivers: their cause, character, and classification. Earth Surface Processes Landforms, v. 21, pp. 217-239.

Schumm, S.A., 1981. Evolution and response of the fluvial system, sedimentologic implications. Soc. Econ Paleontologists and Mineralogists (SEPM) Special Pub. 31, pp. 19-29.

Schumm, S.A., 2005. *River Variability and Complexity*. Cambridge Univ. Press, Cambridge, UK, 220 p.

U.S. Geological Survey, 1914a. Profile surveys of Missouri River from Great Falls to Three Forks, Montana. Water-Supply Paper 367.

U.S. Geological Survey, 1914b. Profile surveys in the basin of Clark Fork of Columbia River. Water-Supply Paper 346.

U.S. Geological Survey Topographical Map, Garrison Quadrangle, 1989.

6. GLOSSARY

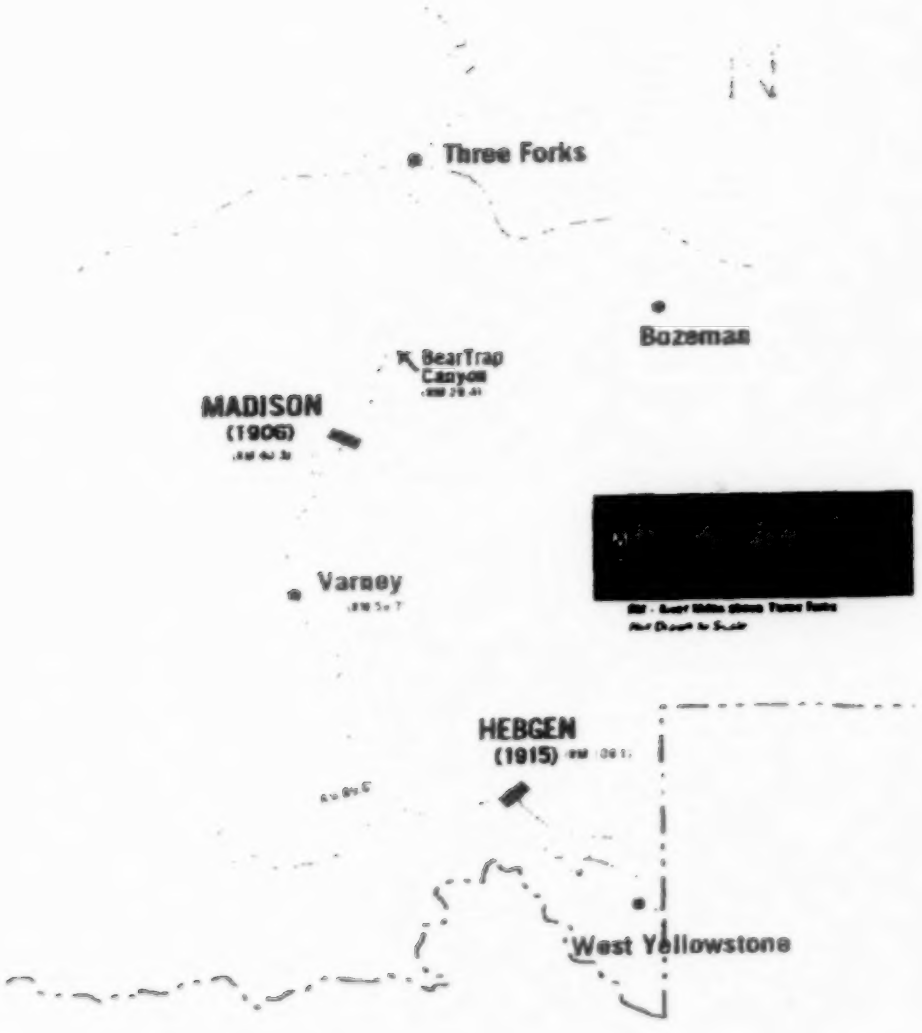
Alluvial river	The channel is composed of sediment transported by the river. It is fully adjustable.
Alluvium	*"A general term for clay, silt, sand, gravel, or similar material deposited during comparatively recent geologic time by a stream or other body of running water as a sorted or semi-sorted sediment in the bed of a stream or on its floodplain."* (AGI, p. 18)
Anastomosing river	A multiple channel system of branching and rejoining channels.
Bed load	Sediment (sand, gravel) transported on the bed of a river (bed-material - load).
Braided river	A single channel containing numerous bars.
Confined river	The channel is totally controlled by bedrock or resistant alluvium.

Constrained river	The channel is locally controlled by bedrock or resistant alluvium.
Discharge	The flow of water in a channel usually expressed as cubic feet per second and calculated as velocity times cross-section area.
Gradient	*"The steepness of a slope."*(AGI, p. 305)
Meandering river	Single channel composed of a series of bends or meanders.
Rapids	*"A part of a stream where the current is moving with a greater swiftness than usual and where the water surface is broken by obstructions, but without a sufficient break in slope to form a waterfall, as where the water descends over a series of small steps."* (AGI, p. 551)
Riffle	*"A natural shallows or other expanse of shallow bottom extending across a streambed over which the water flows swiftly and the water surface is broken into waves by obstructions wholly or partly submerged; a shallow rapids of comparatively little fall."* (AGI, p. 569)
Ripple	*"A shallow reach of running water in a stream roughened or broken into small waves by a rocky or uneven bottom."* (AGI, p. 611) (see riffle)

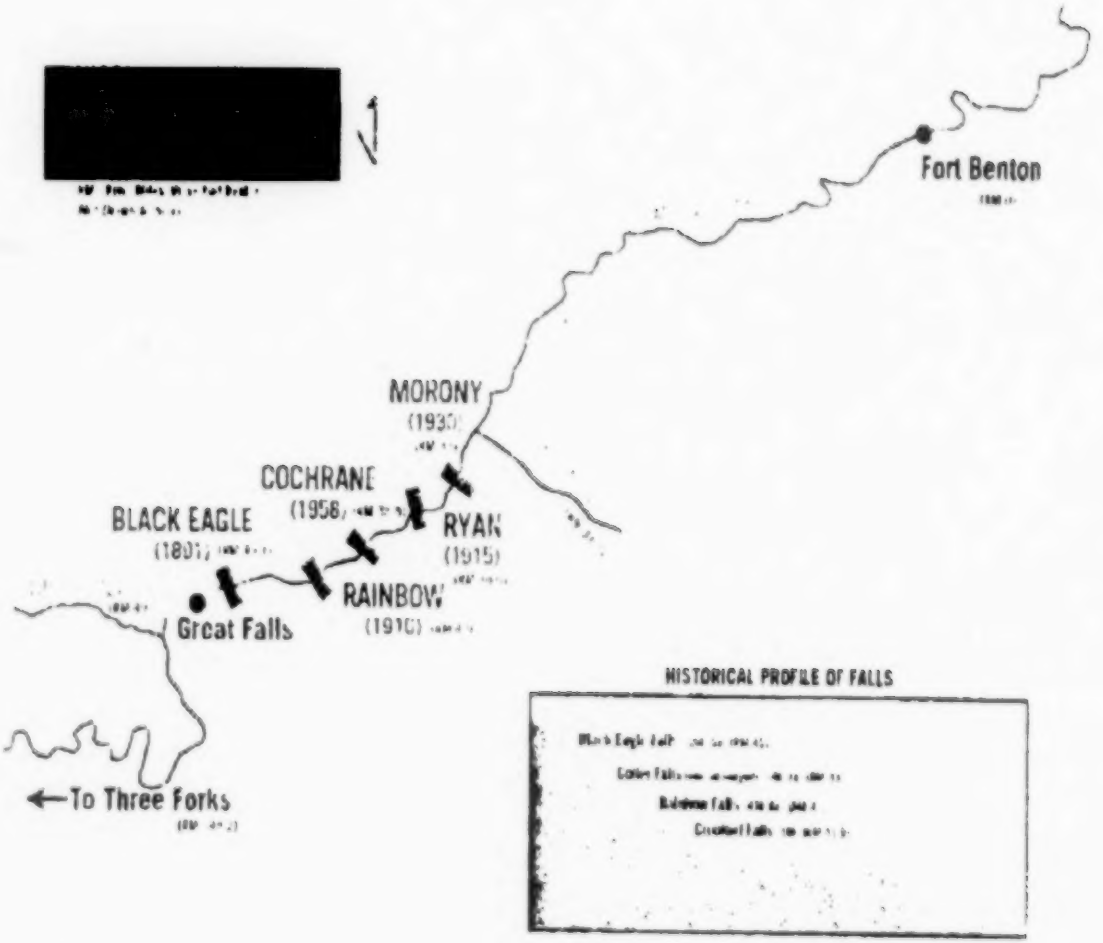
Stage	*"the height of a water surface above an arbitrary established datum plane."* (AGI, p. 687)
Suspended load	sediment (silt and clay) transported in suspension in a river.
Thalweg	*"the line connecting the lowest points along the bed of a stream."* (AGE, p. 733)
Waterfall	*"A perpendicular or steep descent of the water of a stream, as where it crosses an outcrop of resistant rock overhanging softer rock that has been eroded."* (AGI, p. 731)
Width-depth ratio	The ratio of width to depth of a stream channel. The higher the width-depth ratio, the relatively wider and shallower the stream.

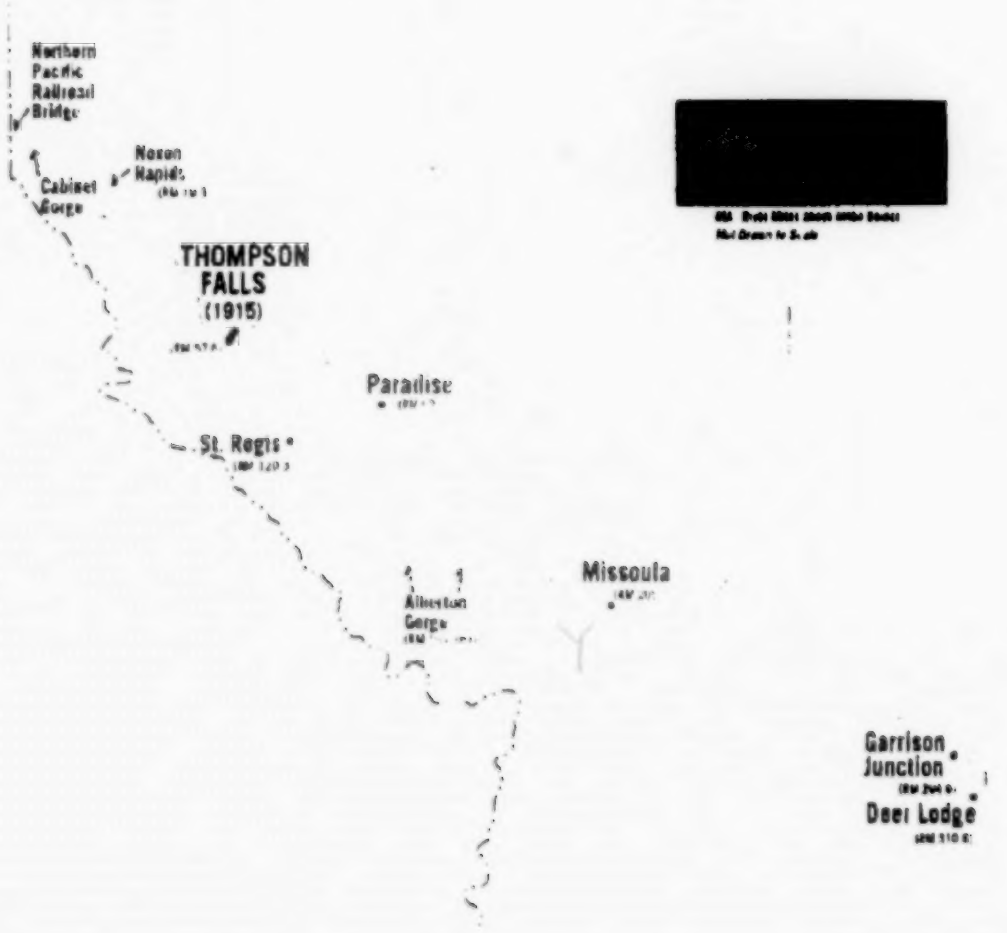
EXHIBIT D
LOCATION MAPS

THOMPSON FALLS
MORONY
COCHRANE
BLACK EAGLE
RYAN
RAINBOW
HOLTER
HAUSER
MADISON
HEBGEN


Three Forks
Bozeman
BearTrap
Canyon
MADISON
(1906)
Varney
HEBGEN
(1915)
West Yellowstone

To Fort Benton
Great Falls
Long Pool
Half Breed Rapids
Cascade
HOLTER
(1918)
Beartooth Rapids
HAUSER
(1911)
Canyon Ferry Dam
Stubbs Ferry
(Historical)
Helena
Townsend
Three Forks


Fort Benton
MORONY
(1930)
COCHRANE
(1958)
RYAN
(1915)
BLACK EAGLE
(1891)
RAINBOW
(1910)
Great Falls
To Three Forks
HISTORICAL PROFILE OF FALLS


Northern
Pacific
Railroad
Bridge
Cabinet
Gorge
Noxon
Rapids
THOMPSON
FALLS
(1915)
Paradise
St. Regis
Alberton
Gorge
Missoula
Garrison
Junction
Deer Lodge

NAVIGATION REPORT: A STUDY OF THE HISTORIC USES OF THE MISSOURI, MADISON, AND CLARK FORK RIVERS IN MONTANA

/s/David Emmons
By David Emmons, Ph.D.
June, 2007

* * *

I. MY CREDENTIALS

My name is David M. Emmons. I earned my Ph.D. in history from the University of Colorado, Boulder. As I explained in some detail in my previous affidavit in this matter, I am a Professor of History Emeritus at the University of Montana. Over the course of my forty-year career as a professional historian I have published two books and numerous articles on various aspects of Western American history. My attached curriculum vitae gives the details to this brief sketch of why I was hired to be an expert witness in this matter regarding historical uses in Montana of the Missouri, Madison and Clark Fork Rivers. (CV attached as Exhibit A).

II. FOCUS OF MY REPORT

I was asked by PPL Montana to research and prepare a report on the topic of historical navigation on several reaches of the Missouri, Madison and Clark Fork of the Columbia rivers in Montana. The issue of river navigation and use is of major importance to historians. Multiple volumes have been written, for example, regarding the importance of the Hudson river

in the development of colonial America. Indeed, the historical significance of river transportation was a question asked of me in my doctoral dissertation exams, as I earned my Ph.D. I remember asking at the time I was approached regarding this report, what sections of these rivers were at issue. When told by PPL that these rivers were to be divided into stretches or reaches, I accepted this task. To a historian that is the only sensible way to proceed. To speak of rivers as if each was a single unitary system distorts the historical record and makes impossible any comprehensive or even comprehensible analysis of how the rivers were used historically. A prime example is the Missouri River, which has a length of some 2,500 miles, with a colorful and varied history along all of its sections.

The reaches I focused my research on are those reaches where the ten dams at issue are located, as shown on the maps attached as Exhibits B-F: 1) the approximately 49 miles from Fort Benton to the confluence of the Sun River (slightly above the City of Great Falls; *see* Ex. C); 2) the approximately 76 miles on the Upper Missouri River from Cascade to the historic Stubbs Ferry (some 13 miles northeast of Helena; *see* Ex. D); 3) the approximately 60 miles on the Madison River from Three Forks to Varney (*see* Ex. E); 4) the approximately 30 miles from Varney to the West Fork (*see* Ex. E); 5) the approximately 45 miles on the Madison from the West Fork to the Wyoming border, (*see* Ex. E); 6) the approximately 35 miles on the Clark Fork River from the confluence of the Flathead River in the vicinity of Paradise, to the Thompson Falls, and also the Clark Fork River from Deer Lodge, the point where the State claims the

Clark Fork becomes navigable, to Thompson Falls (*see* Ex. F).

It is my opinion that these reaches are appropriate for historical reasons, as well as for the physical characteristics of the rivers themselves. For the Missouri, the Army Corps of Engineers historically broke the river above the Falls into several "distinct portions," including the section from "Stubbs Ferry to just below the town of Cascade," based on its shallow channel and "numerous rapids and rock obstructions." The Army Corps called the 49 mile reach of the upper Missouri between Great Falls (the city) and Fort Benton a single section "occupied by cataracts and dangerous rapids." (As a point of definition, when I use the term upper Missouri or upper river I am referring to the Missouri from Fort Benton to Three Forks.) For the Clark Fork, the reach between Paradise and the Thompson Falls is another natural division because the falls cut off the river below them, and the confluence of the Flathead River substantially increases the Clark Fork's flow. Historically, this stretch seems always to have been called the Clark's (or Clarke's) Fork by inhabitants; other reaches were often called by other names. As for the Madison, I have examined the entire river, but have used the natural divisions chosen by the State from the Wyoming border to the confluence of the West Fork with its larger flow, to Varney, where the river starts to heavily braid, then to Three Forks where the Madison, Jefferson and Gallatin become the Missouri.[1]

---

[1] MDH013725, Sanford, "Improvement of Missouri River at and Above Sioux City Iowa, and at Yellowstone River, Montana and North Dakota," in *Annual Reports of the War Department for the*

III. HISTORICAL SOURCES I USED

I was also asked to investigate these river use patterns in historically specific times, essentially from the first written and extant record of use to 1889 when Montana entered the Union or to when the relevant sections of the rivers were altered substantially by changes in their character occasioned by improvement projects, natural events such as earthquakes, or the construction of dams and the impoundment of the rivers' waters. That meant that in the case of these three rivers I was dealing with material from the time of the Lewis and Clark Expedition, 1803-1806, to about 1920, or some thirty years after statehood. Specifically, I was asked to study material, both secondary and primary, dealing with the important question of the historic use of sections of these waterways upon which hydroelectric facilities are now located.

A. Sources for the Missouri River

The history of the use, attempted use, and non-use of the upper Missouri for navigation has generated an

---

Fiscal Year Ended June 30, 1898. Report of the Chief of Engineers, Part 1, (Washington D.C.: GPO 1898) pp. 323-24; Thomas Symons, U.S. Army Corp. of Engineers, *Preliminary Examination of Clark Fork of the Columbia River (By Whatever Name Called*, 1891, Washington: D.C. GPO 1891, MDH 013736 "Preliminary Examination of Clarke Fork of the Columbia River" from the International Boundary Line to the Mouth of the Big Blackfoot River, in the State of Montana" in *Report of the Chief Engineers U.S. Army*, U.S. House of Representatives, Ex. Doc. 52nd Congress, 1st Session 1891-92 (Washington D.C. GPO 1892) p. 3250; also State's navigable rivers list which is found at *http://dnrc.mt.gov./trust/MMB/navwaterslist2.pdf.*

enormous amount of primary documents as well as a voluminous number of secondary accounts. Finding them was eased considerably by the indefatigable work of researchers during the long and contentious hearings and trial on the Federal Power Commission's insistence, in the 1940s, that the Montana Power Company license nine of its dams. Eight of those were hydroelectric, one was built for the storage of water; seven were on the Missouri above Fort Benton; two were on the Madison. The FPC made its initial "request" in 1942; MPC lost its final appeal in 1950. What makes this source so invaluable was that the FPC's lead counsel promised the hearing officer and the court that he and his team were going to provide every bit of evidence they could find whether it served to support or to refute the FPC's contention that it had regulatory authority. He didn't quite do that, but he forced MPC to match his bold promise. The result was that this legal controversy between the Commission and Montana Power generated thousands of pages of hearing and trial testimony and many hundreds of pages of exhibits regarding river navigation or the lack thereof. I reviewed them all, and will subsequently refer to this material as being from the FPC/MPC matter. Other sources I used are enumerated below in roughly sequential order.

1. *The Journals of Lewis and Clark.* Lewis and Clark came up in the FPC/MPC case. At that time the best edition of their journals was that edited by Ruben Gold Thwaites. I used the more recent and far more complete 12 volume edition of the journals edited by Gary Moulton, who during his visiting professorship at UM, was a colleague of mine.

2. I also researched secondary sources on Lewis and Clark. These were sources known to me before my investigation in this matter. I would mention in particular John Logan Allen's splendid *Passage Through the Garden* (1975), Russell Cutwright's *Lewis and Clark: Pioneering Naturalists* (1969), and Richard White's *It's Your Misfortune and None of My Own: A New History of the American West* (1991).

3. I read all of the material on those who, like Lewis and Clark, were not trained engineers, and who followed the two captains in investigating the Missouri River. I would call specific attention to those sources listed in Jodie Foley's Affidavit, the FPC/MPC record, and the citations in the River Studies–about which more later. These sources included but are not limited to H.H. Bancroft's histories, Thomas James, *Three Years Among the Indians and Mexicans*, and, as a secondary source, my own book, *Garden in the Grasslands: the Boomer Literature of the Central Plains*.

4. I turned next to the engineers, particularly those from the Army Corps but including as well Thomas Roberts, an engineer working for the Northern Pacific Railroad, whose 1872 report was available in the UM library and which I read in its entirety. I also read the Reports of John Mullan and William Ludlow. Both were Army officers and trained engineers. Mullan, already known to me, built a road to bypass the upper Missouri; Ludlow, a new acquaintance, investigated a road already in place, the so-called Carroll Cutoff from Carroll, Montana, some 170 miles below Fort Benton, to Helena. I also reviewed the excerpts from the Reports of the Army Corps of Engineers from 1868 to 1974 provided to me, and

followed up in the UM Documents Library, and read the entire reports as well as reports not provided, finding some material that others had not consulted. This does not quite exhaust the list of engineers. Four qualified and experienced engineers were called by MPC as expert witnesses in the FPC/MPC matter. I read the testimony of all of them, concentrating in particular on the comments of Malcolm Elliott, Hans Kramer, and Max Tyler. I also investigated the full report of the private engineer, Samuel Barker, who conducted a survey of part of the Missouri above the Great Falls in 1916.

5. I also read thoroughly and critically what I call the River Studies. These were reports attached to the affidavit of Monte Mason. I used these as background material only since, as I explained in my earlier Affidavit, I do not consider these underfunded, secondary studies to be of much use other than as a roadmap to more useful sources.

6. Finally, I reviewed contemporary newspaper accounts of various activities on the Missouri. I generated one of these newspaper stories–an account of the Carroll Road that led me to the Ludlow Report. The rest came from FPC/MPC material, the Foley Affidavit, and the River Studies. Newspapers have to be used with great care, particularly newspapers from the early years of a region's history. They tend to be excessively optimistic and promotional in their reportage–a point I made in my previous Affidavit. Frequently, however, they are the only sources of information the historian has. But they must always be used in context, in combination with other more reliable sources, when such are available, with

appropriate caution, and with an understanding of their limitations.

B. Sources for the Madison River

The documentation for the uses of the Madison River is sketchy at best. There is nothing from the voluminous record assembled in the FPC/MPC case. Instead, both FPC and MPC reached rare agreement–the Madison was "concededly non-navigable."[2] There are, however, Army Corps of Engineer Reports on the Madison which I consulted along with the Madison River Study, one of the River Studies mentioned above. The Foley Affidavit included material from the Lewis and Clark Expedition, but since the Corps of Discovery did not ascend the Madison, it was of scant relevance to me. I also consulted records provided me by PPL Montana on the Hebgen Lake project as well as the Affidavit of Professor Stanley Shumm, a fluvial geomorphologist who is serving as an expert witness for PPL in this case. I located several old maps of the Madison River, and my graduate assistant searched the UM Library's holdings for secondary accounts of the historical uses of the Madison. Those searches, however, turned up nothing of importance. There is no surprise there; rivers that were not used historically do not generate a great deal of historical attention.

---

[2] 1950 opinion of the DC Circuit Court in *Montana Power Co. v. Federal Power Commission*, found in volume 185 of the Federal Reports (Second) at p. 493, MDH000431.

C. Sources for the Clark Fork River

The sources on the uses of the Clark Fork are considerably more numerous. There was a long correspondence in the early 1940s between Montana Power officials and the Washington D.C. engineering firm of Leighton and Gamble regarding the hydroelectric facility at Thompson Falls, built by a predecessor of Montana Power. There was an important legal decision in 1910 in which the Montana federal court found the river in Sanders County to be non-navigable under the federal navigability for title test discussed in more detail, below. I also reviewed a significant amount of newspaper reportage (as always, of questionable veracity), as well as Army Corps of Engineer Reports. Since the basic contention on the uses of the Clark Fork center around alleged log drives, I also consulted the corporate records of Western Montana logging and lumber companies looking for references to log drives on the Clark Fork River. I found numerous references to moving logs by rail and one reference to using the river immediately adjacent to a mill as a holding area for logs, but not a single mention of driving logs downstream. For what it was worth, I also reviewed the River Study of the Clark Fork, the author of which is unnamed and unknown; the agency for which it was prepared unidentified. As with the other Studies, it was of value only as it led me to more dependable sources.

This is a partial list of the sources I consulted and a cursory look at my research methods. I literally spent many hundreds of hours reading and interpreting the thousands of pages of documentation that I had either uncovered on my own or that had

been provided me by PPL. I am confident that this research forms a solid base for my conclusions.

IV. THE NAVIGABILITY TEST

My last and most important task before beginning to write my report was to find a satisfactory definition of navigability that I might apply it to the identified sections of these rivers. This required a working definition of navigability–working in the sense that it was useful to a historical analysis. The test I was asked to consider was whether the given reaches were used, or were susceptible of being used, in their ordinary condition, at statehood, as highways for useful commerce, in the customary modes of trade and travel on water. There was nothing alien or arcane in this definition. Questions of "useful commerce" and "customary modes of trade and travel" are right up an historian's alley.

I took some guidance from a brief prepared by the State of Montana in a case from the late 1980s–and relied upon by Judge Jeffrey Sherlock in deciding that a reach of the Milk River was not navigable–which offered this helpful explanation: "[N]avigability of a water way under the federal title test depends on the conditions of the waterway in its *unimproved*, or natural condition at the time of statehood." The State's Milk River brief stressed that commerce alone is not enough, the waterway must have been used (or been susceptible for use) as "a channel for *useful commerce,*" and proof of "occasional," "sporadic" or

"ineffective" uses would not do.[3] As a historian, I found this explanation immensely helpful, both because of its source–the Montana Attorney General's office–and because it directed my attention to precisely what I find historically useful, namely, what kind of commerce, if any, traveled on a river; what goods went from where to where; how often; and finally, did they make it to where they were going. That is what was important to our predecessors who either made actual use of rivers as highways of useful commerce, or chose not to use them in such a manner because they found trying to navigate them not to be useful.

V. CUSTOMARY MODES OF TRADE AND TRAVEL ON WATER

By the time Montana became a state in 1889, the customary mode of commercial trade and travel on water was steamboats. As discussed in more detail later, throughout the 1860s, 1870s, and 1880s, steamers moved immense amounts of cargo and passengers on the Missouri to and from Fort Benton. Steamboats of small draft and great maneuverability plied the inland rivers of the young United States, and could hope to navigate in channels as shallow as three feet or less. These steamers carried cargo not only down but upstream as well, and turned rivers that could be used by them into what can truly be called "highways of useful commerce." From Mark Twain to Steamboat Willie, steamers are writ large in American

---

[3] *Drugge v. State of Montana*, Cause No. BDV 89-952, Montana First Judicial District Court, Lewis and Clark County; State of Montana's Memorandum of Law Concerning the Navigability of the Milk River, September 20, 1991; Order on Issue of Navigability, Hon. Jeffrey Sherlock, Dec. 11. 1991.

history and culture from the mid-1800s forward, only to fade slowly into the background when the railroads came calling somewhat later. It is my opinion that by 1889, vessels other than steamboats would simply not have been considered either customary or useful for commercial trade on an inland river like the upper Missouri.[4]

Prior to the advent of steamships, sailing vessels used the rivers in the east and west. Indeed, in 1792 Captain Robert Gray sailed his three-masted sloop–in which he had circumnavigated the globe–into the estuary of the Columbia and up the river some miles. In smaller inland rivers, keelboats seem to have been the customary trade vessel. Lewis and Clark used such a boat on the wider, more easily floated stretches of the Missouri. To my knowledge, no one has ever suggested that keelboats could have traveled the Missouri above Fort Benton, or the Madison or Clark Fork in Montana. There is some discussion in the historical record of smaller vessels like pirogues and bateaux, but these seem to have been used mostly for exploration. I found no credible evidence in the historical record of the use of such vessels for commercial navigation on the river reaches I studied for this report.[5]

There is also mention in the historical record of Mackinaw boats. These do seem to have been used on

---

[4] 48th Congress 1st Session House of Representative Ex. Doc. 1, pt. 2, Vol. II, *Annual Report of Engineers, U.S. Army, to the Secretary of War for 1883*. Appendix V, pp. 1343-1344.

[5] OTH01674; Moulton (ed.), *The Journals of Lewis and Clark*, Vol. 4, p. 1; http://www.mt.blm.gov/ldo/um/docs/ftbenton.htm.

the Missouri between Fort Benton and points east prior to, and even during, the steamboat era. But there is no credible evidence that they were used for commercial navigation on the Upper Missouri, much less the Madison or the Clark Fork above Thompson Falls. Thus, like the Army Corps of Engineers has done for over a century, this report on navigation will focus on steamers, but with discussion of canoes, rafts and the like where relevant to the question of whether commercial navigation occurred on the reaches of the rivers at issue.

VI. MY CONCLUSIONS

The opinions I developed are as follows:

1. The Missouri from Sun River to Fort Benton was not used as a highway for useful commerce at the time of statehood. I found no credible evidence in the historical record of any passage of goods in commerce between those two points (hereafter the "Great Falls Reach"). In fact, I concluded that the Great Falls of the Missouri and related rapids effectively make the Missouri above Fort Benton a different river from the Missouri below Fort Benton, and that the Great Falls reach is impassable. In my opinion it was (and is) not navigable.

2. The Missouri from Cascade to Stubbs Ferry was not used at the time of statehood as a highway for useful commerce. While there is some evidence in the historical record that a few vessels did float on this stretch, they did not carry goods in commerce, and–at best–any travel was sporadic, ineffective and downright dangerous, even after not inconsiderable sums had been expended to try and improve this reach

from its natural state into a navigable river. In my opinion, it was not navigable at statehood.

3. I found no evidence at all in the historical record of any use of the Madison River from the Wyoming border to the confluence of its West Fork as a highway for useful commerce at the time of statehood. In my opinion, it was not navigated and not navigable at statehood.

4. I found no evidence in the historical record of any commercial use of the Madison River from Varney to Three Forks around the time of statehood. This reach of the river was (and remains) very braided. In my opinion, it was not navigated and not navigable at statehood.

5. Given the lack of any evidence in the historical record of the use of the entire Madison for commerce, except one ineffective log drive on the reach between the confluence of the West Fork and Varney–and that after the construction of the Hebgen dam had radically altered the natural condition of the river making it more susceptible to navigation – it is my opinion that the entire Madison River was not navigated and not navigable at the time of statehood.

6. I found no credible evidence in the historical record of the use of the Clark Fork River from the confluence of the Flathead River to the Thompson Falls, as a highway for useful commerce. This reach was fast, rocky, steep and treacherous. The few uses that were made of it before the building of the Thompson Falls dam radically altered its character, were sporadic, ineffective, and deadly. In my opinion,

this reach was not navigated and, thus, not navigable at the time of statehood.

7. I found no credible evidence in the historical record of the use of the Clark Fork River from Deer Lodge to Thompson Falls as a highway for useful commerce. In my opinion, the Clark Fork above Thompson Falls was not navigable at the time of statehood.

Those are my conclusions. What follows are the more detailed interpretations, analyses, and reasons for those conclusions.

VII. THE MISSOURI: A TALE OF TWO RIVERS

A. The Lewis and Clark Expedition

1. The Dream of a Northwest Passage – searching for a short portage to the Columbia River and the Pacific Ocean.

John Logan Allen in his definitive *Passage Through the Garden: Lewis and Clark and the Image of the American Northwest* writes: "The concept of a water route across the North American continent had been a fundamental part of the geographical lore of North America ever since the world had first been made aware of that continent's existence," and that this new world was in the way of an ocean passage from Europe to "the silk and spices of the Orient." Aristotle and Virgil were among those who believed–or hoped–that it would be a short passage. Columbus, of course, sailed to find it. All of that, however, takes the story further back than present needs require, although it is important to keep in mind just how ancient was that

dream and with what tenacity it was held. Dreams of this sort are not abandoned easily and never without a share of heartbreak.[6]

A more reasonable starting point is the famous exploration of the "Corps of Discovery of the Northwest" captained by Meriwether Lewis and William Clark in 1803 - 1806. Lewis and Clark were commissioned by President Thomas Jefferson whose instructions to Lewis arose directly from the dream and its geographical images. The captains were "to explore the Missouri river, and such principal stream of it, as, by its course and communication with the waters of the Pacific ocean, whether the Columbia, Oregan, Colorado or any other river may offer the most direct & practicable water communication across this continent for the purposes of commerce." Jefferson knew there was a great westward flowing river that emptied its waters into the Pacific; he knew of its mouth but not of its headwaters. The same was true of the Missouri; he knew where it ended but not where it started. He had, however, an image of the dreamed of Northwest Passage, with one short portage, and the rest a grand highway for the commerce to come between east and west.[7]

---

[6] John Logan Allen, *Passage Through the Garden: Lewis and Clark and the Image of the American Northwest* (Urbana: University of Illinois Press, 1975), pp. xix-xx.

[7] *Ibid.*, p. xix. By their nature, historical documents often contain spellings of words different from spelling standards today. When quoting, I have kept the original spelling used by the author of the document.

The State has referred to Lewis in its summary judgment brief as Jefferson's "expert on navigability." In one sense, he was precisely that, but not in the way the State intended. Lewis and Clark accepted Jefferson's image "without modification." And, until they reached the mouth of what they called Portage Creek (now Belt Creek), they had no reason to modify it other than to give geographical precision to some of its hazier aspects. Above Portage Creek, however, their image of what western landscapes should be gave way to a much different reality. It was, as Allen puts it, the "exploratory genius" of Lewis and Clark that they were able to shed their preconceptions and "to differentiate between the geography as it had been imagined . . . and the geography as it actually was." And the geography as it actually was, was both awful and awesome. The Corps had reached the "impassable rapids and cascades" of the Great Falls of the Missouri.[8]

2. The Nightmare of Portage – 33 days around the Great Falls

There is a reason why this stretch of the river is always capitalized. Allen calls the Falls "one of the great landmarks of the West." At the time Lewis and Clark reached them in 1805, only Niagara of the world's great water falls had been discovered. "Discovering" the Great Falls was one of the signal achievements of the expedition and seeing them made an indelible impression. Clark recorded the site in a wonderfully accurate hand-drawn map (copy attached

---

[8] *State's Summary Judgment Brief*, p. 5; Allen, *Passage*, pp. 174, 280-82.

as Ex.G). He charted and listed fifteen different rapids and nine waterfalls, including the five named falls in this reach of the river. The highest of the five was the equivalent of a nine story building; navigating them was clearly impossible. It still is.[9]

And moving around them was no bargain. A third of the way into the portage Lewis admitted that "the season is now waisting a pace." Portaging the Great Falls was bound to delay the Corps' progress and Lewis was "extremely impatient . . . fully preswaded that we shall not reach Fort Mandan again this season if we even return from the ocean." This is an exceptionally important reference: clearly Lewis saw the expedition which he co-led as at most a one and a half year adventure; they would get to the coast and come back to Fort Mandan. The portage around the Great Falls, however, changed his mind–and his mood. The Passage, he was forced to admit was going to be "less easy than so many earlier generations had believed and hoped." Getting around the Falls would be "no easy half-mile carry," but "the most perilous and difficult part of our Voyage." It was assuredly that. It took the Corps thirty three days to make the eighteen mile carry from Portage Creek to the mouth of the Sun

---

[9] Allen, *Passage*, pp. 43-44. OTH 01680-1738 Gary Moulton (ed.) *The Journals of the Lewis & Clark Expedition*, 11 vols. (Lincoln: University of Nebraska Press, 1987), vol. 4, pp. 322-81, esp. pp. 353, 355. See also Paul Russell Cutright, *Lewis and Clark: Pioneering Naturalists* (Urbana: University of Illinois Press, 1969). The Clark Map is OTH01739.

(then Medicine) River on the other side of these Great Falls.[10]

3. The River Above the Falls – Lewis & Clark use "navigable" to mean a walkable trail through mountainous country, not a commercially navigable river.

By the time they reached the head waters of the Missouri at the Three Forks, Lewis and Clark knew that the Northwest Passage to India was chimerical. They ascended the largest and most westerly of the three forks, naming it the Jefferson, but it could never be said that they "navigated" it, any more than it could be said that they "navigated" the upper Missouri in the sense we mean today. Instead, the Expedition pushed, poled and towed their log canoes along the water, dealing with rocks and rapids as best they could. Lewis often took to walking in the uplands. He made a journal entry for July 16, 1805 having "pursued our route through a high rolling plain," about what may have been the Half-Breed rapids near present-day Hardy. Gary Moulton, editor of the best edition of the Journals observed Lewis may never have seen the Half-Breed rapids–what the Expedition called the Lone Pine Rapids. At best, he only looked down on them and did not go over them.[11] The task of "navigating" the Lone Pine rapids was left to Clark and the enlisted men.

---

[10] OTH01701, OTH01718, Moulton (ed.), *Journals*, vol. 4, p. 344; Allen, *Passage*, pp. 280-282.

[11] Moulton (ed.), *The Journals of Lewis and Clark*, Vol. 4, p. 287 (my emphasis).

On July 24, 1805, Lewis made an extremely important and revealing entry in his journal, writing that he fully expected to encounter other falls and rapids above the Great Falls. How could he not have? He was traveling along a large river that was coursing through a valley surrounded by high mountains. Surely, somewhere up stream that river would have to plummet from those mountains as it had earlier at the Great Falls. Sacagawea, however, the "Indian woman," as Lewis called her, told him that there were no impassable falls and Lewis was delighted to learn she was right, that the Missouri had carved deeply into the mountains, creating a gate through them. Travel alongside both the Missouri and the Jefferson, pulling canoes along, was slow and gradual, but it was possible. It was that which accounted for his reference to the rivers' "navigability." All he meant by that word was that his men would not have any more 33 day upland portages to deal with, and that the river could be followed without long upland walking bypasses.[12]

Lewis and Clark were "navigating" in small dugout canoes that were barely more than floating logs. These river vessels were made in a couple of hours; trees were felled, limbed, hollowed out, their bottoms flattened. Craft such as these could have "navigated"–as in pulled and cordelled–up any decent sized creek in Montana. As to what Lewis meant by "navigated," listen to these descriptions: "the men complain of being much fatiegued. their labour is excessively great. I occasionally encourage them by assisting in the labor of *navigating* the canoes and have learned to *push a tolerable good pole*. . . ." Lewis

---

[12] *Ibid.*, p. 422.

wrote "the current still so rapid that the men are in a continual state of their utmost exertion to get on, and they begin to weaken fast from the continual state of violent exertion." This is hardly a description of navigating up a river.[13]

Clark was no different. In describing what the expedition called the Philanthropy (Ruby) River, he wrote that "this river is 30 yds wide is navigable and heds in the Roky Mountains with Madison's River." Not even the State claims this small stream as "navigable" for title purposes.[14] Keep in mind, too, that Lewis and Clark were the commanding officers of this expedition. The "enlisted" men, as in every such enterprise, were the ones who became "much fatigued."[15] One of them, Joseph Whitehouse kept a separate journal and recorded some of his experiences above the Falls. He made repeated references similar to this entry from July 23, 1805: We ". . . found the current run very rapid. . . . the current still running very Rapid. . . .Our Men being very much fataigued." Two days later Whitehouse wrote that "We found several bad rockey Rapids . . . the Water was so shallow that the Rocks appeared above the Water almost across the River. We double manned our Canoes, and with difficulty, got over them by hard towing. . . . The men were very much fataigued towing. . . and some of them had their feet Cut in passing over the Rocks." Clearly, Whitehouse would

---

[13] *Ibid.*, vol. 4, pp. 423, 433. First emphasis mine; second in original.

[14] OTH 01808-09, State's Navigable River list.

[15] Moulton (ed.), OTH 01796, OTH01808-09, pp. 47, 59, 60.

not have said that the Corps of Discovery was navigating the rivers. It was walking up them, and it was a most demanding walk.[16]

Lewis's and Clark's comments regarding navigability must be interpreted in this proper historical context; they did not mean the word "navigability" the way we use the word now. When Lewis wrote that "I do not believe that the world can furnish an example of a river runing to the extent which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so *navigable* as they are," all he was saying was that he was surprised that the rivers provided passage as far into the mountains as they did. But it was passage by foot and by dragging hollowed out trees which passed as canoes. Those canoes could be towed up what were essentially pathways, little better than watery and somewhat wider game trails. Lewis was an explorer, not a tradesman. To use his words to suggest he was making a case for the *commercial* navigability of the Missouri above the Falls isn't just a strained use of his remarks; it is an ahistorical misreading of them.

4. The End of the Dream of a Northwest Passage – the Falls cannot Reasonably be Portaged, the Upper River is not commercially navigable.

What then can be said about the significance of Lewis's and Clark's voyage of discovery, their search for a passage through the garden? I am entirely

---

[16] *The Journal of Joseph Whitehouse*, May 14, 1804-April 2, 1806; Moulton (ed.), *Journals*, vol. 11, pp. 238, 240-41.

persuaded by John Logan Allen's conclusions. They are based on thorough research and thoughtful and informed analysis. More to the point, I know of no historian or geographer who has challenged them. There is, in fact, a remarkable agreement among historians that Allen's basic conclusion is entirely accurate. That conclusion deserves to be better known. Allen writes that "the size of the western cordillera dealt a *shattering blow to the ancient hopes for an easy passage from sea to sea through the western interior*." As for the rivers, "experience had proved to the American explorers that many of the rivers of the West were not navigable, and where Jefferson had believed in the navigability of streams all the way from their mouths to their sources in the core drainage area," their "observations had proven that the short portage did not exist." This, in fact, "was *the final denunciation of the Passage to India*. . . . an end to the centuries of search for the Northwest Passage." And finally, the "traditional adherence to the concept of the short portage did not survive. . . . the time-honored concept of the simple passage from the Missouri to the Columbia was dealt a fatal stroke."[17]

B. After Lewis and Clark: Bypasses, not Portages

1. Road Travel not River Travel.

As Allan puts it, Lewis and Clark had discovered a "break in navigation created by the Falls." Allan's is an important reference. It meant that for purposes of any commerce that might come, the Missouri would be two rivers, one, to Fort Benton, a comparatively

---

[17] Allen, *Passage*, pp. 286, 328, 330, 391. My emphasis.

straight river highway, the other a crooked, impassable barrier consisting of falls, rapids, cascades, and low water. Boats did not leave Fort Benton bound upstream; but tens of thousands of ox-, mule-, and horse-drawn wagons did. All roads, it was said, left from Fort Benton. Had the Missouri above Fort Benton been navigable, I have no doubt it would have been navigated. By the late 1860s, Montana's population was large enough and sufficiently diverse to require means of traverse from east to west. That Montanans did not make use of the upper Missouri for navigation speaks volumes.[18]

The Army Corps of Engineers did not have to be dispatched to prove that the Missouri above Fort Benton was not a highway–or even an arduous pathway of commerce. In fact, Congress did not commission an investigation of the upper Missouri River until nearly eighty years after Lewis and Clark had returned home. The issue for the engineers was not to study the Missouri River above the Falls, but to conduct a surveillance of the easiest way to get around both them and the sections of the river above them. One of the intriguing aspects of this historical case study is that all of those roads leading from Fort Benton were not bound for Great Falls or Stubbs' Ferry (just east of Helena) or Townsend or Three Forks. None of the roads out of Benton led back to the river. Had they, I suppose it would be possible to refer to a portage, though a very long and arduous one. A portage, however, whatever its length, would have accomplished nothing. First of all, getting to Great Falls (the townsite) was not easy, as Lewis and Clark

---

[18] *Ibid.*, p. 279.

would willingly have attested. Second, and more to the point, unloading cargo at Fort Benton and reloading at Great Falls left only fifty miles of what might be barely navigable waterway–the Long Pool. Above the pool, the rock-strewn, rapids-filled river was not even barely navigable, which is why there were *no wagon roads back to the river at all.*[19]

The Army Corps of Engineers understood this unhappy fact perfectly. In its 1878 report the Corps noted regarding shipments to Montana that ". . . about one-fourth are to Benton and the remainder *to Helena via Benton.* Helena, the principal distributive depot, is about 140 miles from Benton, the transportation between the two places being by means of wagon trains." Helena, needless to say, is not a port city on the Missouri. This bypassing of the river was true not just because of the Falls; it was not just the Falls that had to be skirted but the entire river from Fort Benton to Helena. Nor was there any reason to return to the river at Helena and head upstream to Three Forks. Rather, cargoes were forwarded from Helena by road or, later, railroad to points west. Montana had an enormous need for transportation facilities. The Missouri River, however, could not meet that need.

---

[19] See David Billington and Donald Jackson, *Big Dams of the New Deal Era: A Confluence of Engineering and Politics* (Norman: University of Oklahoma Press, 2006), p. 204. The Mullan Road ran from Fort Benton to Walla Walla, Washington through Helena, Missoula and points west. The Whoop-Up Trail ran from Fort Benton to Canada. Another road ran from Fort Benton to St. Paul, Minnesota. One easily accessible source regarding roads from Fort Benton is the National Historic Landmark website maintained by the U.S. Bureau of Land Management; *www.blm.gov./ldo/um/docs/ftbenton.htm.*

Portaging the Falls was, first of all, extremely difficult, and, second, availed nothing. There remain two historical certainties: If the upper Missouri had been suitable for use, it would have been used. It wasn't and it wasn't.[20]

2. The Mullan Road – the Army builds a 600-mile bypass of the Great Falls and Upper Missouri, connecting "the heads of navigation" on the Missouri and Columbia Rivers; Fort Benton, Montana to Walla Walla, Washington.

One of Montana's singular misfortunes was that the Missouri River above Fort Benton was a hindrance rather than an aid to transportation. Ferries were built up and down the upper river (e.g., Stubbs Ferry, Gibson's Ferry) to cross it. The issue, then, was not how best to use the river, or even how best to portage the Great Falls that marked it. The issue was how best to avoid it entirely. And here the Army's engineers were of great service. In 1858 Captain John Mullan was sent to explore a route for a wagon road from the head of navigation on the Missouri to the head of navigation on the Columbia. The wagon road was to "attain the *minimum land transit*; to "solve the special problem of connecting by a continuous practicable wagon road line . . . ." the highways of commerce that much of the Missouri and Columbia could properly be called. The connection to which Mullan referred was with the head of navigation on

---

[20] I122550015, U.S. Department of War, "Extract from Report of the Chief Engineer, 1878," in *Report of the Chief of Engineers*, U.S. Army, House Ex. Doc. 1, Part 2, 50th Cong., 1st sess. 1887.

the Columbia at Wallula near Fort Walla Walla in Washington, but the Montana section of his road was built to enable freight to move by wagon train to Helena and over the Mullan Pass to Missoula and points west.[21]

Had the dreamers been right, had the Missouri (or the Columbia) been navigable to, or even close to, their headwaters, this would have been a relatively short road–perhaps 60 miles from the Missouri just east of Helena to the Clark Fork of the Columbia near present Garrison Junction. Instead the Mullan Road ran for *624 miles*. According to his own reports, Mullan did not even investigate any "short portage." He did not even look to follow Lewis and Clark and improve their 18 mile trail around the Falls, then use the river to get to Helena and the 60 mile road over the Continental Divide to the Clark Fork of the Columbia. He did not terminate his road on the Clark Fork either; it was no more navigable than the upper Missouri. Rather, he proceeded eastward from Fort Walla Walla, referring to it as the *"head of navigation"* on the Columbia, to Fort Benton, which he identified as the *"head of navigation"* on the Missouri.[22]

As noted, the Mullan Road, completed in 1866, was more than 600 tortuous miles long. That, I would contend, was not a portage by any meaningful historical definition of the word. A portage is a means

---

[21] Mullan to Topographical Bureau, Feb. 14, 1863 in *Report on the Construction of a Military Road from Fort Walla Walla to Fort Benton* (Washington, D.C.: GPO, 1863), p. 3.

[22] *Ibid.* His road, it should be noted, ran to the *north* of the Missouri over the last 80 some miles to Fort Benton.

to get back *to* a river; the Mullan Road was a means of *bypassing* a river. And this was no easy bypass. As Norman Holter, son of the Helena lumber baron for whom the Holter dam would later be named, testified in the FPC matter, from his own experience of meeting wagons on the Mullan Road, "the road was pretty rough over the Bird Tail Divide and Sullivan's Hill." In muddy weather the relatively short trip from Benton to Helena could be extremely slow. The Mullan Road was no bargain; it was simply a way of dealing with an intractable fact of life: the Falls and most of the Missouri above them were – as Lewis and Clark discovered – a genuine break in navigation. *That never changed.*[23]

Portaging the Falls could not heal that breach; nothing could. Most true portages are not very long and, though inconvenient, easily enough accomplished. In the case of the Missouri, however, cargoes were taken out at Carroll or Fort Benton, loaded onto wagons and brought by road to Helena, from where they were taken via the Mullan Road to points west. Other than to cross the river at Stubbs Ferry, those cargoes were never returned to the Missouri for the simple reason that the Missouri was not navigable above Great Falls; returning them to the river would have made no sense because it would not have been useful. Historically, this renders meaningless any quarrel over the legal definition of what constitutes a portage. *There were no commercial portages on the Missouri.*

---

[23] Holter, FPC testimony, MDH001828.

3. The Carroll Cutoff – The Army contemplates improving a road from Carroll to Helena to bypass the Falls and the "fierce rapids" of the River above the Falls.

Two years after the completion of the Mullan Road, the February 27, 1868 edition of the *Daily Herald* of Helena carried an interesting story that extends the significance of both Lewis and Clark's discovery of the non-navigability of the Missouri and John Mullan's tacit acknowledgment of that non-navigability. That issue contained an unsigned story about what was known as the "Carroll Cutoff," a rough and undeveloped wagon road from Carroll, Montana, a small village on the Missouri river 175 miles *downstream* from Fort Benton, to a point on the Missouri just east of Helena. The *Herald* notes that the Missouri was navigated–and navigable–to Carroll well into September and October while Fort Benton could not usually be reached after early July. Obviously, making Carroll the western terminus of the Missouri would extend the trade season and vastly improve the Territory's access to outside markets. The story went on to relate that using an overland route from Carroll to Helena (Stubbs Ferry) had the obvious benefit of dodging the "fierce rapids intervening between that point (Helena) and Benton." The *Herald* editor was here referring to the Half-Breed and other rapids on the river above Cascade. Had he meant the Great Falls, he would have said the "Great Falls."

"Fierce rapids," it seems needless to add, are not the same as "great falls."[24]

Montanans were becoming used to the idea that "all roads lead from Fort Benton." The *Herald* wanted to change that to "all roads lead from Carroll." The important point here, however, is the same one I made regarding the Mullan Road. The editor of the *Herald* was not advocating an improved "portage road." He was not referring to a portage at all. He seems to have understood that the upper Missouri River was not and could not become a highway of commerce. At issue was not whether the river could be navigated above Fort Benton; it could not. Somehow, somewhere, roads were needed to connect with Helena. Such a road, whether originating in Carroll and headed south–the Carroll Cutoff–or in Fort Benton and headed north–the Mullan Road–would be the "highway of commerce." The Missouri River would continue to run unnavigated and scarcely used between the two highways.[25]

The editor of the *Herald* was also convinced that the "Government is likewise alive to the importance of

---

[24] *Helena Weekly Herald*, Feb. 27, 1868. Between 1859 when the first steamer arrived at Fort Benton to 1872, the latest arriving boat reached the city on September 6. The usual closing date was in late June. See Thomas P. Roberts, *Report of a Reconnaissance of the Missouri River in 1872* (Washington, D.C.: Government Printing Office, 1875), pp. 28-32. A more complete list running from 1859 to 1889 can be found in "Contributions to the Historical Society of Montana", I160300368-82, vol. I in *Joint Appendix*, Exhibit 32a and 32b, pp. 1420-34.

[25] *Helena Weekly Herald*, Feb. 27, 1868.

opening up and protecting the most practicable route to the interior of her rich fields of wealth in Montana. . . ." Nothing could be shipped "down the river," whether from Helena or Great Falls. If Montana's riches were to make their way to market it would have to be by road and, though the good citizens of Fort Benton might not like it, the best road went to Carroll. The *Herald's* reference to an interested government was not fanciful, and lends some credence to this otherwise dismissible piece of boosterism. In 1875, seven years after the newspaper's story, the U.S. War Department conducted a "Reconnaissance from Carroll, Montana Territory on the Upper Missouri River, to the Yellowstone National Park." The reconnaissance was led by Captain William Ludlow of the United States Army and his final report contained some interesting and important observations. Ludlow noted that "Carroll is a frontier 'town'. . . 165 miles below Fort Benton, *the limit of navigation on the Upper Missouri.*"[26]

Ludlow also noted that if the Carroll Cutoff were to be used, "a large savings can be made by the Government in the cost of transporting its troops and supplies. . . ." Montana was still a frontier territory and near to Canada where, at this time, border disputes were a real possibility. Likewise, by now, the importance of Montana's "treasures" was becoming recognized, but they were "treasures" only if they could be brought to markets. Obviously, if the Missouri

---

[26] *Ibid.* Also see, *Report of a Reconnaissance from Carroll, Montana Territory . . . to the Yellowstone National Park and Return Made in the Summer of 1875* by William Ludlow, U.S. Army (Washington, D.C.: Government Printing Office, 1876), p. 12. (My emphasis.)

above the Falls had been able to be navigated, Montana would not, in the language of the *Herald's* editor, have "wanted for an outlet for its production," and the Army would not have been looking for another way to move its troops west, and no one would have had to build a road any longer than was sufficient to bring goods around the Falls.[27]

C. Other Dreams of Commercial Navigation on the River above the Falls.

No one who ever looked at the Falls seriously contemplated navigating the Great Falls reach of the river. Dreams of making commercial use of the river above the Falls did not evaporate so easily.

1. Thomas Roberts (1872) an NP Railroad engineer hopes to "improve" the river above the Falls and build a railroad around the Falls. This never happens.

Ludlow, with his focus on roads was a realist. Thomas Roberts was not. In 1872, three years before Ludlow took the field, Roberts, an assistant engineer for the Northern Pacific Railroad, floated a skiff down the Missouri in order to conduct what he called a reconnaissance of the "Upper Missouri River from the Three Forks to Fort Benton." Those who would argue today that the Upper River is navigable try to make much of Roberts. They should not. Roberts concluded that the upper Missouri was "navigable," or could be easily made such, but it is difficult to know with any historical precision what Roberts meant. The report of

---

[27] *Helena Weekly Herald*, Feb. 27, 1868.

his investigations is a scant 14 pages long. One of the Army engineers who later consulted Roberts's Report, Lieutenant (later Captain). Edward Maguire, noted tellingly that "I have at present only Mr. Roberts's report to depend upon, and should prefer to have more data at my command. . . ." Maguire even criticized Roberts for changing the name of Lone Pine Rapids, the name given them by Lewis and Clark, to Half-Breed Rapids, noting that by whatever name it was "a very dangerous place."[28]

In his report, Roberts made comments regarding what he hoped would be future navigation. Above the Falls, Roberts described: "Upper Mosquito Rapids. Water very swift in these rapids. . . Boats will have to cordelle here." His passing skiff than reached Lower Mosquito Rapids and Roberts concluded that ". . . these rapids are serious obstructions to navigation for steamers." Then came "Goose Rapids," "Curlew Rapids", "Bull Rapids," "Montana Rapids," "Slough Rapids," "Wall Rapids," "Sweeny Rapids," "Ferry Rapids," "Fork Rapids," and finally what he called "Half-Breed Rapids, . . , the most serious rapid we have seen. . . .worse than any of these mentioned. . . ." But once the river was "improved" (Roberts was frustratingly vague about how) he did not "think" the Half Breed Rapids "will result in more than a delay of steamers while cordeling"–in other words, dragged up

---

[28] BX0501899-20, *Report of the Chief of Engineers*, House Exec. Doc. 1, pt. 2 vol. II, 44th Congress 1st Session, 1875, pp. 517-18; BX050248 U.S. Army Corp of Engineers, *Annual Report*, House Exec. Doc. 1, pt. 2, vol. II, 46th Cong. 2nd sess, 1879, p. 1096; BX050262 U.S. Army Corps of Engineers, *Annual Report for 1880*, vol. II, part 2 (Washington, D.C.: Government Printing Office, 1880), p. 1474.

the river using the simple physics of driving poles in the ground along the shore line and setting up a rope and pulley system–not, I would argue, the customary mode of navigating steamboats. Even Roberts would have agreed: The "boats" (again left undefined as to size and means of propulsion) on the "Upper Missouri will, at all times, *even with the numerous improvements that could be suggested,* have to be of small size and navigated with great caution."[29]

At the mouth of the Sun River, Roberts began to survey "for a narrow-gauge railroad along river-bank." Had it ever been built, it would have been more than twenty miles long. That would have been a portage, but it was never built for the simple but compelling reason that it would have returned cargoes to an unnavigable river. Add to this Roberts's admission that steamboats, by 1872 the "customary mode" of moving commerce by water, would encounter "serious obstructions," and Roberts offers next to nothing useful on actual navigability. No one took Roberts seriously enough to act on his railroad plans for what might be called a "short portage" of the Falls.[30]

I return to a point made earlier: There were no overland commercial portages on the Missouri River. A portage–and that is what Roberts was advocating–would have meant that cargoes bound upstream would have been unloaded at Fort Benton and reloaded on other vessels at Great Falls, from there to continue up the Missouri to what Roberts

---

[29] *Ibid.*, Roberts, pp. 44, 55 (my emphasis).

[30] *Ibid.*, pp. 48-49.

hoped would be an intersection with the Northern Pacific Railroad–for which he worked. The roads out of Fort Benton would have been replaced by one narrow gauge railroad destined for Great Falls. This plan, however, could have worked only if the Missouri above Great Falls could be navigated. No one, it seems, was willing to gamble that it could, which is strong and historically valid evidence that it could not. Cargoes were still unladed at Fort Benton; roads still left from there, but the roads ran to Helena over difficult upland passes to continue their *overland* journey on the roads that left from there. All of which, for an historian at least, makes Roberts' "reconnaissance" an interesting boat ride in a skiff but nothing more.

2. The Montana Navigation Company (1878)–a private company spends thousands in the late 1870s "improving" the river above the Falls for navigation, finally abandoning the project.

Gold was struck in the area of what would become Helena in 1864. Even at this early date, these new "Montanans" were hoping to make commercial use of the upper Missouri. The *Chippewa*, the first steamboat to reach Fort Benton, had made its historic voyage several years before. In December 1864, the Territorial legislature granted corporate status to the upper Missouri River Steamboat Navigation Company giving it "the power and authority and the exclusive right to open and *remove all obstructions, and make navigable* that part or parts of the upper Missouri River, from the Falls on said river above Fort Benton to the Three Forks on said river, or what is known as Gallatin City." Nothing ever came of this, but the hope

was real, as was the recognition that human intercession was needed for any chance "to make navigable" the naturally unnavigable.[31]

A gold rush followed the initial strike in Helena and other Montana locations, and by the 1870s Helena was bustling but still physically isolated. Two new companies incorporated, and then consolidated into one – the Montana Navigation Company – in 1878. This time real money was put into a further recognition that the upper river in its ordinary condition was not useful for commercial navigation. Hoping to solve the area's transportation problem by making the upper Missouri navigable, that same year the company hired out work on some of the worst rapids on the river above the Falls – men apparently removed rock, dug trenches, blasted boulders, and built wing dams. One colorful newspaper report described these efforts as using "giant powder in reducing the boulders under water to small pieces," and a corporate resolution stated that the company "expended several thousand dollars in the *improvement" of the river. For whatever these reports* are worth, a few years later the Army Corps of Engineers would make note of these improvement efforts. As all others to follow would do, the Montana Navigation Company seems to have left its improvements to the ravages of the river. Nevertheless, because of the improvements made, after this point, the river above the Falls–where its most difficult rapids were found–could no longer be

---

[31] *Acts, Resolutions and Memorials of the Territory of Montana*, Dec. 12, 1864. MDH 022922-23 (my emphasis).

said to be in its natural condition, albeit still not navigable.[32]

3. Samuel Barker (1916) – Mining Engineer Barker travels down the Upper River in a small metal craft to assess its navigable potential. He finds the river "remarkably tortuous" and utterly unfit for commercial navigation.

In 1916, there was another engineering reconnaissance of the Missouri above the Falls. A private engineer, Samuel Barker, was hired by the Montana Power Company as part of the Company's preliminary planning for what became the Holter dam. Barker, a Mining Engineer from Butte, began his examination in April during high but manageable water; he went from Hauser Lake to Cascade in an 18 foot steel boat; his report, accompanied by photographs

---

[32] MDH022922, MDH022258, *The Helena Weekly Herald*, Feb. 2, 1882; MDH022916, *The Helena Daily Herald*, Dec. 10, 1878, MDH022301, *The Daily Independent: Helena*, Oct. 3, 1878; MDH022192, Articles of Incorporation of the Montana Steam Navigation Company, MDH022403, Articles of Incorporation of the Montana Navigation Company, MDH018231; the work by the Montana Navigation Company was mentioned in an 1881 Appendix to a Corps report filed by Captain Edward Maguire regarding Corps work on the Bear Tooth Rapids/Bear's Teeth Shoal that occurred in 1990: "The Montana Navigation Company had undertaken to improve the shoal. They closed the upper chute with a stone dam, and built about 150 feet of a dam to close the lower chute." By 1880, this dam had not been maintained but "had a large break in it, made by the ice." 47th Congress, House Exec. Doc. 1, Part 2, *Report of the Secretary of War*, Vol. II, part 2, Appendix T; p. 1671 (Washington, D.C.: Government Printing Office, 1882).

and maps, amply confirmed what the Army Corps of Engineers–as detailed below–had been saying for years. The stretch of river above Half-Breed Rapids was tough enough to navigate. Barker described "vertical canyon walls," "swift" flowing and muddied waters, frequent rapids, extremely high winds, which, "if navigation should be attempted, would be a dangerous element" given the "remarkably tortuous" course of the river.[33]

Then his crew reached the area of the Half Breed Rapids. Barker concurred with every previous assessment of this obstacle; these "constitute[d] the worst section of the river. . . . They are two and one-half times as long as the Beartooth rapids, and present a far more dangerous situation because of rocks, islands, shoals and a widening crooked channel of extremely swift water. The boat had to be unloaded and lowered down stream. . . ." And that was before he reached the "lower portion of these rapids" which were the "worst because of the large rocks across the entire channel. The passage of the river is made more dangerous also for the reason that there are quick changes in direction along the line of the greatest water channel. . . ." His photographs of this section confirm his written description, as did his slope figure of "18.9 feet per mile."[34]

Barker's slope figures at Half Breed proved that "the river for a half-mile" was "practically an

---

[33] I1910008 William Barker, "*Examination of Missouri River from Hauser Lake to Cascade with Respect to Navigation*," Sept. 6, 1916, p. 8.

[34] *Ibid.*, pp. 9, 11.

uncontrollable torrential force, rushing swiftly down a small channel strewn with immense rocks." His conclusions were directly to the point: ". . . the navigability of the Missouri River from Hauser Lake to Cascade is not practicable and almost impossible. . . ." There were "no commercial or other uses to which it can be put. . . ." It ran through a "tortuous rock bound canyon. . . . constant dredging would have to be done to keep the channel clear. . . . because of the numerous rocks and rapids an immense amount of work would be necessary to clear. . . obstructions. . . . Therefore, from every standpoint, navigation would be attended by so many difficulties that such is not feasible or practicable." Decades later, in testimony in the FPC case, Barker was equally plainspoken. When asked if it "would be difficult for a boat carrying either freight or passengers to go up or down that section of the Missouri [he had] examined," Barker replied, "It would be more than difficult. *It never could be done.*"[35]

D. The Army Corps of Engineers – The Great Falls Reach is unnavigable and cannot be improved; attempts to "improve" the river above the Falls to make it navigable, all fail.

The Army Corps of Engineers is the federal agency that long has had the care of rivers in its hands. As the name suggests, it is mostly staffed with engineers who surveyed rivers and carried out engineering projects to improve their navigable capacities. The Corps' engineers have a long, and historically quite

---

[35] *Ibid.*, p. 11. MDH002675, "Testimony, FPC," p. 1859. My emphasis.

relevant, history with the Upper Missouri. I address some of that history below.

1. **Lt. Maguire (1880)–blasts out boulders, digs channels and builds wing dams on the Upper River, changing its natural condition. It is still not navigable.**

Lieutenant (later Captain) Edward Maguire surveyed the Upper River in 1879. That survey, and constant exhortations by prominent Montanans and the Territorial legislature, led Congress in June 1880 to appropriate $25,000 for improvements on the upper Missouri, "work [to] begin at once on Half Breed rapids ... ." By September 1880, men under Lt. Maguire's command would use dynamite, trenching and the constructions of wing dams, to try and improve the upper river for navigation. During his survey, Maguire used the Roberts report, but he did not come to the same conclusion that Roberts had about the navigability of the upper river. In fact, on one occasion Maguire found the Missouri below Fort Benton, "almost literally paved with boulders," . . . noting then that he had been "led to believe, from the Robert's report, that there were but few boulders scattered here and there through the channel."[36]

---

[36] "Missouri River Study," p. 17. U.S. Army, Corps of Engineers, *Annual Report for 1877*, Part I, p. 521. The combined approximately $30,000 expended by the Montana Navigation Company and the U.S. Government in 1878 and 1880 to improve the Bear Tooth and Half Breed Rapids was not an inconsiderable sum. Using a CPI calculator, $30,000 in 1880 is over half a million in 2005 dollars. The CPI calculator I used is found at www.measuringworth.com. This site explains that CPI calculators often dramatically understate the differences between

Instead, a year later Maguire and his crew found it necessary to use dynamite to blow up the boulders Roberts said were not there. Following in the footsteps of the Montana Navigation Company, Lt. Maguire's men not only blew up boulders, they constructed more wing dams and dug more channels. Detailed notebooks kept by Assistant Engineer Wood and Foreman Batsan regarding work on the Stubbs Ferry to Cascade reach, show that up to 17 men worked for nearly three months on the Bear Tooth and Half Breed (aka Lone Pine) Rapids. Such entries as, "[b]lasting outside rocks on upper reef. Big rock, with three foot hole charged four times before it went off. Too big a rock for one hole," give a clear picture of just how impassable these rocks and rapids made the upper river. The natural condition of this reach, of course, was dramatically altered by this government work. It still did not, however, make the reach a highway of commerce, as discussed below.[37]

In his 1879 survey, Maguire had stated, as Lewis and Clark had over sixty years earlier, that the Great Falls "separat[ed] the river into . . . two natural divisions, 'Missouri River above the Falls' and 'Missouri River proper.'" The Missouri River "proper" commenced at Fort Benton and Maguire emphasized

---

dollar amounts over long time spans. Another comparison the site suggests – the unskilled wage rate – puts the 2005 value of the $30,000 spent on improvements at over $4 million.

[37] MDH018231, *Report of the Secretary of War*, Appendix T, 1881; MDH013725-28, Sanford, *Annual Report*, 1898; MDH022919, *The Helena Daily Herald*, July 11, 1882; MDH022761-22781 Wood, *Journal*, 1880; MDH022783-22802, Batsan, *Journal*, 1880, MDH022773, Wood, *Journal*, 1880.

that "all through freight carried on the river above the falls would have to be portaged from Benton to Sun River, a distance of 45 miles, or from the foot of the falls to Sun River, a distance of 25 miles." In either case, "there would have to be two rehandlings of freight . . . and thus a great expense incurred." The shorter portage, moreover, was very unlikely; "the great slope" from Fort Benton to the foot of the falls "would render navigation difficult"–a considerable understatement. What Maguire was clearly implying was that the river above Fort Benton was a separate body of water, sufficiently so to require a different name. To my knowledge, previous to Maguire, the term "Upper Missouri" most often was used to mean that section above either Sioux City or the mouth of the Yellowstone. Maguire's point, after his "extensive survey," was that the Falls created an entirely distinct and disconnected river.[38]

As to navigation on this new Upper Missouri, in 1879 Maguire was ambivalent at best. The "customary mode" of navigation was by steamboat and, as he pointedly said, "No steamboat has ever been on this portion . . ," meaning obviously the Upper Missouri as he had defined it. He was impressed with the navigable potential of the Long Pool–though he did not call it that. The Long Pool–a 54 mile stretch below Cascade–presented "no obstacles to easy and rapid navigation. . . . there [was] sufficient water for light draught boats", *i.e.*, steamers able to use a three foot deep channel or less. This turned out to be not quite correct; the Long Pool, too, required expensive

---

[38] U.S. Army, *Report of the Chief of Engineers*, House Exec. Doc. 1, part 2, vol. II, 48th Cong., 1st Sess., 1883, p. 1342, MDH018245.

improvement work to open a channel of sufficient depth. In any event, above the Pool conditions were far different. Near "Gibson's Ferry, . . . the slope and current are very great. . . ." There were "fifteen places at which the depth at low water is less than 2.5 feet, and twenty-eight places at which the depth is less than 3 feet. . . . No improvements have been estimated for those places."[39]

Then came Maguire's final, prescient judgment on the Upper Missouri: "I do not believe the river above the falls will every be navigated by steamboats, except perhaps. . . one or two small pleasure boats. . . for the benefit of tourists," on very short stretches of the upper river. The improvements made by Maguire's men in 1880, although extensive, did not change this. Despite the high hopes of all the dreamers, boats did not begin to carry commerce on the upper river. In fact, by 1882, even some of the dreamers were losing hope, acknowledging "the upper river in worse condition than we had been led to suppose from former explorations and our knowledge that some work had been accomplished by the government engineers," and recognizing that "a lock should be constructed" at the Half Breed rapids if the upper river were ever to be made navigable. Like Roberts' proposed railroad around the Falls, this too never happened.[40]

---

[39] *Ibid.*, pp. 1339, 1342, MDH018248, MDH018245.

[40] MDH013725-27, Sanford, *Annual Report*, 1898.

2. 1880-1896, Other Army Engineers – more improvements; no navigation

a. Between Fort Benton and Great Falls–no navigation on the Great Falls reach; river seriously obstructed.

In 1885, six years after Maguire's survey, five years after the government-funded improvements to the upper river, the Missouri River Commission reported that the "obstacle" to navigation presented by the Falls, "completely and permanently cuts off the extreme upper portion of the river from all open channel connection with the lower." This, of course, seconded Maguire's opinion. In 1891 the Corps Report contained the following language: "The river above Fort Benton, the head of navigation, to the foot of the falls is seriously obstructed by numerous rapids and rocks. This part of the river is the tailing out of the Great Falls. No work has been done upon it and none is proposed." As to the stretch above the foot of the Falls, the Corps had no comment–and no reason to comment. It was totally unnavigable.[41]

The next year, 1892, three years after Montana entered the Union, the Army Corps stated that "from Great Falls to Fort Benton the Missouri River is so much obstructed and has so steep a slope that no improvement for the purposes of navigation seems practicable and none has ever been attempted." In 1895 the report noted that between the Great Falls and Fort Benton. . . the channel is unnavigable, being

---

[41] *Report of the Chief of Engineers*, 1885, p. 2994; *Ibid.*, 1891, p. 275.

obstructed by rocks and having a very steep slope. No effort has ever been made to improve it and none is contemplated." In 1896 the Corps was even more specific: "Between Great Falls and Fort Benton . . . the river is unnavigable, having three sheer falls of 90, 50 and 26 feet. The river is very rapid between the different falls. . . ." These reports, all written at or very near the time of Montana's admission to the Union, are like a drumbeat. Year after year the Corps said the same things: the Great Falls Reach was not navigable and could not be made navigable.[42]

b. The River Above the Falls – the Corps abandons improvement efforts.

In 1885, the Missouri River Commission, a kind of branch of the Army Corps of Engineers, stated as follows: "It is held by the Commission that the appropriations [for river improvements] are intended as a business investment made by the Government with the object with which any other capitalist enters upon a great enterprise, *viz,* a return of the capital together with interest; that the primary object of the improvement is to deepen the channel and thus to provide cheap *through* transportation for freight. . . ." The emphasis on "through" was in the original. It was the Army Corps' consistent position that the Great Falls prevented any through navigation. For purposes of navigation the "upper Missouri," as Maguire had called it, was tributary to and separate from what he

---

[42] *Ibid.,* 1892, p. 2299; *Ibid.,* 1895, p. 301; *Ibid.,* 1896, p. 260.

had called the "Missouri River proper."[43] And that Missouri was not navigable like the more "proper" river.

The Army would continue to carry out "intermittent work" aimed at "improvement of critical passages of the river above the Falls." After Maguire's blasting and construction efforts in 1880, the Army continued some efforts at improving navigation. As late as 1894 obstructions were still being removed from the upper river in the Long Pool. These improvements, while mostly ineffective, plainly improved the river for the navigation that would be attempted. They were, however, the end of any serious attempts by the Corps to make the upper river commercially navigable.[44]

3. 1896 – The Secretary of War grants leave to build the Black Eagle Dam – Captain Sanford's report concludes the Great Falls reach can never be made navigable.

The first of the Missouri hydroelectric facilities—The Black Eagle dam– was built in 1891. The president of the Townsite Company that constructed it wrote to the Secretary of War in 1896 asking if his company should have formal permission to maintain the dam. The Secretary of War responded by sending him a copy of a "report of the local U.S. Engineer Officer. . . ." The officer, Captain J.C. Sanford, got straight to the point: the "portion of the

---

[43] BX050331 Missouri River Commission Report in *Annual Report of the Secretary of War*, 1885, (Washington D.C. GPO, 1885), vol. II, p. 2992.

[44] MDH013725-27.

river" where the Black Eagle dam had been built, could never, in his judgment, "be made navigable at a cost that the demands of commerce will ever justify. While the dam is in a stream which in the greater portion of its length is a 'navigable stream'"–a reference to the river below Fort Benton and a point not in dispute–"it is situated in a portion of this stream which is not now navigable and which in all probability never will be. For these reasons it appears to me that the permit referred to is unnecessary." The issue of permits would not arise again until after the law on federal regulatory navigability changed dramatically with passage of the Federal Power Act.[45]

4. 1915: Army Corps Report – The Missouri is Two Rivers. Above Fort Benton no further improvements are contemplated.

In 1915 the Corps of Engineers offered up its most detailed analysis yet of the Missouri River and its potential use as a highway of commerce. In its Annual Report of that year, the Chief of Engineers summarized all that had been learned to that date. Among other items of interest in this report was the statement that, by the terms of the River and Harbors Act of June 25, 1910, the Missouri was "divided. . . into two sections, *viz*, Kansas City to mouth and Kansas City to Fort Benton." I note with emphasis that *there was no reference to the river–or even a river–above Fort Benton.*[46]

---

[45] I13550003 Daniel Lamont to Samuel Hill, Nov. 2, 1896; I13550004 J.C. Sanford, *Report*, Oct. 24, 1896.

[46] *Annual Report of the Chief of Engineers*, 1915, p. 1892.

The chief explained why, in language that the Army Corps had been using for more than two decades: "As far as navigation is concerned the headwaters of the Missouri are completely and *permanently separated from the river below.*" That reference was to the 49 miles from Fort Benton to Great Falls, but the Corps was scarcely more optimistic in discussing the river above Great Falls; I would point specifically to the Chief's quite matter-of-fact statement that not a dime had been appropriated for improving the river above the Falls since 1896; throwing money at hopeless causes made no sense.[47]

5. 1935: 500-plus Page Army *Report on the Missouri* – the report ends at Fort Benton and makes no mention of the Upper River.

By 1935, this understanding of the two Missouri Rivers was set in stone. I found it interesting and instructive that when the Chief of Engineers and the Secretary of War issued a massive (500+pages and hundreds of maps, charts, and illustrations) *Report on the Missouri River* in that year, the table of contents under the heading of "Navigation" read as follows: 1. "Kansas City to Mouth;" 2. "Kansas City to Sioux City;" 3. "Mouth of Yellowstone to Sioux City;" and, 4. "Mouth of Yellowstone to Fort Benton." Conspicuous by its absence was *any* reference to *any* navigation of *any* part of the river above Fort Benton. The reason for that absence was quite simple: the river was not

---

[47] *Ibid.*, p. 1897.

navigable above Fort Benton and, therefore, the Department and the Corps had nothing to talk about.[48]

6. 1940s Engineers Tyler, Elliott and Kramer – a proposal to make the upper river navigable is "ridiculous" and "harebrained"

The final contingent of Army corps engineers whom I want to discuss were those called by Montana Power in its 1940s legal dispute with the FPC, already mentioned. But before I bring them to center stage, a couple of general comments would be in order. By this time, the Federal Power Act had been interpreted very broadly by the U.S. Supreme Court in The Appalachian Power case.[49] Thus, each of the engineers about to be discussed was dealing with navigability for purposes of establishing regulatory authority, which means that each was applying the most permissive definition of navigability, not the much harder to meet "title navigability" test I understand to be at issue here. Technically, I suppose that makes their comments irrelevant. Historically, however, it makes them indispensable: The three make an incontrovertible case that not only was the Missouri above Fort Benton non navigable, *it could not be improved and rendered navigable*, at least not at a cost that made any sense.

---

[48] *The Missouri River*, House Doc. 238; 73rd Cong., 2nd sess., 1934, pp. vi-viii, MDH015817-818.

[49] MDH008618, *U.S. v. Appalachian Electric Power Company*, 311 U.S. 377, 61 S. Ct. 291 U.S. 1940 (December 16, 1940).

General Max Tyler had once been the chief engineer for the Federal Power Commission. Tyler had been involved in what he referred to as a "preliminary plan" to "determine whether a [more complete] survey" of the navigable potential of an improved Missouri River was "warranted." This preliminary plan involved a nine foot deep channel, along with the dams and locks necessary to lift boats. Tyler was not impressed with the idea of improving the river, including the upper river, for navigation. To summarize his most relevant remarks: Making the Missouri navigable from the Falls to the Three Forks would cost $488,000,000. That's 488 million dollars, not counting interest, yearly maintenance costs or the inevitable cost overruns which he estimated at about 30 percent. Using a CPI calculator, that is $6.8 billion in today's dollars. Tyler's final verdict on the "preliminary plan" was that the improvements could be done but he wanted it understood that "I think . . . this whole thing is a fantastic thing. I think it is fantastic. . . . the basic assumption that you can make such an improvement, I think, is entirely untenable. . . . It is a *fantastic proposal.*"[50]

Next up was Colonel Malcolm Elliott. He was asked whether the Missouri could carry or had ever carried "ordinary river commerce." His answer was unequivocal. "I have found no evidence of commerce between the States above Fort Benton at any time." In

---

[50] "Testimony, FPC", MDH1385, p. 1300; MDH001284-93, pp. 1204-1213; MDH1312, p. 1231; MDH1316, p. 1235; MDH1328, p. 1247; MDH1387-88, pp. 1302-03. My emphasis. I again used the CPI calculator at www.measuringworth.com. Using the unskilled wage comparison, Colonel Elliott's $488 million to make the upper Missouri navigable is $14 billion in 2005 dollars.

other words, what came up the Missouri to Fort Benton from states to the east, went out on all those roads from Fort Benton, not back on the river. And no commercial goods came down the river from above the Falls to travel further down the river to North Dakota and points east. His explanation went to the heart of the matter: "The Missouri River," said Elliott, "naturally divides itself into separate sections . . . influencing methods of treatment for developing a navigable waterway." There were ten such sections . . . . , "the sixth and seventh . . . comprise the reach between Fort Benton and Great Falls which the annual reports of the Chief of Engineers have so frequently described as non-navigable and not susceptible of improvement. I know of no instance anywhere where obstructions to navigation so formidable as in this section of river have been overcome." When asked "Is there any one word which you believe could be used to describe your opinion of any program to the development of navigation of the Missouri River from Sioux City to Three Forks?" Elliott responded, "Ridiculous." On the central question of legal definitions, Elliot's position was strikingly like that of most historians: "in my opinion, it does not require an expert to believe that court decisions cannot make facts out of falsities." That's my opinion too.[51]

General Hans Kramer was last up. Kramer's estimate of "the ultimate construction costs" of the

---

[51] "Testimony, FPC", MDH1543, p. 1455. Quotes from MDH1544, p. 1456; MDH1550, p. 1462; MDH1557-58, pp. 1469-70; MDH1560-61, pp. 1472-73.MDH1611, p. 1523; MDH1640, p. 1549; MDH1668, p. 1577; MDH1687, p. 1596.

entire proposed improvement project was in the amount of "one and a half billion dollars, a figure, incidentally, which is nearly three times the capital cost of the Panama Canal." He then returned to the guiding principle of socially responsible applied science: "I would consider the expenditure of public funds for such an improvement to be grossly unjustified." *No law could or should negate that* principle. "I regard the question . . . to be one of common sense judgment of physical facts. . . . it being my philosophy that sound legal concepts cannot be based on fiction but must be consistent with the facts of life. On the basis of that philosophy a waterway to be navigable in a legal sense must certainly be navigable as an actual fact." Any plan to make the upper Missouri navigable was *"preposterous . . . unrealistic. . . entirely beyond the realm of justification* . . . and, for final good measure *"'harebrained."*[52]

7. 1974: An Army Lawyer versus its Engineers – fictional "history."

So far as the engineers in the Army Corps were concerned, that was where the matter ended. There was, however, a historically meaningless 1974 "determination" by a lawyer in the Department of the Army, one E. Manning Seltzer, which requires some attention. The date stamped on the document was October 25, 1974 and, though the evidence is admittedly circumstantial, historians are used to

---

[52] "Testimony, FPC", MDH1705-06, pp. 1614-15; MDH 1709, p. 1618; MDH1727, p. 1636; MDH1731-32, pp. 1640-41; MDH1711-12, pp. 1620-21. My emphasis.

working with circumstances; they are the basis of most historical investigations.[53]

Let me look briefly at the circumstances likely in play here. On August 12, 1974, just two months previous to Seltzer's memorandum, the Heritage Resource Center forwarded its "Missouri River Navigation Study" to the Omaha District of the Corps of Engineers. I have referred earlier to this study; it is one of the River Reports on which the State relies. It is also so seriously flawed as a historical document as to be worthless, a topic which I addressed in my Affidavit. The study was written under contract to the Corps of Engineers; its purpose was to prove that the Missouri in Montana was and is navigable. The study was faithful to its contract, if not to the historical record. Among other flaws, it uses two hopelessly untrustworthy sources: Frederick Goddard's 1869 gazette, *Where to Emigrate and Why*, and H.H. Bancroft's historical compilations, to make its argument that miners and trappers used the river at all. I commented on Bancroft's unreliability in my Affidavit, and will have more to say on him later in this report. Goddard was an equally untrustworthy source. He was one of a number of gazetteers who toured the West, usually at the urging of the land office of a railroad or the Republican Party. These gazetteers wrote glowingly--though seldom accurately--of the future of America's grand Western Empire. They reveal, as few other sources can, the

---

[53] SJ00274 U.S. Army, Chief of Engineers, "Determination of Navigability, Missouri River above Fort Benton, Montana," memorandum of E. Manning Seltzer, Oct. 25, 1974.

wild flights of fancy that were so conspicuous a part of the scripting of America's westward expansion.[54]

Seltzer had the same free and easy way with the truth as the most inveterate of Western boosters. In a remarkable passage, he wrote in his memorandum that *"Several steamboats traversed sections of the river between Great Falls and Fort Benton carrying textiles, produce and passengers."* The River Study said nothing about these miraculous steamboats; Seltzer himself offered no evidence to support his statement. Seltzer's comment was either a complete fabrication or a misunderstanding of staggering proportions. First, his "several steamboats" were going downstream and hence plunging *over* the Falls. Coming upstream and breaching the Falls was impossible; going downstream and over them was suicidal. Second, unless buffalo hides are to be counted, Montana produced no "textiles" that might have been taken to Great Falls to be shipped down the Missouri.[55]

In other words, Seltzer's historical "facts" were based on an inaccurate secondary account, which itself was based on notoriously untrustworthy sources. He

---

[54] Goddard, *Where to Emigrate* (Philadelphia: People Pub. Co., 1869). I have dealt extensively with these gazetteers. See Emmons, *Garden in the Grasslands: The Boomer Literature of the Central Plains* (Lincoln: University of Nebraska Press, 1969) and "The Influence of Ideology on Changing Environmental Images: The Case of Six Gazetteers," in Brian Blouet and Merlin Lawson (eds.) *Images of the Plains: The Role of Human Nature in Settlement* (Lincoln: University of Nebraska Press, 1975), pp. 125-36.

[55] Seltzer memorandum, SJ00274. My emphasis.

then embellished the story by inventing one of his own–steamboats laden with textiles, produce, and passengers making their way over the Great Falls of the Missouri. Still not finished, Seltzer then "hereby determine[d] that the Upper Missouri River between Fort Benton. . . and Three Forks. . . is a navigable water of the United States for the purposes of the exercise of regulatory jurisdiction of the Corps of Engineers." There is a certain imperious quality to Seltzer's "determination," based as it was on a historical invention. He did get one thing correct, though. He notes that "improvements to navigation" were carried out on the upper river before whatever navigation he relies upon occurred (if it did at all), thus rendering his determination useless for a study of navigability for title purposes.[56]

Seltzer's memorandum proves only that there were bureaucrats in Washington D.C. who knew absolutely nothing about what they were talking about. No one interested in the historical truth can take Seltzer's "determination" seriously. It is the Corp's engineers who deserve the attention of historians. While the idea of steamboats somehow traversing the Great Falls has a certain attraction, the historical, hydrological and engineering record cannot be escaped.[57]

---

[56] *Ibid.*

[57] *Ibid.* I think it is extremely doubtful that the engineers looked closely enough at Seltzer's recommendation to have noticed the absurdity of it.

E. The FPC Case Against the Montana Power Company – different navigability tests, different results; a historical "history."

I need at this point to make a prefatory remark. Proving a negative is impossible. No historian can prove that no boats ever made their way up and down the Missouri–or any other river. There were no river watchers who recorded that "no boats came by today" and then carefully stored their records for later archiving and study. What historians can do is investigate what was said to have happened and then offer an interpretation of what in fact *probably* happened. That involves an understanding of historical context, a determination to avoid being anachronistic, and an appreciation of the fact that some sources are better and more trustworthy than others. It also involves the use of simple common sense. These are among the more obvious of the rules of the historians' craft.[58]

In this case, as I said above, my task was made considerably easier by the prodigious labors of those who researched the historical record in the 1940s as part of the legal tangle between the Montana Power Company and the Federal Power Commission. I have read every page (some 2,000 of them) of the appeal and trial transcripts in that matter. I came away absolutely convinced that the FPC was far more interested in the consequences of MPC's operations on interstate navigation *below* Fort Benton than on the

---

[58] As explained in my previous Affidavit, I taught a course entitled "the Historian's Craft" for more than two decades at the University of Montana.

purported historical navigability *above* it. I say that in part because the FPC called only one expert witness in its effort to prove historic navigability in the upper stretches and his actual testimony takes up less than 20 pages. The interstate issue, however, was entrusted to engineers who counted every gallon of water stored behind and released from MPC dams and then calculated the effect of that stored and released water on navigation below the last of those dams–which is to say, below Fort Benton. That testimony covered more than 200 pages.[59]

It is true that the Trial Examiner ruled in favor of the FPC, deciding that the Missouri was navigable for federal regulatory authority; it is also true that the judges in the power company's appeal of the examiner's ruling came to the same conclusion. Willard Gatchell, however, the lead attorney for the FPC, was uncommonly candid in admitting that navigability above Fort Benton was not an important part of his case. During Montana Power's appeal of the FPC insistence that it secure licenses, Gatchell told the trial examiner that

> When we come to the evidence on navigation, I think the Trial Examiner will be surprised to find that we are going to put in everything that

---

[59] The expert was Professor Paul Phillips, a historian at Montana State University (now University of Montana.) His testimony is from "Testimony, FPC," pp. 197-236, MDH002343-82. Most of the time when Phillips was on the stand was taken up with legal wrangling among the attorneys for both sides. The FPC's principal engineer was Ralph Coomes whose testimony from the same source is on pp. 369-82, 410-14, 427-512, MDH002508-21, MDH000474-78, MDH000491-575.

> we have been able to dig up relating to the use of the upper Missouri River above Great Falls for the transportation of persons and property, whether that is favorable to a finding of navigability or against it. And we are doing that because we felt the Commission should have everything that is available. And the reason some of the statements may appear to look to a non-navigable finding is that the conditions are peculiar to this River, but we are giving everything we can.

Essentially, Gatchell was saying that he didn't care if he could prove navigability or not, that he "would attempt to show that even if the seven Missouri River plants [of MPC] are not in navigable waters . . . , they nevertheless affect navigable capacity below Fort Benton. . . ." Navigability above Fort Benton was not exactly incidental to his case, but neither was it central to it.[60]

The Federal Power Act of 1920, the legislation upon which Gatchell based his case, was based on a standard for navigability much easier to meet than the test for title at issue here. That test, I understand, looks not to time of statehood, natural condition, or even actual use, but to potential use. One senator who supported passage of the Act bluntly stated: "We simply say that for the purposes of this Act–that is, for the purpose of applying for permits to build dams. . . –certain waters shall be considered navigable." The

---

[60] Gatchell's comment is from MDH002252 "Testimony, FPC," p. 111. See also MDH003159 *Respondent's Reply Brief to Main Brief of Staff Counsel*, July 10, 1947, p. 4.

FPC *claimed* the Missouri was navigable for its entire length; it did not *prove* historical, commercial navigability for the simple but compelling reasons that it didn't need to and didn't really try to.[61]

In my considered and careful opinion, the decision for licensing has no historical significance as evidence of anything regarding the commercial navigability (as opposed to regulatory navigability) of the Missouri River above Fort Benton at statehood. The decision proves nothing about the actual history of navigation. One need only look to what I am told is the final legal decision, to see why. The District of Columbia Circuit court properly conceded that "the Great Falls themselves have never been navigated." But then it listed what it called "substantial evidence" of "several steamboats" making it to the foot of the Falls, and of gold miners who "in considerable numbers traveled downstream with the aid of a portage or 'land carriage' around the Falls." Neither is evidence of commerce at all, much less "substantial" evidence.[62]

The statement regarding steamers at the foot of the Falls is from evidence presented at the hearing by historian Paul Phillips based on a book by H.M. Chittenden; that about miners in Mackinaw boats from H.H. Bancroft. A Corps Engineer himself, Chittenden is a fairly reliable source. In his book he discussed the steamer *Peter Belen* that purportedly took some passengers on a sightseeing trip close to the

---

[61] *Congressional Record*, 59th Congress, pp. 6537, 7729 in MDH003167, *Respondent's Reply Brief*, p. 12.

[62] MDH002119 and 2120, U.S. Court of Appeals for D.C. Circuit. *MPC v. FPC*, Oct. 4, 1950, pp. 2 and 3.

foot of the Falls some time in the late 1860s. Chittenden added in a footnote that two other boats "were reported" to have done the same, but his sources for these "trips" were even more uncertain and anecdotal at best. Back to the *Peter Belen*, Chittenden does not suggest that this stunt trip (if it occurred at all) proved anything about the navigability of the steep, rocky, rapids-laden miles between the foot of the Falls and Fort Benton. To the contrary, the hearings officer and the court needed to read further. What Chittenden actually said regarding the *Peter Belen* was this: "The feat was accomplished during the June flood and would have been impossible at ordinary stages. *Fort Benton has always been considered the head of navigation on the Missouri River.*"[63]

That brings us to Hubert Howe Bancroft and his "considerable number" of floating gold miners. Historians owe a great deal to H.H. Bancroft. He founded the Bancroft Library at the University of California, Berkeley, and his collected documents still make up a considerable percentage of the holdings of that remarkable depository. Bancroft the historian, however, did not write anything that even approaches historical works generally considered authentic and reliable. Instead, he collected documents. Those for California can be very useful. That cannot be said for other states, including Montana, where all Bancroft did was have assistants peruse unreliable newspapers and gazettes. The historian's profession has come a long way since a compiler like Bancroft could be given the title of historian. Indeed, the profession has come

---

[63] Hiram M. Chittenden, *History of Early Steamboat Navigation on the Missouri River* (1903 Minneapolis, 1962), p. 220.

a long way in the half-century since Professor Phillips apparently felt comfortable relying on Bancroft's Montana sources in the FPC case. No reputable historian today would use Bancroft as a sole source on an important factual point of Montana history. The premiere historian of California history, USC's Professor Kevin Starr, dismisses any reliance on Bancroft, of whom he says: "as a historian, [he] was often ludicrous and sometimes dishonest." For Montana, even stronger language is required; Bancroft is not a reliable source.[64]

In any event, the decision in the FPC/MPC dispute cannot be taken as serious history, particularly on the purported floating gold miners. Why would miners who had likely spent a year in the dirty work of gold mining trust their precious cargo to a treacherous stretch of river that had never been safely traveled before? The apparent source behind Bancroft is a puff piece in an 1866 *Helena Gazette*. That article told of "two to three thousand people" floating on the upper river in Mackinaws and making a "six mile" portage around the Falls. Of course, a six mile portage would have left those poor passengers in the middle of the Falls, and dead by drowning. This account is entirely unbelievable. Two to three thousand people? In 1866 Montana? If anything like this had actually happened, it would be reported in source after reliable source, including the Army Corps reports. I am certain it did

---

[64] Kevin Starr, *Americans and the California Dream*, 1850 - 1915 (New York: Oxford University Press, 1973), pp. 117-118. Also, Charles S. Peterson, "Speaking for the Past," in *The Oxford History of the American West*, ed. Clyde A. Milner II, Carol A. O'Connor and Martha A. Sandweiss (New York: Oxford University Press, 1994), pp. 743-69.

not happen. The casual acceptance of newspaper predications and advertisements as fact is a hallmark of Bancroft's works, which can no longer accurately be called "histories." One looking for actual history must look elsewhere than Bancroft and the 1940s FPC decision.[65]

F. "Navigating" the Missouri - Customary modes of trade and travel were not used in commerce on the upper river.

I reviewed carefully the record of what were referred to in the FPC matter, offhandedly, as "stunt trips" and pleasure boating. Of course, none of that occurred on the Great Falls reach–stunts are one thing, suicide quite another. There is evidence in the historical record of short trips on small stretches above the Great Falls reach, but the terms "occasional" and "sporadic" fit them well, and in any event, these pleasure trips and picnic outings were not made for commercial purposes, and occurred on a mere six-mile long section in the Gates of the Mountain, or in a small part of the Long Pool.[66] Likewise, as explained in detail above, the evidence for any non-steam powered navigation is equally lacking. I have already discussed Lewis and Clark; they do not help the case for commercial navigability. Nor do the mythical miners in Mackinaw boats. That brings me, then, to the *Fern* and the *Rose of Helena*, the only two steamers that

---

[65] 1866 *Helena Gazette* Article; SJ00229, Missouri River Study, p. 13.

[66] Testimony, FPC, MDH000472-73.

ever made their way to Great Falls from above Cascade.

The first thing to consider is that both these small steamers made these trips after Maguire and others blew hundreds of cubic yards of boulders from the river above the Falls, and built wing dams and dug trenches to create channel depths that did not exist in the river before these improvements. Thus, no steamer–or any vessel bigger than a canoe or skiff of which I am aware–ever traversed the Stubbs Ferry to Cascade reach of the river in its unimproved natural state. Given the great difficulties the *Fern* and the *Rose* encountered, it is my opinion that neither could have made the trips they did on the river as nature made it. That is the real, telling, story of the *Fern* and the *Rose*.

1. The Fern–40 days of tribulations and terror.

In 1886, Dr. A.L. Davison of Townsend financed the construction of a steamer, the *Fern*, variously estimated at 75 to 88 feet long. Davison set the *Fern* on its sole voyage to Great Falls in the early Autumn of 1887. It was quite a trip. Carrying neither freight nor passengers, the *Fern* was barely afloat past Townsend when it struck a large slab which created a gaping hole in its hull. It sank in four feet of water. The crew quickly patched the damaged hull and refloated the boat, which then suffered a broken wheel, further delaying its passage.[67]

---

[67] The trip to Great Falls was covered in I12390068, 70-72 *Great Falls Semi-Weekly Tribune*, Oct. 8, 26, Nov. 9, 1887, pp. 63, 65-67; I12390069 *Townsend Tranchant*, Oct. 12, 1887, p. 64. See also

It took the *Fern* 17 days to negotiate (navigate just does not fit the circumstances here) the 34 miles between Townsend and Canyon Ferry. More than three weeks later, the badly battered *Fern* reached Great Falls; the entire trip of 172 miles took 40 days–averaging just over four miles a day – and this for the downstream run. It could easily have been walked in ten days. This lengthy trip was excitement enough for Davison; from this point forward the *Fern* was kept on a very short mooring rope. It never again traveled above Cascade, its owners unwilling to challenge the rapids above the Long Pool. As Davison's son (after whom the *Fern* was named) put it in 1923, "though staunchily built and skillfully maneuvered, the Fern was no match for the treacherous Missouri. The stream's penchant for changing its course in a night quickly dispelled the dream of a steam connecting link between Great Falls and the railroad."[68]

2. The Rose of Helena–never again; happy to be home.

The *Fern's* sole competitor for control of the recreational use of any portion of the Upper Missouri was the *Rose of Helena*, a small boat owned and

---

MDH003019 "Oral Arguments," Washington, D.C., Feb. 16, 1949, p. 2195.

[68] For the *Fern's* later career, see I12390088 *Great Falls Semi-Weekly Tribune*, June 29, 1889, p. 83 and MDH003019-20 "Oral Arguments," pp. 2195-96. Davison's son, Fern, related his story in the *Helena Daily Independent*, Sept. 9, 1923. Like all reminiscences, this one has to be used with caution, but Fern Davison was an eye witness and his comments unmediated.

operated by Nicholas Hilger whose ranch was near the Gates of the Mountains below Helena. From 1886 to 1904, the *Rose* ran picnic parties through the Gates, a trip of between six and seven miles. On two occasions, the *Rose* went down the upper river below the Bear Tooth Rapids, seven miles below the Hilger Ranch. One of those trips was a memorable day in 1887, when the *Rose* ventured below the Half Breed Rapids, fifty some miles below the Hilger ranch, and all the way to Great Falls. On the downstream run, Hilger planted "snubbing posts" and carefully ran the rapids with their help. The return trip was harrowing – it took two hours to pass the Half Breed Rapids – six days for the entire trip. "Judge Hilger," reported the *Great Falls Tribune*, "takes great pride in the Rose. 'She will go almost anywhere,' he says."[69]

The key word in this piece of boosterism is "almost." In fact, Hilger and his *Rose* would *never again* attempt the Half Breed Rapids. It would take another five or six years, in 1892 or 1893, before Hilger and his son would again attempt to run even the Bear Tooth Rapids in the *Rose*; this time in some of the highest water ever recorded, and only to Craig – just below the Bear Tooth rapids but well above the Half Breed Rapids. The son's testimony in the MPC/FPC affair regarding the Craig trip is worth repeating: "That was high water when we went down. We was going toward that rapids, and, say, anybody that never seen that stream [at] high water can't realize what it was like." What it was like, in Hilger's words, was the

---

[69] MDH000766-775 "Testimony, FPC," pp. 697, 698, 706, 713, 707. MDH003185 "Respondent's Brief," p. 30; I12390059 May 14, 1887 in BX12 0039, Exhibit 21, p. 54.

"high seas," as they attempted their return from Craig. "We would have got home [too] except for the Bear Tooth Rapids." They came on the Bear Tooth section--a considerably less difficult area than the Half Breed--and knew immediately that "any man who has any judgment at all would have known better than to . . . run those rapids in the condition it was. . . . We couldn't have handled the boat. We would have went straight into that rock, with the waves rolling 20 or 30 feet." The Hilgers waited *two weeks* at the Bear Tooth Rapids before they could get off the bank where they had landed--or been deposited--and ascend the rapids and return home.[70]

They never went down the Missouri past the Bear Tooth Rapids again. As for Great Falls, the *Rose* "had no business going there," Hilger explained, . . . "There was no call for freight . . . we didn't do anything with the boat but run passengers, and there was no inducement to get us to run to Great Falls." But, asked one of MPC's lawyers, did not the passengers "demand . . . a trip to Great Falls and back?" Hilger's answer was quick and to the point: "I should say not." Interestingly, one of those passengers was the engineer Samuel Barker who, on the 4th of July, 1896, took the *Rose* to Picnic Gulch. Barker noted in his FPC testimony that "Mr. Hilger was asked why he did not go farther and he said the Beartooth Rapids were impassable." This was twenty years before Barker made his own investigation of the Upper Missouri. He

---

[70] MDH000779, "Testimony, FPC," p. 709.

added in his testimony that "I proved that very fact when I made my examination in 1916."[71]

The *Fern* and the *Rose* loom large in the efforts to prove the navigability of the Missouri River between the Helena area and Great Falls. They have to; they are all the advocates of navigability have: two small boats which between them made three extremely hazardous trips over the rapids above the Falls, after expensive and extensive improvements had been made to those rapids. And only the *Rose* made it back *upstream* to port, and it to stay. Perspective is an important part of historical analysis. And so I offer, by way of providing that perspective, the fact that between 1859 and 1889 there were 441 steamboat landings at Fort Benton. Some of these steamers made the trip from and to various eastern cities scores of times. They carried many thousands of tons of trade goods and tens of thousands of passengers. Whole city blocks of Fort Benton were packed high with finished items about to be loaded on ox and horse drawn wagons for the trip into Montana's interior or with raw materials to be loaded on east bound steamers. *That* is historical evidence for navigability.[72]

The same cannot be said of the two little boats, the *Fern* and the *Rose*. In the first place, using the two occasions between them when they made it to Great Falls, and the *Rose's* trip back, while ignoring the

---

[71] Barker from MDH002691-92, "Testimony, FPC," pp. 1875-76; Hilger from 00780-784 *Ibid.*, pp. 710-14.

[72] I160300368-89, "Joint Appendix," Exhibit 32-a and b "Contributions to the Historical Society of Montana", vol. I, pp. 1419-34. Handcount.

circumstances of the voyages and the fact that they were never repeated by either boat – or by any other – is unpersuasive and illogical. One "successful" trip followed by one complete failure and no further efforts seems to prove the exact opposite. This is particularly so since the river they traveled on had been greatly improved from its natural state. Add to that these facts: Neither the *Fern* nor the *Rose* ever carried any freight. Except for the trips discussed above, the *Rose* ran only from below Helena to the Gates of the Mountains; the *Fern* limited its excursions to the Long Pool with its owners unwilling even to attempt a trip back home by water. Both were henceforth used exclusively for dance parties, picnics, sight seeing; and what we would now call keggers. Neither crossed county lines, not to mention state lines. They do not provide evidence of anything other than Montanans' unending search for a good time. As a historian, I do not consider these short, recreational jaunts to be evidence of commerce at all. Nor do I consider the two arduous trips to Great Falls (and only one return, both without carrying any goods), evidence that the upper river was or could be used as a highway of useful commerce at statehood. Indeed, they prove the opposite.[73]

---

[73] The "keggers" were called "beer gardens;" see MDH000473, "Testimony, FPC", p. 409. For other accounts of the pleasure boat careers of the two, see, e.g. I12390088 *Great Falls Semi-Weekly Tribune*, June 29, 1889; "Joint Appendix, Exhibit 21, p. 83 and MDH000472 "Testimony, FPC," p. 408.

G. Logs and Lumber – occasional, ineffective and at high water.

This leaves one flimsy piece of historical evidence for navigability: the logs and milled timber rafts floated down (obviously, never up) the Missouri. For historians, putting logs into a river is not commerce; it does not make the river a highway anymore than rolling or skidding the logs down a hill makes the hill a highway. There was a fascinating note in a Fort Benton newspaper of 1887 to the effect that high water had brought hundreds of trees downed in every variety of way to the area, and that enterprising and daring young men could make between $25.00 and $50.00 a day by swimming out and somehow dragging them to shore. Would anyone contend that this was evidence that the river, because it carried trees that had commercial value, was thus a highway for the delivery of those trees?[74]

However, since I was asked to investigate whether and where log floats occurred, I did so. What I found was that single logs were floated mostly on the Long Pool. I found no credible evidence of log floats of any distance occurring above Cascade. To a historian, this evidence is of no import since at most these "floats" were short and occasional drives. And obviously, logs were never floated on the Great Falls reach except by accident. Such accidents did occur, as logs escaped from the booms–which established a kind of river "holding pen" where logs cut elsewhere were rolled into the river to cool and soften before they were pulled out again for debarking and milling. One report

---

[74] I12390063, *The Great Falls Tribune*, June 8, 1887.

characterized such logs that were not caught by the boom as "on their way to New Orleans." That is not commerce.[75]

There is one other issue. In 1884 the Holter Lumber Company of Great Falls built a raft of milled lumber, loaded the raft with wagons, men, and horses, and set it to float on the Missouri from the company's mill on Stickney Creek to its lumber yard some 70 miles down the river near Great Falls. There the raft was to be taken apart and the lumber moved by the wagons to the yard. Unfortunately, the men lost control of the raft above the Great Falls; men and horses barely escaped with their lives as the raft went over the first of the Falls and the lumber from which it was made was destroyed. It is not clear how many of these rafts were ever used. Norman Holter testified in the FPC matter that they could only be used "in high water," and, as the lost raft would indicate, it was a tough and dangerous activity. The "high water" requirement makes good sense. While Stickney Creek is below the Bear Tooth rapids, it is above Half Breed. In my opinion, lumber rafts would have floundered on the rapids and rocks in anything but high water, and I also believe such rafts could not have passed the rapids at all if the boulders blown up by Maguire and other had still been in the river. In any event, the lost Holter raft may have brought a sudden end to this very seasonal, ineffective and dangerous practice. As far as I am aware, there were no subsequent attempts by the Holters or anyone else to float lumber rafts to Great Falls, and I am aware of no credible evidence

---

[75] I12390094-95, *The Great Falls Semi-Weekly Tribune*, Aug. 9, 1890.

which shows that this was anything but a sporadic and ineffective practice.[76]

In my opinion, these few instances of high water, daredevil stunts are also not competent evidence to show that the upper river was ever a highway of useful commerce, even in its post-1880 improved condition. I take some comfort in this assertion from the State's quotation in its Milk River brief of the words of the U.S. Supreme Court: "the mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river." As a historian, I completely agree.[77]

H. Missouri Conclusions – No historic navigation on the Great Falls reach. No commercial navigation between Stubbs Ferry and Cascade. All uses on the Upper River were sporadic, ineffective and on an "improved" river.

When reduced to its essentials, the case for the navigability of the Missouri above Fort Benton is based on a mistaken reading of what Lewis and Clark meant when they used the words "navigable," and "navigate." This initial error is followed by an unwarranted reliance on stories that show little more than that water flows down hill in Montana and swiftly in the Spring. The year by year reports of engineers, including those in the Army Corps, provide

---

[76] MDH001834 "Testimony, FPC," p. 1738-9.

[77] DRU00014, *Drugge v. State of Montana*, State's Memorandum; p. 4.

the most compelling historical evidence. They establish the fact that the entire river above Fort Benton, not just the area of the Great Falls, was useless for the movement of goods. Finally, for this historian, the concept of navigability, if it is to make any sense at all, has to involve actual, commercial navigation, and there wasn't any or even the potential for any. The upper Missouri was not suited to serve as a watery roadway; in the language of Fern Davison, after whom the *Fern* was named, it had a higher calling. Without meaning to suggest that Fern Davison spoke ultimate historical truths–assuming that such even exist–he is worth quoting on this issue because of his intimate knowledge of what can and cannot be done on the river his father tried to navigate.

His father "knew that his venture had failed. . . . The Fern in her struggle with the . . . Missouri had demonstrated for all time the fallacy of attempting to navigate the stream with vessels of her tonnage." But that failure "was of lasting benefit to the budding state! The Fern's lack of success as an up-river packet furnished with an unanswerable argument the men who later sought permission to throw power dams across the stream. It proved that no amount of dredging would ever fit the upper channel for steamboat navigation and that the western Missouri could be made to serve mankind only by harnessing it to the wheels of industry." I would argue that Lewis and Clark–though obviously they had no idea of hydroelectric power–had proved the same point. It would, however, be churlish to deny Fern Davison the historical salience of his point. Like Lewis and Clark, his father had dared bravely. The Missouri River above Fort Benton simply could not be made to serve

as a highway of useful commerce. The Missouri River is one of Montana's treasures. To steal from Hemingway, it is truly a big two-hearted river – or, and more accurately – *two* big two-hearted rivers. The upper of the two, however, was never a navigable one.[78]

VIII. THE MADISON RIVER–THE 100 MILE RIFFLE

There's a fond place in my heart for the Madison River. It's a lovely, lively trout stream that locals often refer to as "the 100 Mile riffle." What it is not is a navigable river. I will discuss the historical record for navigation on the Madison first by reaches, and then as a whole.[79]

A. <u>The Wyoming Border to the West Fork – no evidence of any navigation.</u>

The Madison starts in the high country of Yellowstone Park. It is a small stream until it reaches the confluence with its West Fork. In this uppermost stretch, it is a mountain stream of incomparable beauty. Quake Lake, an odd and misshaped body of water created by the 1959 earthquake, is located on this stretch as is Hebgen Lake, the huge reservoir which began to impound the Madison's waters in 1912. Historically, however–at least for purposes of commercial navigation–it is a nonentity. There is

---

[78] Davison's comment from *The Helena Daily Independent*, Sept. 9, 1923.

[79] "Montana Afloat, Madison Floater's Map": The Madison River from Quake Lake to Three Forks.

nothing in the historical record to show that anyone ever tried to use it to move goods in commerce. The State has offered nothing. I checked every part of the extant historical record and found nothing. The authors of the River Study reviewed the relevant newspapers and found nothing. It was not navigated.[80]

B. Varney to Three Forks–no evidence of any navigation.

The history of the reach on which the Madison hydroelectric facility near Ennis is located, the Varney to Three Forks stretch, is equally easy to summarize. Again, there is nothing in the historical record to show any commercial activity of any sort on this part of the Madison. Having looked at old maps, that makes perfect sense to me. This part of the river is so "braided" as to resemble multiple rivers. The braids were there at statehood, they are there still today. This reach is simply not navigable.

---

[80] For detailed information on when the Hebgen facility was begun, when, by how much, and how rapidly the water behind it began to collect, see I14320002 F.W. Bird, *Montana Reservoir & Irrigation Company History of Hebgen Reservoir*, typescript, Jan. 10, 1916. *See also* OTH02689, *Jeffers v. Montana Power Company*, 1923, p. 128. SJ00174, "Madison River Study", p. 5. I have used this last named source only for uncontested facts. I reject its conclusion that the Madison from its headwaters to its mouth is navigable.

C. West Fork to Varney – a single, ineffective log drive, not on the river in its natural condition.

That leaves the middle section, between the West Fork and Varney. No dams are located on this reach; even had it been navigated, that would not matter for purposes of this report. Nevertheless, to tell the story of the Madison as a whole, I did review the record of this reach as well. Here the historical record does document a single instance of a 1913 log drive by the Madison River Lumber Company. There are no dams on this section. The Hebgen dam, however, upstream from the West Fork, was central to this log float, and that does present a very minor historical issue. I say very minor because there was only the one float, and a single instance of anything is synonymous with "sporadic." That one drive, moreover, was–and I understate significantly–nothing if not "ineffective." It took two months to complete the 55 mile long drive to the mill at Varney; scores of logs were "beached" and stacked up on the banks of the river; some were not recovered for two years. As for the Madison River Lumber Company, it went broke and folded up its operations in 1916.[81]

There is also the insurmountable problem that this effort to move logs on the river occurred in 1913, long after statehood and immediately after the river had been substantially altered by the construction of the Hebgen dam and filling of its large reservoir. Indeed, it seems obvious to me that Hebgen was the reason that a log drive could even commence. Put directly,

---

[81] *Ibid.*, SJ00173-179 and attached documents.

the timing of the dam and the timing of the log drive were not only not coincidental but the impounded waters behind the Hebgen dam were all that made the drive possible, and the Madison River Lumber Company knew this and scheduled its project to coincide with the reservoir's filling. In 1932 the Army Corps of Engineers reported that during low water–and the Madison drive did not begin until late July–the Hebgen Reservoir "increase[d] the natural flow by from 1,000 to 3,000 second-feet. . ."[82]

It has been suggested that the Hebgen and Ennis dams *prevented* subsequent log drives. That argument turns the historical record on its head; the Hebgen reservoir made the drive as possible as it was. That suggestion, moreover, begs an important historical question. Why, if the Madison could be used for that purpose, were there no log drives prior to the construction of the dams? The resource was in place as was the market. In fact, there had been a market for logs and milled timber in this part of Montana for at least 40 years before the Madison River Lumber Company decided to begin operations. Why had no one attempted to tap that existing market? I think the answer is simple: because the Madison could not even be used to float logs prior to the construction of the Hebgen dam. Unfortunately for the lumber company, in 1914 the power company that controlled the Hebgen dam apparently chose not to release its impounded waters to be used for another log drive. There is a sizeable difference between that and the argument that the dam impounding the water prevented a log

---

[82] OTH 00891, *U.S. Secretary of War Report ... on The Jefferson, Madison and Gallatin Rivers*, (Washington: GPO, 1932), p. 6.

drive, that there would have been more and larger drives had not those pesky dams been in the way.[83]

That one log drive is all that has been uncovered about the use of the Madison for "navigation." During the FPC dispute, both sides agreed that the Madison had never been navigated and was not navigable. Lewis and Clark said nothing about its potential as a highway of useful commerce for the simple reason that they did not ascend it. Fur trappers and traders certainly were active in the area through which the Madison flowed, but there is no evidence that they used its waters as a means of transporting either furs or themselves. There are references in the1974 Madison River Study to commercial fishing guides on the river, but that purported "commercial" use of the river began many decades after Montana entered the Union and long after the dams had altered the Madison's natural condition to one more susceptible to navigation.[84]

D. <u>The Army Corps of Engineers – there has never been any navigation on the Madison.</u>

That leaves me with the Army Corps of Engineers as a principal source. I'm comfortable with that–as I think any historian would be. The Corps' engineers

---

[83] For an account of the power company's reported refusal to release water, see SJ00168 *Madison River Report* and attached documents.

[84] *Ibid. See also* Affidavit of Stanley Schumm. It is my opinion that downstream floating in small craft for recreational fishing – even if paid for – would not, in any event, turn an otherwise non-navigable river into a highway for useful commerce.

studied and reported on the navigable potential of rivers. What follows is some of what they said about the Madison in their 1932 report. Foremost among their findings was that the fall rate of the Madison was extremely rapid "due to the steep fall and narrowness of the canyon and valley sections of the Madison River. . . ." "The main stream. . . flow[s] . . . through deep canyons. . . . The slopes . . . are very steep. . . ." "From the vicinity of the Hebgen Dam, and downstream for 8 miles, the river flows through a deep and narrow gorge about 500 feet deep." Based on my own admittedly rough calculations, the fall rate of the Madison was about 29 feet per mile in its upper canyon section, where the Hebgen reservoir is located. That is almost six times faster than Thomas Roberts thought was navigable–and Roberts was nothing if not sanguine about the possibilities of navigating western rivers. In the lower canyon the fall is 16 feet per mile.[85]

The Corps' conclusions followed from these fall rates and from other relevant data: the Madison and the other two forks of the Missouri, the Jefferson and the Gallatin "flow generally in deep canyons and narrow mountain valleys. . . ." Combine that with the braided nature of the river and the swiftness of its current and the conclusion was absolutely predictable: "*There never has been any navigation on these rivers and their improvement for this purpose is impracticable.*" "As far as is known there has never been any navigation on these streams, and commercial

---

[85] OTH 00917, p. 58, *U.S. Secretary of War Report ... on the Jefferson, Madison and Gallatin Rivers*, (Washington GPO, 1932); OTH 00895, p15.

navigation on them is *entirely out of the question.*" And finally, "Commercial navigation is out of the question on these streams." "There is no navigation in the Three Forks Basin, nor any prospects of any." That last comment has relevance to the question of the navigability of the Missouri as well. Note, too, that the Corps said nothing about the dams on the Madison having anything to do with the fact that the river was not navigable. Nor–and this less than twenty years after the event–did they say a word about the Madison River Lumber Company and its historically meaningless log drive. The Corps' position was that the Madison was not navigable; that is still its position, and mine.[86]

IX. THE CLARK FORK RIVER, "BY WHATEVER NAME CALLED"

A. Introduction – a river with many names and many reaches.

I have fished and explored the Missouri and the Madison. Both are among Montana's treasures and I have a strong affection for them. But the Clark Fork of the Columbia flows through the heart of Missoula and that city has been my home for the last 40 years. Over the course of those years, I have watched this river, fished it, walked along its banks, and rafted its twisting course through many rapids, eddies, and over countless submerged boulders. It is in every respect a grand river. And the fact that it was never commercially navigated detracts not at all from that

---

[86] *Ibid.*, OTH 00888, p. 1; OTH 00921, p. 66; OTH 00923, pp. 70, 71.

grandeur. If anything, it enhances it; the Clark Fork has more important things to do than to serve as a highway of useful commerce.

Which is a very good thing, because it could never have been such a highway. In the first place, taking as its headwaters the juncture of Warm Springs and Silver Bow Creeks, its rate of fall from its head to its mouth some 350 miles away is 7.5 feet to the mile. If its headwaters were to be pushed upward to the mouth of Silver Bow Creek, as some have done, the Clark Fork not only becomes more than 50 miles longer but its average rate of fall over its entire course exceeds 12 feet per mile. There are, it is true, some languid stretches, but they are not very long and there are not very many of them. This is a mountain river, fed by other mountain rivers and streams. It does not run downstream, it crashes downstream; it has some class 3 and 4 rapids, some twists that are difficult to handle in kayaks. I am willing to allow that four miles of it in Idaho were commercially navigable; that is what the Army Corps of Engineers has said. Based on the historical record, including conspicuously the reports of the Corps, I do not believe that the river above Thompson Falls was ever commercially navigated.

The above preliminary comments, of course, refer to the entire river from its headwaters to its mouth. But that raises another issue that I must address early on in this report. I have to this point referred only to the Clark Fork River. That is the convention now, but it was not the practice prior to about 1920, after the chronological limits of this study. In the early nineteenth century and for more than a century after that, the river was known—moving downstream—as the Deer Lodge River, the Hellgate River, the Missoula

River, the Clark Fork River, and the Pend d'Oreille River. In 1891 Thomas Symons, an engineer with the Army Corps evaded the issue–and the confusion–by titling his report a "Preliminary Examination of Clarke Fork of the Columbia River (By Whatever Named Called)." I sense that Symons felt some quite understandable frustration as he considered the title of his report; I am grateful to him for resolving it so neatly.[87]

Proprietary claims by the towns and villages along its banks occasioned some of this multiple labeling. More important, however, was the fact that this was a diverse waterway; different of its stretches had different "personalities" that required different names. For purposes of this report, I am interested, for the most part, in that section from where the Flathead River enters it near present-day Paradise, Montana to the Thompson falls just below the mouth of the river and very near the present-day city of that same name. Fortunately, for ease of understanding, that stretch was the Clark's (or more commonly and inaccurately, Clarke's) Fork.

B. Thompson, Suckley, and DeLacy–early explorers

Since Lewis and Clark did not explore the river that bears Clark's name, the history of the uses of this stretch of the river begins in 1808 with David Thompson, a fur trader and explorer for the British North West Company, who established a trading center, Saleesh House, at or near the Thompson falls.

---

[87] See n. 1 (Symons).

Thompson kept a journal and in it he wrote of canoe trips upstream from Saleesh House toward the mouth of the Flathead River. There is nothing in those journal entries that would indicate that Thompson was "navigating" the Clark Fork. He was simply taking canoe trips–and rather hazardous ones at that.[88]

His journal is filled with entries like ". . . very strong Rapid . . . cannot be run. . . . I think this Rapid may be shot from left to right, but always keeping to the left of the waves. . . . Rapids very frequent & many very heavy–some few dangerous. . . . they run the Rapid . . . in doing which both Canoes received a severe blow, by the Waves dashing them against a Rock–but only the new Canoe was broken." Little wonder that Thompson was forced to portage his canoes or that he had to make frequent use of the wearying "line and hand" technique to make his way to and from Saleesh House.[89]

There were supposed to have been two other exploratory journeys after Thompson's. Three secondary accounts (no one of them credible), deal with one or both of these journeys. One recounts that in 1853 Dr. George Suckley, a surgeon and naturalist, made his way with three others from Fort Owen on the Bitterroot River to Lake Pend d'Oreille, where they were "hospitably received" at the Jesuit Mission. They began their adventure in a boat constructed of bull hides; there is no indication, however, that they

---

[88] Affidavit of Jodie Foley, May 10, 2006; document #2. Supplemental Affidavit of Jodie Foley, Nov. 1, 2006.

[89] Supplemental Affidavit, at pp. 98, 110, 221, 97, 216, 221. See also Affidavit, documents #2-5.

completed their trip in or even with that same vessel, much less that they engaged in any commerce. The source indicates only that the Suckley party traveled down the Clark Fork. It says nothing about any travel on the river or if any portages were required.[90]

Another secondary account deals with the 1859 trip of W.W. DeLacy who allegedly went by a twelve-foot flat bottomed boat from the Bitterroot River to its mouth at the Clark Fork and then down the Clark Fork to the mouth of the Flathead River which DeLacy ascended to the Jesuit mission where he was "hospitably received"–the exact language used earlier in the Suckley account. Certainly, from these two secondary sources, it may be presumed that the Jesuits were "hospitable," but it is clear that the authors of these two accounts disagree on which of the two, Suckley or DeLacy, was treated to their hospitality. More to the point, the two sources disagree on where the Jesuit mission was located; the Suckley story had it on Lake Pend d'Oreille, some 65 miles below Thompson Falls; the DeLacy story on the mouth of Plum Creek, a tributary of the Flathead well above Thompson Falls. The third secondary account, the unnamed author of the Clark Fork River Study, repeats both stories, without recognizing the fact that one or the other confuses Suckley with DeLacy and that the two contradict each other. As I said, these are not credible sources. Even if they were, they are dealing with a few men in canoes. There was no trade;

---

[90] Foley Affidavit, document #4.

their trips were dictionary definitions of "sporadic," "occasional," and "ineffective."[91]

C. Steamships on the Pend d'Oreille River and Captain Mullan's Road – no steamboats above Thompson Falls; the Mullan Road bypasses the Clark Fork.

But what of larger craft? There were steamers on the stretch of the Clark Fork below Thompson Falls. The *Mary Moody* began to carry passengers and cargo on the Pend d'Orielle River and Lake as early as 1865. Two years later the *Cabinet* and the *Missoula* joined the *Mary Moody* in a kind of steamship tag team that resulted in a very few passengers and freight making their way from the mouth of the Pend d'Oreille (now spelled Pend Oreille) River to Thompson Falls, the "upper limit of navigation," according to two historians. None of these three steamships, however, ever ventured farther than that. Instead, before the railroad came through, goods and passengers were transported from Thompson Falls to Missoula and points east on "a good wagon road."[92]

---

[91] *Ibid.*, documents #3 and 4. The third secondary account is SJ 00153 the "Report on Navigability of the Clark Fork of the Columbia River, Idaho and Montana." No author is given for this report; it is undated, and uncertain for whom prepared. See pp. [11], 12. See also OTH 001941. U.S. Department of the Army, Letter from the Secretary of War, Ex. Doc. #186, 47th Cong., 1st Sess. 1998, p. 13.

[92] Burlingame and Toole; Foley Affidavit, document 1. *Ibid.*, *The Missoulian*, Feb. 24, 1882.

There is some newspaper mention of the steamer, *Kangeroo,* which, according to the promoters who ran *The Missoula Pioneer* newspaper, is supposed to have taken a voyage that "demonstrate[d] the practicability of navigating the Deer Lodge, Hellgate and Missoula rivers from Deer Lodge City to the Pen d'Oreille." There is, however, another story from the *Pioneer,* the date of which cannot be read, that reported that the *Kangeroo* had first smashed up on rocks and then been "ignobly stolen." There are no further references to the *Kangeroo*, or to the practicability of navigating the river–and no documented, credible references to it being navigated at all.[93]

I have already discussed Captain John Mullan and his road in connection with the non-navigability of the Missouri. There is no reason to revisit that issue here except to note that Mullan's marvelous 624 mile long road bypassed the Clark Fork as surely as it did the Missouri. It began at Walla Walla on the Columbia, not at Paradise or Missoula on the Clark Fork. Mullan understood completely that the Clark Fork was a river to be bridged, not navigated. This was true by "whatever name called."[94]

---

[93] *Ibid.*, documents #10 and 11.

[94] *Ibid.*, documents #1-9 There was a newspaper account that mail had been delivered from Deer Lodge to Missoula via a vessel that floated the Deer Lodge River through the Hellgate. I see absolutely no reason to take this account seriously. If, for purposes of argument, I were to take it seriously, I see no reason to take it as evidence of the "navigation" of the Clark Fork. Indeed, once the Milltown dam is removed, I can imagine someone floating a stout rubber raft with a sack of mail aboard from Deer Lodge to Missoula. I cannot imagine anyone referring to that as

D. Log Drives – no credible evidence of drives of applicable distance above Thompson Falls.

Which leaves the usual references and sources–log drives and the Army Corps of Engineer reports–plus, in this instance, an important court case dealing with navigability for title and an interesting piece of correspondence between officers of the Montana Power Company and a Washington D.C. engineering firm regarding the navigability of the Clark Fork at Thompson Falls. Western Montana is (or was) logging and milling country. From Thompson Falls to St. Regis, Superior, Frenchtown, Missoula, Bonner, Drummond, and Deer Lodge, the landscape was dotted with lumber mills filled with acres of logs and with their ubiquitous "teepee burners" incinerating the "hog fuels." The highways and city streets, not to mention the precipitous logging roads in the mountains, teemed with heavily loaded logging trucks bringing freshly cut timber to the mills. I can remember when logging trucks were more common in Missoula than Subarus are now.

The historical question is simple: before the roads and the trucks, before even the chain saws that felled the timber, how were cut trees brought to the mills? More specifically, were logs ever carried by the Clark Fork for any distance to any of those mills? I have already noted that proving a negative is no easier for historians than for anyone else. I note here that there is reason to believe that logs were floated on the Clark Fork–as they were on the Missouri and once on the

---

commercial navigation. See SJ00157, *Report on Navigability of the Clark Fork*, p. 13.

Madison – for short, often indiscernible distances. There is one account that some logs were "splashed" over the dam at Thompson Falls, but I am convinced that evidence of that sort indicates that the dam made any drive that did occur possible – as was the case on the Madison. In all events, the splashing certainly took place after the dam had altered the river behind the falls from its natural state of a fast, rocky river, into a wider, more placid reservoir.[95]

The basic questions remain, then: When, where, and how often did log drives occur and how far did they carry the logs? In the undated Clark Fork Study and in the Rivers Study of 1986, for example, it is stated that "drives occurred. . . originating on Nine Mile Creek, White Pine Creek, Trout Creek, Vermilion River and Bull River" and ending in Clark Fork, Idaho. That casual statement of "fact" is essentially without a citation. There is a brief reference to an old-timer from the region who "remembered" these drives. But even allowing for the accuracy of the statement (which I do not), I would like to know *how far* the logs were floated. Clark Fork, Idaho, over 200 miles from Nine Mile Creek, won't do.[96]

The statement that log drives originated on Nine Mile Creek is particularly troublesome. Not far below the mouth of that stream the Clark Fork enters what is now known as the Alberton Gorge. No logs could

---

[95] OTH 001970 U.S. Army Corps of Engineers, *Report on Navigability of Clark Fork River Above Pend Oreille Lake, Idaho and Montana*, April 15, 1932, p. 1.

[96] SJ 00153, *Report on Navigability of Clark Fork*, p. 9, SJ 00136, *Montana Navigable Water Study*, p. 20.

have been *driven* through the Gorge; it is doubtful that any logs could even have *floated* through the Gorge and not been either destroyed or washed ashore by Tumble Weed Rapids or the wonderfully named Boat Eater Rapids. Mention should also be made of the fact that White Pine Creek, as well as the Vermilion and the Bull Rivers are below Thompson Falls and hence not relevant to the discussion. That leaves an undocumented statement that log drives "originated" at Nine Mile and Trout Creeks and no indication of where they "terminated" except for a puzzling and meaningless reference to Clark Fork, Idaho. Answers to those questions involve looking at more than a few newspaper clippings.

Better sources include the archives of the logging companies that were located on the Clark Fork River. Some of these companies were very small and their business records seem not to have survived–or at least not to have made their way into the University of Montana's Archives. Some records, however, did survive and I looked at all of them. They reveal that logs from western Montana were destined for the mines and ore processing facilities *to the east* of where they were cut, that bringing western Montana logs to Idaho was like bringing coal to Newcastle, that the logs were often stored in the river in booms (as was also the case on the Missouri), that log drives were so inefficient that those on the Big Blackfoot River were abandoned and a rail line built for more efficient operation, and that the Northern Pacific Railroad constructed log loading platforms along its line to facilitate the carrying of log cargoes to the mills. There were no references in these corporate records to

floating logs or rafting milled lumber down the Clark Fork.[97]

In sum, in the record I have reviewed, in particular I see no credible evidence of historic log drives on the swift, rocky reach between Paradise and Thompson Falls. The sole mention of a milled lumber raft is one that was supposed to be a short float – Weeksville to

---

[97] Among other archives, I looked at the Anaconda Forest Products Records, Series VI, Box 1, folder 1 which indicated that the Anaconda Company's mills served the Anaconda Company's mines and smelters and that the logs and milled lumber made their way east via the Northern Pacific Railroad. The Records of the Hope Lumber Manufacturing Company in Hope, Idaho indicate that in 1911, as a representative year, sales were made to buyers in Idaho, Kansas, Montana, Nebraska, and Wisconsin. The Records of the Big Blackfoot Milling Company in Bonner, Montana (near Missoula) from 1903 indicate sales to the Boston and Montana Mining Company, the Butte and Boston Company, Anaconda Copper Mining Company, and the Parrot Silver and Copper Mining Company, all in Butte. There were no customers west–or downstream–from the Big Blackfoot Mill. The St. Regis Lumber Company Records indicate that the company sent all of its products via the Northern Pacific Railroad. All of these companies made use of the N.P. loading stations at Eddy, Gold Creek, and Clinton. There is an entry in the St. Regis Company's records that "The above list includes everything cut this fall at Camp #1 except about 300,000 which has been cut opposite the mill and which is being *rolled into the river* from time to time. . . .," (my emphasis) which I take as a reference to logs being held in a boom. This was followed by a ledger entry on "river expenses." The Big Blackfoot Records also include the 1913 speech by company executive John Ross explaining why the company had built a rail line 13 miles up the Big Blackfoot River rather than continuing to rely on log drives to the mill at the mouth of the River. Log drives, Ross explained, were inefficient and, though the rail line cost a lot of money, in the long run, it would pay for itself.

the mouth of the Thompson River – but was lost over the Thompson Falls, with one man drowned. This float, in June's high water, was seasonal, sporadic and deadly. I saw no other evidence of lumber rafts. I have likewise seen no credible evidence of log drives of any appreciable distance on any of the Clark Fork River above Thompson Falls.[98]

E. The Army Corps of Engineers – the river in Montana is not navigable.

The first report from the Army Corps of Engineers regarding the Clark Fork seems to have been issued in 1882 and consists of a general description of the region of the upper Columbia River basin. There are no references to navigation. The Corps turned to that issue ten years later in 1891 when it issued another report. This second document is an interesting and important one. The engineer in charge of the examination of the river for navigability, Thomas Symons, surveyed the entire stretch from the mouth of the Blackfoot to Lake Pend d'Oreille, a distance of 250 miles. His conclusion: this "is a mountain torrential stream, full of rocks, rapids, and falls, and is utterly unnavigable, and incapable of being made navigable except at an enormous cost." That sane and prudent judgment was made two years after Montana entered the Union. What makes it even more interesting is that it was concurred in by the mayor of Missoula as well as by "prominent citizens engaged in various commercial and mining pursuits." That such a gathering would have been interested in promoting the region is as safe an historical assumption as I can

---

[98] Foley Affidavit, Document #12, *The Missoulian*, July 7, 1882.

make. In this instance, however, Symons "could not find that there was any demand for the improvement of the river. *In fact, the idea of making the river navigable was scouted as an absurdity.*" It was Symons' "opinion" that "the Clarke Fork . . . is unworthy of improvement."[99]

In 1932 the Corps of Engineers again examined the Clark Fork. Its investigation indicated that logs had been floated from as "far upstream as Dixon, . . . 22 miles" above the mouth of the Flathead River. It did not say to where they were floated; again the terminus of the drive is missing. On the record I have seen, it is clear that whatever log drives may have occurred were at best "sporadic." The report also pointed out that Congress had never authorized any funds for the improvement of the river and that the judgment of a steamboat captain was that, except for the four mile stretch from the head of Lake Pend d'Oreille to the Northern Pacific Railroad bridge in the state of Idaho, it was "utterly impossible to make it a navigable river." I think the historical record bears out his opinion.[100]

---

[99] The 1882 Reports are in OTH 001937.1-58. Symons's from MDH013716 his "Preliminary Examination of Clarke Fork of the Columbia River (By Whatever Name Called). . . ." March 21, 1891 (my emphasis).

[100] OTH001971-72, Report on *Navigability of Clark Fork River Above Pend Oreille Lake* . . ., 1932. See also OTH 001975, Malcolm Elliott to I.M. Brandjord, Sept. 20, 1932; and OTH 001976 Army Corps of Engineers, Seattle District to Division Engineer, Pacific Division, Feb. 9, 1933.

Eight years after this Corps report, M.O. Leighton, a Washington D.C. engineer, indicated that the Corps had not changed its mind. In a letter to a Montana Power Company official Leighton made "definite inquiry . . . as to the opinion of the Corps on the navigable status of Clark's Fork River from the mouth of the Blackfoot . . . to Pend O'Reille Lake." This, it must be pointed out, was an inquiry for purposes of establishing regulatory authority, not title. In other words, it did not take much for a determination of "navigability." As it happened, Leighton already knew the answer because he had "already seen it on the chart at the office of the Chief of Engineers. The answer is that the river "is not navigable within the above named limits except for a short distance . . . upstream from Pend O'Reille Lake."[101]

F. The Donlan case–in 1910, the Montana federal court declares the river in Sanders county non-navigable under the federal navigability for title test.

Given the significance–both historical and contemporary–of the navigability question, I found it odd that there had been no court cases dealing with that issue on the relevant sections of the Missouri and Madison Rivers. Perhaps past generations were not as litigious as this one. That the matter of the navigability of the Clark Fork–and in that section of the river that is of most concern here–did provoke a legal dispute was a welcome bit of news for me. In 1910 three complainants challenged Edward Donlan's and his Northwestern Development Company's claims

---

[101] I34110042 Leighton to J.E. Corette, Nov. 18, 1940.

of ownership of the beds and banks of the Clark Fork River in a part of Sanders County, Montana. The complainants argued that the Clark Fork was a navigable waterway and that as such Donlan had no right to its beds and banks. The Montana federal district court had a distinctly different view of it.

The decree of the court was unambiguous. It ruled that "the Clark's Fork . . . in Sanders County . . . was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation. . . ." That being the case, the ". . . Northwestern Development Company was and is the owner of the first and prior right to the use for power development and other industrial purposes. . . ," and "owns all of both the banks of said stream [for certain distances] and the whole bed of such stream at all points opposite the said bank lands ... including the portion of the bed carrying that portion of said river known as Thompson Falls ... ." There is no trial transcript so I cannot comment on how it is that the court reached this ruling; given some similarities in language, I strongly suspect that the Army Corps Reports were an important part of the evidence on which the ruling was made.[102]

More generally, I would like to think it was because the court knew how the river had been used in the past and simply applied the lessons of history in reaching a judgment. I am also of the mind that that same

---

[102] MDH000232-33 Decree of Circuit Court of the U.S., Ninth Circuit, District of Montana in case no. 950; *Fred Steele, Edward Maher and Zaidah E. Wenham vs. Edward Donlan and Northwestern Development Company*, July 19, 1910. See also Foley Affidavit, document #9.

unbeatable combination of historical awareness and a willingness to take lessons from what can be known of the past has the same usefulness and relevancy when dealing with the Missouri and the Madison. That is the historians' prerogative and I claim it.

X. FINAL CONCLUSIONS – THE RELEVANT REACHES WERE NOT HIGHWAYS FOR USEFUL COMMERCE

That last thought leads me to my final conclusions. A careful analysis of the historical record can do one of three things: It can support "side A" of an issue; it can support "side B" of that same issue; or, and most commonly, it can support neither side or both sides. The record may be inconclusive, even contradictory. In this instance, however, the historical record is none of those. Lewis and Clark not only did not prove that the Missouri was navigable above Fort Benton; they proved that it was not. The same must be said of John Mullan and his road and of the reports of the Army Corps of Engineers, and all the others who investigated or lived on that stretch of the Missouri, and tried, in vain, to improve it to a navigable condition. Similarly, the Madison River log drive of 1913 did not prove that the river was navigable in its natural condition, it showed that it was not. The record regarding the Clark Fork is also similar. There is no credible evidence that the stretch between Paradise and Thompson Falls, indeed the entire river above these falls, was ever navigated and no evidence that it was commercially navigable or could ever be made such. If history can be likened to a bridge game, this is a lay down hand. It is my opinion that the reaches of these three rivers that I studied for this

report were not navigated and were not navigable at statehood.

JA 824

A Project of the Center for

Great Plains Studies,

University of Nebraska-Lincoln

Gary E. Moulton, Editor

The Journals of
The Lewis & Clark
Expedition

Volume 4, April 7– July 27, 1805

University of Nebraska Press

Lincoln and London

* * *

[p.422]

2. Later Duck, or Gurnett, Creek, in Broadwater County, Montana. On Atlas map 63 it was first labeled "Ordway's Creek" and then corrected to the name Lewis gave it. MRC map 81.

3. Probably *Cirsium foliosum* (Hook.) DC., ell thistle,. Booth &Wright, 261.

4. Possibly *Allium brevistylum* A. Wats. Dorn, 161; Hahn, *Allium* map. It was probably Biddle who drew a red vertical line through the passages about garlic and flax.

5. Clark's camp was in Broadwater County, about four miles downstream from Toston. *Atlas* map 63; MRC map 82.

6. Probably *Scirpus acutus* Muhl. ex Bigel., western bulrush, and *Typha lalifolin* L., common cattail. Hahn, *Scirpus* and *Typha* maps; Dorn, 25.

7. In Broadwater County, near the south end of present Canyon Ferry Lake, near present Townsend. *Atlas* map 63; MRC map 82.

8. The western hog-nosed snake, *Heterodon nasicus,* then new to science. Burroughs. 276-77; Cutright (LCPN), 427-28.

9. On *Atlas* map 63 the dotted line indicating Clark's route does not go through the July 22 campsite, his actual starting point on the twenty-third.

[Lewis] *Wednesday July 24th 1805.*

Set out at sunrise; the current very strong; passed a remarkable bluff of a crimson coloured earth on Stard. intermixed with Stratas of black and brick red slate.[1] the valley through which the river passed today is much as that of yesterday nor is there any difference in the appearance of the mountains, they still continue high and seem to rise in some places like an amphatheater one rang above another as they receede from the river untill the most distant and lofty have their tops clad with snow. the adjacent mountains commonly rise so high as to conceal the more distant and lofty mountains from our view. I fear every day that we shall meet with some considerable falls or obstruction in the river notwithstanding the information of the Indian woman to the contrary who assures us that the river continues much as we see it. I can scarcely from an idea of a river running to great extent through such a rough mountainous country without having it's stream intersepted by some difficult and gangerous rappids or falls. we daily pass a great number of small rappids or riffles which decend one to or 3 feet in 150 yards but they are rarely incommoded with fixed or standing rocks and altho' strong rappid water are nevertheless quite practicable & by no means dangerous. we saw many beaver and some otter today: the former dam up the small channels of the river between the islands and compell the river in these parts to make

[p.423]

other channels; which as soon as it has effected that which was stoped by the beaver becomes dry and is filled up with mud sand gravel and drift wood. the beaver is then compelled to seek another spot for his habitation wher he again erects his dam. thus the river in many places among the cluster of islands is constantly changing the direction of such sluices as the beaver are capable of stoping or of 20 yds. in width. this animal in that way I believe to be very instrumental in adding to the number of islands with which we find the river crouded. we killed one deer today and found a goat or Antelope which had been left by Capt. Clark. we saw a large bear but could not get a shoot at him. we also saw a great number of Crains and Antelopes, some gees and a few red-headed ducks the small bird of the plans and culoos still abundant. we observed a great number of snakes about the water of a brown uniform colour, some black, and others speckled on the abdomen and striped with black and brownish yellow on the back and sides. the first of these is the largest being about 4 feet long, the second is of that kind mentioned yesterday, and the last is much like the garter snake of our country and about it's size. none of these species are poisonous I examined their teeth and fund them innocent. they all appear to be fond of the water, to which they fly for shelter immediately on being pursued. -- we saw much sign of Elk but met with none of them. from the appearance of bones and excrement of old date the buffaloe sometimes straggle into this valley; but there is no fresh sighn of them and I begin think that our harvest of which puddings is at and end, at least untill our return to the buffaloe country. our trio of pests still invade and obstruct us on all occasions, these are

the Musquetoes eye knats and prickley pears, equal to any three curses that ever poor Egypt laiboured under, except the *Mahometant yoke*. the men complain of being much fortiegued, their labour is excessively great. I occasionally encourage them by assisting in the labour of navigating the canoes, and have learned to *push a tolerable good pole* in their fraize. This morning Capt. Clark [*NB: had]* set out early and pursued the Indian road whih took him up a creek some miles abot 10 A.M. he discovered a horse about six miles distant on his left, he changed his rout towards the horse, on approaching him he found the horse in fine order but so wild he could not get within less than several hundred paces of . . .

* * *

[p.433]

on the little river 3 miles above its mouth & near the place it falls into the bottom a fiew Drops of rain this evening.

we killed 2 bear which was immediately in our way. both pore emence number of Beaver and orter in this little river which forks in the bottom.

1. Sixteenmile Creek, on the Broadwater-Gallatin county line, Montana, at is mouth. *Atlas* map 64; MRC map 83.

2. Present Garden Gulch, in Gallatin County, mislabeled "Howard's Creek" on *Atlas* map 64. MRC map 83.

3. *Slipa comala* Trin & Rupr., needle and thread grass. Hahn, *Stipa*map; Curright (LCPN), 172, 420. It was probably Biddle who drew a red vertical line through several passages, beginning with "covered with" to "Cocheneal plant."

4. *Coryphantha missouriensis* (Sweet) Britton & Rose, yelloe pincushion cactus. Booth & Wright, 159; BEnson (CUSC), 856-60. The "Cockeneal" used for comparison is *Nopulea cochinillifero* Salm-Dyck, cochineal cactus, which Lewis would have known as an ornamental in the East, Bailey, 702-3.

5. "R. Fields Vally Creek" on *Atlas* map 65, now Boulder River, entering the Jefferson near Cardwell, Jefferson County, Montana. Clark's route is indicated by a dotted line on *Atlas* maps 64, 65; it becomes confused, however, with another dotted line showing Lewis's route of a few days later

6. On Willow Creek (Philosophy River), in Gallatin County, above the present town of Willow Creek, *Atlas* map 65.

7. The main party camp is misdated July 25 on *Atlas* map 64. It is in Gallatin County, at the landmark of Eagle Rock, MRC map 83.

8. Frazer and Reubin Field, Joseph Field having remained with Charbonneau.

9. Clark's illness may be attributed mostly to fatigue from his great physical output; the illness persisted for several days. See Chuinard (OOMD), 302-4.

[Lewis] *Saturday, July 27th, 1805.*

We set out at an early hour and proceeded on but slowly the current still so rapid that the men are in a continual state of their utmost exertion to get on, and they begin to weaken fast from this continual state of violent exertion. at the distance of 1 ¾ miles the river was again closely hamned in by high Clifts of a solid limestone rock which appear to have tumbled or sunk in the same manner of those discribed yesterday. the limestone appears to be of an excellent quality of deep blue colour when fractured and of a light led colour where exposed to the weather. it appears to be of a very fine gr[a]in the fracture like that of marble.[1] we saw . . .

* * *

* * *

[p.47]

South 45° E.	½	to a Lard. Bend.
S. 15° W.	¼	to a Stard. Bend under a buff.
East—	½	to a Lard. Bend passing a bayou on Stard. side.
S. 5° W.	¼	to bayou in a Lard. Bend.
S. 45° W.	½	to a Stard. Bend passing an island.
West—	¼	to a bayou in a Stard. bend.
S. 45° E.	¼	to a Lard. bend passing an island
South—	½	to the forks. these forks are
Miles	9 ¼	nearly of the same size tho' the N.W. fork possesses the most water at this time and is infinitely the most rapid. Ascended the last one mile on a course of S 30 W. and encamped on an Island.

[Clark] *August 5th Monday 1805*

A Cold Clear morning the wind from the S.E. the river Streight & much more rapid than yesterday, I Sent out Jo. & R. Fields to kill Some meat they killed 2 Deer & we brackfast on one of them and proceeded on with great dificuelety from the rapidity of the Current, and numerable rapids we had to encounter, at 4 oClock P M Murcury 49 ab. o, passed the mouth? Of principal fork which falls in on the Lard. Side, this fork is about the Size of the Stard. one less water reather not so rapid, its Course as far as can be Seen is S.E. & appear to pass through between two mountains, the N.W. fork being the one most in our

course i.e. S 25 W. as far as I can See, deturmind me to take this fork as the principal and the one most proper the S E fork is of a Greenish Colour & contains but little timber. The S W fok contains more timber than is below for Some distance,8 we assended this fork about one mile and Encamped on an Island which had been laterly overflown & was wet we raised our bed on bushes, we passed a part of the river above the forks which was divided and Scattered thro the willows in Such a manner as to render it dificuelt to pass through for a ¼ of a mile, we wer oblige to Cut our way thro' the willows— Men much fatigued from their excessive labours in hauling the Canoes over the rapids & c. verry weak being in the water all day. my foot verry painfull

* * *

[p.59]

nothing of Shannon, he had killed a deer and an Antelope. Great quantity of beaver Otter and musk-rats in these rivers. two of the hunters we sent out this morning returned at noon had killed each a deer and an Antelope. we use the seting poles today almost altogether. we encamped on the Lard side5 where there was but little timber were obliged to use willow brush for fuel; the rosebushes and bryers were very thick. the hunters brought in another deer this evening. te tumor on Capt. Clarks ankle has discharged a considerable quantity of matter but is still much swolen and inflamed and gives him considerable pain. saw a number of Gees ducks and some Crains today. the former begin to fly.— the evening again proved cloudy much to my mortification and prevented my making any lunar observations. the

Indian woman recognized the point of a high plain to our right which she informed us was not very distant from the summer retreat of her nation on a river beyond the mountains which runs to the west. this hill she says her nation calls the beaver's head from a conceived remblance of it's figure to the head of that animal.[6] she assures us that we shall either find her people on this river or on the river immediately west of it's source; which from it's present size cannot be very distant. as it is now all important with us to meet with those people as soon as possible, I determined <to leave the charge of the party, and the care of the lunar observations to Capt. Clark; and> to proceed tomorrow with a small party to the source of the principal stream of this river and pass the mountains to the Columbia; and down that river untill I found the Indians; in short it is my resolution to find them or some others, who have horses if it should cause me a trip of one month. for without horses we shall be obliged to leave a great part of our stores, of which, it appears to me that we have a stock already sufficiently small for the length of the voyage before us.

Courses and Distances of August 8th 1805.

South 2 Miles to the upper or principal entrance of Philanthropy River on Lard. being 5 Miles by water, passing seven bends on the Lard. side, two islands and several bayous. this river is 30 yds. wide is navigable and heads in the Rocky Mountains with Madison's River.—

[p.60]

S. 20 W. 6
Miles 8

to a few high trees on the Stard. side, the river bending to the East two miles from this course. and the distance by water 14 miles passing an island at 1 M. another at 7 M. several small bayous and 35 bends on Strd. side the majority of the bends being short and circular.

[Clark] *August 8th Thursday 1805*

We proceeded on early wind from the S.W. The Thermometer at 52 a o at Sunrise at 5 miles by water & 4 ½ on a derect line from the forks we passed a River on the Lard Side 30 yards wide and navagable for Some distance takeing its rise in the Mountains Easterly & with the waters of Madisons River, passes thro an extensive vallie open & furtill & c. this river we call *Philanthophy*— above this river (which has but little timber) Jefferson R is crooked with Short bends a fiew Islands and maney gravelly Sholes, no large timber, Small willow Birch & Srubs &c. Encamped on the Lard Side, R Fields joined us this eveng. & informes that he could not find Shannon my foot yet verry Swore

1. The name buffalo clover is problematic. If this is a true clover, the most likely species is longstalk clover, *Trifolium longipes* Nutt. However, it is probably *Thermopsis montana* Nutt., mountain thermopsis, which is not a true clover but is common in the wet meadows of the area and has the long, narrow, trifoliate leaflets as described. See August 16, 1805, below. Booth & Wright, 141; Hitchcock et al., 3:364, 351-52.

2. The Sunflower is the perennial species, Nuttall sunflower, *Helianthus nuttallii* T. & G., which is common in this habitat and is known from the area. The term greensward often refers to a lush, green meadow, but in this case may refer to a species of rush or sedge which dominates the wet meadow. One of the rye grasses is certainly basin wildrye, *Elymus cinereus* Scribn. & Merrill, which is a distinctive, tall, bunch-forming grass as described. Other wildrye species of the area include Canada wildrye, *E. canadensis* L., and several species of *Agropyron* with flower heads similar to wildrye. Booth & Wright, 274; Hitchcock et al., 5:230, 1:449-61; Hahn, *Elymus* and *Agropyron* maps.

3. Probably *Calamagrostis stricta* (Timm) Koeler (or C. *inexpansa* Gray), northern reed-grass, which has a flower structure similar to cultivated timothy, fits to ecological and morphological description, and is known from the immediate area. It could also possibly be a species of stream foxtail, *Alopecurus* sp., which is also similar to timothy in flower structure but not as common as *Calamagrostis*. Hahn, *Calamagrostis* and *Alopecurus* maps; Hitchcock et al., 1:527-29.

4. The Gravelly Range. However, the Madison River heads in the Yellowstone Plateau in northwestern Wyoming.

* * *

JA 836

A Project of the Center for

Great Plains Studies,

University of Nebraska-Lincoln

Gary E. Moulton, Editor

The Journals of

The Lewis & Clark

Expedition

The Journals of Joseph Whitehouse, May 14, 1804-April 2, 1806

University of Nebraska Press

Lincoln and London

[p.238]

along the Shores. the beaver pleanty. the pine timber continues on the Sides of the hills at Some distance from the River. our hunter[1] who Stayed our last night came to us at noon where we delayed to dry the articles wh[ich] is wet in the canoes. he had killed Several Deer, and Saved the most of the meat. we hoisted up our flags and proceeded on the current verry rapid. Came 2.1 miles this day and Camped[2] on the South Side. the party in general much fatigued. we find pleanty of wild Inions or garlick in these bottoms & Islands & c.—

Tuesday, July 23rd This morning Cloudy, Captain Clark and three of our party, set out in Order to go to the three forks of the Mesouri River, where they expect to find the Snake Nation of Indians residing, at or near that place.— We set out early, and found the current run very rapid, and the River spreading wide, and full of Islands, we passed the mouth of a small River, which came in behind an Island lying on the South side of the River, & passed level smooth large plains, lying on each side of the River, having line Grass on it & Flax now going to seed. Thistles high & in bloom, the Timber plenty growing along the Shores, and on the sides of the hills, some distance from the Shores.— Our hunters that had staid out all last night came to us at noon.—

We delayed at the place that the hunters came to us, to dry the articles that was wet in the Canoes, the hunters had killed several deer & had saved most of the meat.— We hoisted our flags on board our Canoes & proceeded on at 2 oClock P.M. the current still running very Rapid. We came 2.1 Miles this day, and

encamped on the South side of the River Mesouri, our Men being very much fataigued, We found here plenty of Wild Onions.—

1. Actually four additional persons, Joseph and Reubin Field, Frazer, and Charbonneau.
2. Whitehouse fails to mention that Lewis named the stream after him. Whitehouse Creek was later Duck, or Garnett, Creek, in Broadwater County, Montana.
3. The word "high" is written over "low."
4. Probably elk thistle, Cirsium foliosum (Hook.) DC.
5. Drouillard.
6. In Broadwater County, near the south end of Canyon Ferry Lake, a little north Townsend.
7. Possibly *Allium brevistylum* A. Wats.

* * *

[p.240]

otter. Saw a flock of goats or antelopes one of the hunters killed one of them. we saw a Camp where Capt. Clark had Stayed one night. discovered mountains a head which appear to have Snow on them, if not Snow it must be verry white Clay or rocks. we eat abundance of red & yallow currents. the timber Island not So pleanty as yesterday.— large plains on each Side of the River & looks pleasant and extensive. in the afternoon we entered in to Some rough rockey hills[1] which we expect from the Indian account is the commencement of the Second chain of the rockey mountains, but they do not appear So high as the first nor So Solid a rock. at the entrence we found Several bad rockey rapids which we had to pass through and

So Shallow the rocks Show themselves across the River and appear Shallow all the way across. we double manned and got up Safe. I cut my foot with the Stone a towing along the Shore. Saw excellent Springs which ran from under the clifts. we came 16 miles this day and Camped[2] on the N.S. our hunter killed one goose, which was all that was killed this day—

Thursday July 25th This morning clear & pleasant, we set out as usual, and proceeded on our Voyage, and on an Island saw a larger White or brown bear, & in the River numbers of Otters, and a flock of Antelopes on the Shore one of which our hunters killed.— We passed by a Camp, where Captain Clarke had staid all night, We discover'd Mountains lying ahead of us, which has the appearance of Snow being on them, from their white Colour, we still found abundance of Red & Yellow currants. We did not find the Islands or timber so plenty, as it was Yesterday. We found large extensive plains lying on both sides of the River, which had a pleasant appearance. In the afternoon we <enter'd into> passed some rough rockey hills, which we expect from the account we have from the Indian Woman that is with us, to be the commencement of the Second chain of the Rockey Mountains: but they do not appear, to be so high, as the first chain of Mountains which we have passed, nor so solid a rock at the entrance of them.— We found several bad rockey Rapids, which we had to pass through, and <are> the Water was so shallow that the Rocks appeared above the Water almost across the River, We double manned our Canoes, and with difficulty got over them, In hard towing; We saw several excellent springs, which came out from under

[p.241]

the Clifts of Rocks, near the River, We came 16 Miles this day, & encamped on the North side of the River.—

The men were very much fataigued towing the Canoes this day, and some of them had their feet Cut in passing over the Rocks.— Our hunters only killed one Goose, which was all that was killed this day.—

1. Apparently the cliffs Clark labeled "Little Gate of the Mountains," in Broadwater County, Montana, between Toston and Lombard.
2. In Broadwater County, immediately above Toston Dam.

Friday 26 July 1805. a clear morning. we Set out as usal, and proceeded on the current rapid. Saw Several Springs along the Shores. one of the men killed a beaver. the pine and ceeder timber pleanty along the Shores. passed clifts of rocks on each Side but the hills make off lower. we find that we have not entered the 2nd chain of Mountains but can discover verry high white toped mountains[1] Some distance up the River. the River verry wide and full of Islands. the current verry rapid in general. passed over Several verry bad rapids which was difficult to pass. our hunter on Shore killed 4 Deer. the wind blew hard at 2 oClock & a light Sprinkling of rain. we found an Indian bow. took on board a Deer Skin which Capt. Clark had left with a note, that they had Seen no Indians, but had Seen fresh horse tracks. considerable of cotton & ceeder timber on the Islands &c. Came 19 miles this day and Camped[2] on the South Side of the River. Found Servis berrys[3] &c.

Friday July 26th We had a clear morning, & set out Early as usual and proceeded on. we found the current of the Rivert to run much stronger, than what we had yet experienc'd, since we entered the Mesouri River; we passed several springs, running from under the Rocks, along the Shores on both sides of the River; and Pine & Cedar Trees plenty; also along the shores. One of our party killed a beaver as we passed along with the Canoes.- We proceeded on, and passed Clifts of Rocks, lying on each side of the River, but the hills make off lower than they did Yesterday. We now find that we were mistaken, and that we have not as yet, entered into the Second Chain of Mountains, and we discovered very high white topped Mountains, lying

* * *

JA 842

ACTS, RESOLUTIONS AND MEMORIALS,

OF THE

TERRITORY OF MONTANA,

PASSED BY THE

FIRST LEGISLATIVE ASSEMBLY.

CONVENED AT BANNACK, DECEMBER 12, 1864

VIRGINIA CITY, MONTANA:
D.W. TILTON & CO.
1866.

[p.659]

AN ACT to incorporate the Upper Missouri River Steamboat Navigation Company.

Be it enacted by the Legislative Assembly of the Territory of Montana:

SEC. 1. That N.W. Burris, G. W. Stapleton, John D. Ritchie, A. V. Brookie, F. Moore, B. S. Peabody, Richard F. Lawless and their legal associates and successors, are hereby constituted and declared a body politic and corporate, under the name and style of the Upper Missouri River Steamboat Navigation Company, and by that name may sue and be sued, plead and be impleaded, and may have and use a common seal, which may be altered at pleasure.

SEC. 2. It shall be lawful for said company to acquire and hold real estate, and to sell, dispose of, and convey by deed any real estate held and occupied by them, wherever and whenever they may deem it for the interest of said company to do so.

SEC 3. Said company shall have the power to make, and afterwards to alter and change, all needful rules and regulations for the management and government of said company, and shall elect a president, secretary and treasurer, at such time and place as the said corporation herein mentioned may agree upon, and annually hereafter to elect a president, secretary and treasurer, who shall be shareholders in said company: Provided, however, That the said secretary and treasurer may be united in one person if deemed advisable by said corporation.

SEC. 4. Said corporation shall have the power and authority, and the exclusive right to open and remove all obstructions, and make navigable that part or portion of the upper Missouri river, from the falls on said river above Fort Benton to the three forks on said river, or what is known as Gallatin City.

SEC. 5. Said corporation shall have the exclusive right to the navigation of said Missouri river between the above mentioned points, with steamboats and all kinds of water crafts, for the term of fifty years, and to carry freight and passengers over the same.

SEC. 6. The capital stock of said corporation shall be fifty

* * *

BARKER-WILSON CO.
CIVIL AND MINING ENGINEERS
BUTTE, MONTANA

EXAMINATION OF MISSOURI RIVER FROM HAUSER LAKE TO CASCADE WITH RESPECT TO NAVIGABILITY.

Butte, Montana,

Sept. 6th. 1916

The reconnaissance survey and examination of the Missouri River covered by the following report was undertaken to determine conditions of channel, and depth and velocity of water, bearing on the navigability of the stream from Hauser Lake dam to Cascade. The survey extended from mile 118.5 to mile 55, as shown in Water Supply Paper No. 367, – "Profile Survey of Missouri River from Great Falls to Three Forks, Montana."

The survey and examination was undertaken in April, 1916, for the reason that the flowage records of the river show this to be the month in which, with the exception of the flood season of June and parts of May and July, the largest discharge of water occurs, so that conditions favorable to navigation would be better than average.

An 18 foot steel boat was used and work was commenced at the Hauser Lake dam, or mile 118.5.

DESCRIPTION:

For a mile below Hauser Lake the river runs very swift, with shallow water in many places, as evidence by riffles, which just cover the rocks and by large rocks projecting above the water. The river flows in a canyon cut through the quartzite and schist rocks, which has very precipitous walls and rising on an average of about 250 feet vertically above water level. Photo No. 1 taken at mile 118, showing the west wall, is a fair example of the canyon.

At mile 117 rapids are encountered. At this point for 40 feet from the west bank the water is very rough, then for 50 feet very swift current, the next 150 feet having small rapids with rocks appearing above water surface, and from thence to the east bank rapidly flowing water. This condition exits for several hundred feet downstream. The average current meter readings showed a velocity of 6 feet per second [This is at the ratio of 4.1 miles per hour,] with one of 8 feet per second [This is at the rate of 5.5 miles per hour]. Photos No. 2 and No. 3, 400 feet apart, were taken of these rapids.

Meter reading at mile 116.3 gave 3.6 feet per second [This is at the rate of 2.5 miles per hour]. Between miles 115-116 current is strong, with an island dividing the stream, and riffles extending entirely across the river. The river is confined in canyon to mile 114, from this point to mile 111.3 the ground slopes are gradual for some distance on either side of the river.

At mile 112 readings show a velocity of 6.5 feet per second [which is at the rate of 4.4 miles per hour] and the river makes a right angled turn.

At mile 111 the river again enters canyon at the Gate of the Mountain, where it is quite swift. The canyon walls are limestone, rising almost vertically for some distance, which is clearly shown in Photos Nos. 4, 5, 6 and 7. There are no banks along the river for stretches of many hundreds of feet, the river being practically inaccessible in places. Above the vertical canyon walls immense limestone cliffs are seen on either hand for several miles, in fact this condition exists almost to mile 90, the site of the Holter dam.

From the Gate of the Mountains to a point 1,100 feet westerly, level readings show a difference in elevation of 2.1 feet, with the river running very swift as it enters the canyon. [Handwritten text illegible]

Just below Mann Gulch, or mile 107.5, meter readings showed a velocity of 7.2 feet per second near the shore; [This is at a rate of 4.9 miles per hour] toward the middle of the river the water had a greater velocity.

Beginning at mile 107.5 rapids begin which are shown in Photos Nos. 8, 9 and 10. The difference in elevation of the river in 865 feet is 2.5 feet. [This slope is at the rate of 15.2 feet per mile.] The river is rather difficult of passage and large rocks show below the water surface. The first ranch below mile 112 is at mile 106, at Elkhorn Creek; a small area is plowed on the west side where the river makes a wide sweep.

The Beartooth rapids are encountered at mile 104.5. From the standpoint of Navigability they present a very serious and dangerous problem, not only from swiftness and shallowness of water, but from the length of the rapids and submerged rocks, and even after passing over the swiftest portion the boat struck a great many rocks that could not be seen because of the muddy water. Some idea can be had of the conditions of these rapids when one considers the river dropping 5.5 feet in a distance of 850 feet over a boulder strewn river bottom. [This slope is at the rate of 3.42 feet per mile.]

In the upper portion of the falls, velocities of 7 feet per second were recorded, [This is at the rate of 4.8 miles per hour,] and in the last 280 feet current readings of 10 feet per second were made. [This is at the rate of 6.8 miles per hour.] Of course these readings taken near the shore gave a slower velocity than would be obtained if one could get current readings near the middle of the river. Photos Nos. 11, 12, 13 and 14 present some views of the river at this point.

From these rapids to the north end of Ox Bow bend the river flows swift, the difference in elevation being about 40 feet in 8 miles. [This slope is aboute [sic] the rate of 5 feet per mile.] There are places in this distance where rocks project out of the water, generally where the current is fast and in the deepest portion of the channel. A number of rocks just submerged were noted. Velocities of from 2.4 to 4.8 feet per second were obtained by meter readings. [This is at the rate of from 1.6 to 3.3 miles per hour.]

A Log Gulch, mile 94.4, the river has a restricted width, because of islands, and a right angled turn, with a water velocity of 3.5 [feet] per second. [This is at the rate of 2.4 miles per hour.]

At mile 93 the river drops sharply about 1.5 feet over a reef of rocks, the south end of which projected at least 3 feet out of water. But one break appears along this reef near the north bank and at a point where the greatest flowage and swiftest current occurs. About 30 feet below this break is another reef of rocks which seem to have been moved from the opening above, so that the entire stream is impassable. After examination it was decided to lower the boat by ropes along the north bank. Another feature at this point is, that an island is located about 200 feet below the rapids and to the north side of it a bar shows for 50 feet northerly, making the channel here only about 50 feet in width in the portion of the river which would have enough depth for use and on a curve at the same time. These rapids have the appearance as if a small dam had been constructed across the river, and with the tortuous course of the channel make them a formidable barrier to navigation. Below this point for 1,000 feet the current is very swift. Photos Nos. 15 and 16 show two views at this point.

At mile 90 the river has a drop of 7 feet in distance of 1,000 feet [this slope is at the rate of 36.9 feet per mile,] and from this point down stream rapids occur which are clearly depicted by Photoes [sic] Nos. 17 and 18. From the character of the rapids, the river bottom must consist of large rocks, which feature, added to a great many others, makes any plan looking toward the navigability of the river out of the question.

Below mile 90 the country for some distance is more open, with grazing and ranch lands extending back from the river. Little Prickley Pear Creek is the first stream of any considerable size flowing into the river below mile 119, the point of beginning this survey. Its course is at right angles to the river, and at its mouth shows a large amount of detritus, the bar formed narrowing the channel. From the width of the creek bottom and the nature of the material I should infer that a great amount of gravel and wash is carried down into the river in flood season by it, as gravel extends into the stream for over 100 feet from its bank. This creates a bad condition because of its volume and carrying capacity during the high water periods. To make use of the river, dredging would have to be done each season as the current here is not rapid enough to properly scour the channel.

Rock Creek, at mile 86.5, also shows that in flood water season a width of 100 feet is needed to carry the water, which flows into the river at nearly right angles. A great deal of gravel wash is now visible which has spread out in fan shape for at least 200 feet along the river front. Below Rock Creek the river is cut into several channels by a series of islands, it being difficult to determine which was the deepest to float the boat through. The boat grounded or struck rocks continually for some distance. The river is swift, showing large riffles owing to the rocky bottom.

A reef of highly tilted rocks is eroded by the river at this point, which probably accounts for the semi-rapids and swift current.

Meter readings gave a velocity of 4 feet per second, and at mile 83.5 the same velocity was obtained [this

is at the rate of 2.7 miles per hour]; the east bank was 20 feet above water level and being rapidly eroded.

About 800 feet below Dog Creek, mile 82.5, a rocky point juts out into the water, contracting the channel to about 100 feet, of which from 60 to 70 feet would be usable, the water having a velocity of 3.85 feet per second. [This is at the rate of 2.6 miles per hour]

Miles 84.5 and 83.5 show a fall of 5 feet by the Bulletin. [This slope is at the rate of 5 feet per mile.]

At mile 78.5 the velocity of the river was found to be 3.7 feet per second. [This is at the rate of 2.5 miles per hour.]

From a settler at mile 76.5 I learned that the river froze over the latter part of November, 1915, the ice breaking up on March 7th. of this year, and that between these dates h had driven four horses with heavily loaded sleds across the river, also that the water was so low in September, 1915, as to allow him to easily ford it just above his house.

Just below here, at mile 76.3, the Dearborn River empties into the Missouri. This is the largest stream so far encountered. Bridge No. 23 of the Great Northern Railway over this stream is made up of 300 feet of I-beam construction and 200 feet of clear span trussed bridge, which shows that an immense amount of water is carried in the channel during May, June and July. So much detrital material has been carried out into the river that the channel has been narrowed to a width of about 50 feet, where the river is deep enough to float a boat. The current is also swift here for 200 or 300 feet, with a sheer rick wall along the

south bank where the water is swiftest, making this point dangerous, especially when strong winds prevail.

Below the Dearborn River at several points, velocities of from 2.9 to 4 feet per second were recorded. [This is at the rate of from 2.0 to 2.7 miles per hour.] At mile 75 the river has 3 channels, the north one having large submerged rocks on it.

The river is again in canyon and has been for some distance. A few small area are being farmed, but the percentage of ground that is of use, to the rocky portion is very, very small indeed.

Between miles 73 and 75 the river drops 10 feet in one and five-eights miles and makes an S curve; [This slope is at the rate of 6.2 feet per mile;] at on point riffles show in the river with a velocity of 4 feet per second. [This is at the rate of 2.7 miles per hour.] Just below mile 74 the river drops 4.45 feet in a distance of 2,650 feel [this slope is at the rate of 8.86 feet per mile], here having a velocity of 4.1 feet per second. [This is at the rate of 2.8 miles per hour.] Photo 19 shows the rapids at this point.

At elevation 3410, mile 71.7, meter readings gave 4.55 feet per second velocity, and the river maintaining practically the same rate for the next 3,000 feet. Photo No. 20 was taken at mile 71.

Between miles 68 and 69 the river is very crooked with immense rock cliffs on both banks. Alternating eddies and swift water are to be found here, which, with the hard wind that blew at the time I made the examination of this portion of the river made the passage very dangerous.

The Great Northern tunnel inspector, who has lived here for some time, informed me that winds of high velocity were common in this section. The wind influence, if navigation should be attempted, would be a dangerous element, as not only here but for practically the entire distance thus far examined the course of the river is remarkably tortuous and in a canyon which produces baffling wind currents blowing in every direction. For instance, at mile 68.5 the river makes a turn greater than a right angle, above this point the wind was blowing hard towards the north, below — where the river course is southwesterly, the wind blew through a gap where Tunnel No. 1 of the Great Northern Railway is run, creating a very strong counter current. If I had not experienced the effect of the wind, especially at this point, it would have been difficult to believe what a problem it presents.

Just below this point the river drops 2.75 feet in a distance of 3,000 feet, [this slope is at the rate of 4.85 feet per mile] with a water velocity of 4.5 feet per second [or at the rate of 3.1 miles per hour,] and to further complicate matters a large rock projects out of the water in the swiftest part of the current.

At mile 68.5 another of the numerous dangerous places is encountered because of swift water and immense projecting rocks for at least one-third of the way into the river from the north bank.

Beginning at mile 66 and extending down stream for about a half-mile are the Half Breed rapids which constitute the worst section of the river covered by this examination. They are two and one-half times as long as the Beartooth rapids, and present a far more dangerous situation because of rocks, islands, shoals

and a winding crooked channel of extremely swift water. The boat had to be unloaded and lowered down stream, which proved to be a difficult task for the members of the party. Beginning just above the rock breakwater which has been built out into the stream about 250 feet and at an angle of 45E to protect the west bank form erosion, the water begins to run swiftly, and apposite [sic] the breakwater several large rocks project above the water surface. Here the river is divided into two channels, but the right or east channel does not flow enough water, except at flood season, to be of use.

Directly below the end of the breakwater where the water is swiftest the upper end of Island No. 2, at least 700 feet long, is directly in the center of the current, most of the water however passing through the left hand channel. Some water flows between Islands No. 1 and No. 2, but this channel is useless because of the small amount flowing through it.

In the left hand channel carrying the greatest bulk of the water, at a velocity of 7 feet per second, [this is at the rate of 4.8 miles per hour,] the water is forced sharply to the west bank where riprapping has been resorted to in order to prevent more scouring of the bank, which would in time erode sufficiently to destroy the railroad or necessitate moving the tracks.

The swift current flows along the left bank for about 500 feet, thence turning more to the northeast creating an eddy along the west bank. About 250 feet below the eddy and three-quarters the length of Island No. 1, another Island — No. 3, lies directly in the path of the swiftest current and largest flowage of water. About two-thirds of the water in the entire river at this

point rushes by on the west or left side of Island No. 3, the water in this channel being driven with great velocity (10 feet per second [or at the rate of 6.8 miles per hour]) against the left bank, where large rocks are encountered. Here the river is untied in one stream, where it rushes swiftly over rocks that are just submerged.

From the character of the rapids and water this condition exists for about 300 feet. The lower portion of these rapids are the worst because of the large rocks across the entire channel. The passage of the river is made more dangerous also for the reason that there are quick changes in directly along the line of the greatest water channel which would have to be used if any attempt should ever be made to utilize the river at all for navigation. Going up stream, where the deepest water would have to be followed, would be attended with greater danger when the wind blows hard. Photos Nos. 21 and 26 inclusive, show various phases of these rapids.

Commencing at the Breakwater the drop in the river is as follows

Station	8 plus 10	Drop 2.35 feet,
2	13 " 20	Total drop 5.22 feet.
"	19 " 30	" " 7.10 "
"	21 " 80	" " 8.28 "
"	24 " 80	" " 8.88 "

[This slope is at the rate of 18.9 feet per mile.]

From these figures it will be seen that the river for a half-mile becomes practically an uncontrollable

torrential force, rushing swiftly down a small channel strewn with immense rocks.

The river continues to flow rapidly for two miles below Half Breed Rapids, and in three miles, one mile above and two miles below the rapids, the total fall of the river is 25 feet. [This slope is at a rate of 8.3 feet per mile for 3 miles.]

From here to Cascade the boat ran on shoals and into submerged rocks without warning because of the muddy water.

Opposite mile 64.5 the canyon ends. Farming lands now take the place of deep, rock bound river canyon, although the river maintains its snake like course. In the whole distance covered the river contained a great number of islands and innumerable bars and shallows, which with muddy water made it difficult to even float down the river although much care was exercised to keep the boat in the deepest channel.

From all that I could learn, the only use made of the river at any time was by a man owning a sawmill several miles back from the river at Elkhorn Creek, who sawed and stored a small amount of lumber on the river bank where it was made into a raft and floated during high water to Craig.

It was reported that on James Doggett, about the year 1901, attempted to run a small steamer from Great Falls to Canyon Ferry, but after suffering considerable damage in attempting the Half Breed rapids the boat was cut into sections and hauled by wagon to its destination.

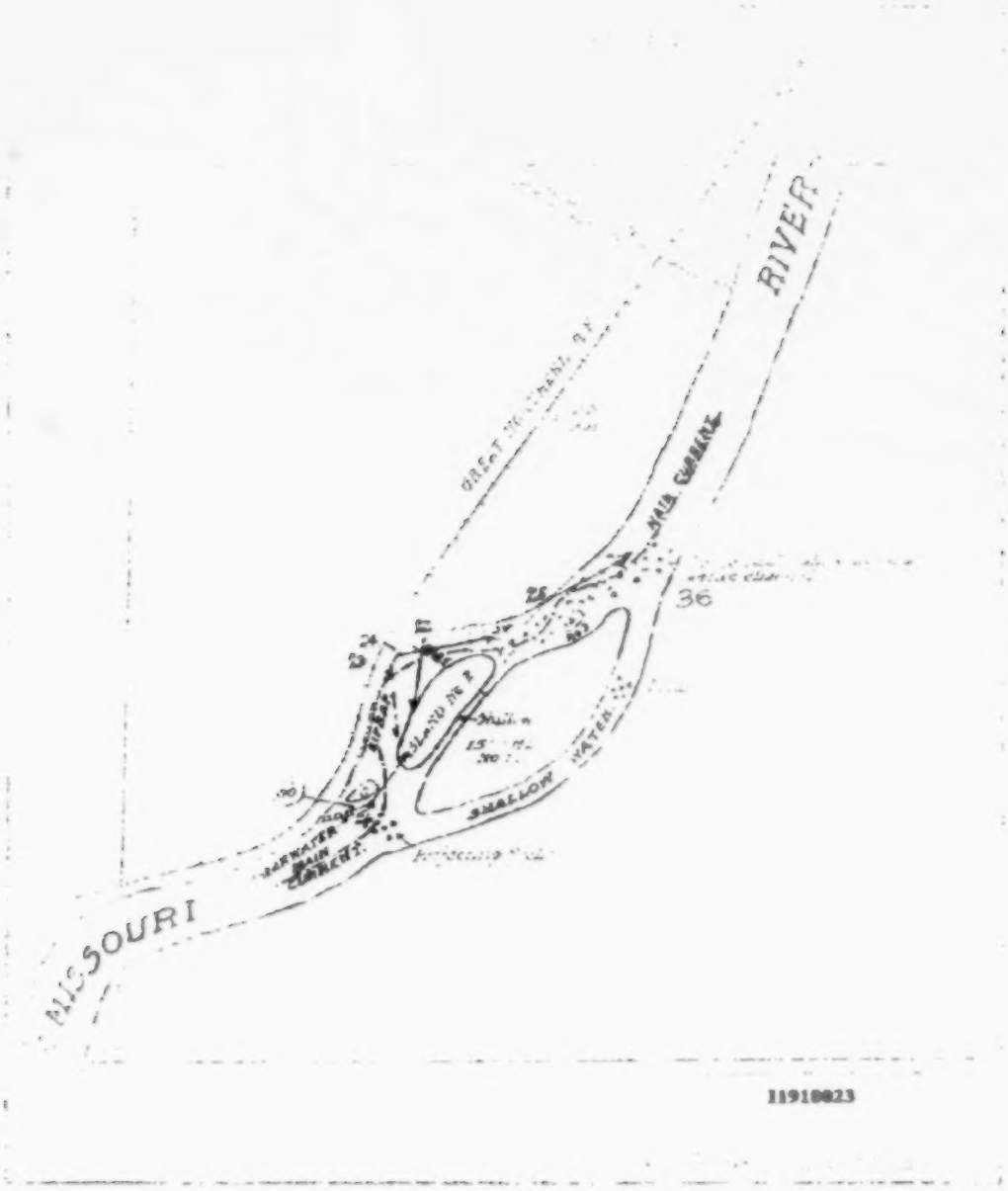
In the case of Spratt v. Missouri River Power Co., tried in the District Court in Helena in 1909, an attempt was made to show that the river was navigable, but no evidence was introduced beyond the fact that a few logs and timber had been driven as noted above, a few trappers had floated down stream, and that a small excursion steamer had operated for a few summer seasons on a limited section of the river at the head of White Rock Canyon. This launch, owned by Mr. Nick Hilger, was a 30 foot, steam, stern wheeler, drawing two feet of water. I made a trip with Capt. Hilger on his boat, July 4th. 1896, the excursion being from Hilger's ranch at mile 112 to Picnic Gulch, mile 108.5, and return. Capt. Hilger said that below this point the river was dangerous and impassable because of the Bear Tooth rapids.

Several accidents have occurred to hunters and trappers who have attempted passage down the stream.

Several years ago Major Chittenden, then in charge of the Missouri River for the Government, succeeded in making the passage down stream in a flat bottom boat from Canyon Ferry to Cascade, but at the expense of considerable difficulty and risk.

CONCLUSIONS.

I therefore conclude, from my observations, that the navigability of the Missouri River from Hauser Lake to Cascade is not practicable and almost impossible, because, there are no commercial or other uses to which it can be put; there is not enough timber to be marketed; from Hauser Lake to Half Breed rapids the river virtually runs through tortuous rock bound


RIVER
MISSOURI
SMALLOW WATER
36
11910023

BEAR TOOTH RAPIDS
AT MILE 104
Looking Southwesterly

No. 12

11910035

LOWER HALF BREED RAPIDS No 25
Looking Northeast
11910048

JA 861

REPORT

ON THE

CONSTRUCTION OF A MILITARY ROAD

FROM

FORT WALLA-WALLA TO FORT BENTON.

BY CAPT. JOHN MULLAN, U.S.A.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1863.

JA 862

REPORT

ON THE

CONSTRUCTION OF A MILITARY ROAD

FROM

FORT WALLA-WALLA TO FORT BENTON.

BY CAPT. JOHN MULLAN, U.S.A.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1863.

JA 863

LETTER

OF

THE SECRETARY OF WAR

TRANSMITTING,

In answer to a resolution of the Senate of the 6th instant, the report and maps of Captain John Mullan, United States army, of his operations while engaged in the construction of a military road from Fort Walla-Walla, on the Columbia river, to Fort Benton, on the Missouri river.

IN THE SENATE OF THE UNITED STATES,
February 17, 1863.

Resolved. That there be printed for the use of the Senate one thousand additional copies of Captain Mullan's report of his military survey of the route from the Columbia river, in Washington Territory, to Fort Benton. In Dakota Territory; also four hundred copies for the use of the Topographical bureau for distribution, and one hundred copies for the use of Captain Mullan.

Attest:

J.W. FORNEY, *Secretary*

WAR DEPARTMENT,
Washington, City, February 19, 1863.

SIR: In compliance with the resolution of the Senate of the 6th instant, I have the honor to transmit herewith the report and maps of Captain John Mullan, United States army, of his operations while engaged in the construction of the military road from Fort Walla-Walla, on the Columbia river, to Fort Benton, on the Missouri river.

I am, sir, very respectfully, your obedient servant.

EDWIN M. STANTON, *Secretary of War.*

Hon. SOLOMON FOOTE,
President pro tempore of the Senate.

OFFICE MILITARY ROAD EXPEDITION,
Topographical Bureau, Washington, D.C.,
February 18, 1863.

SIR: I have the honor herewith to transmit to your bureau the final report of my operations while in charge of the military road from Fort Walla-Walla to Fort Benton, with eight illustrations. Accompanying the report are one general map and three detailed maps, all compiled from our original field-notes. All these are worthy of publication, and particularly the general map.

I am, sir, truly, your obedient servant,

JOHN MULLAN,
Captain 2d Artillery, in charge of Military Road.

Major J.C. WOODRUFF,
United States Topographical Engineers,
Chief of Topographical Bureau, Washington, D.C.

REPORT OF CAPTAIN JOHN MULLAN.

OFFICE MILITARY ROAD EXPEDITION,
Topographical Bureau, Washington, D.C.,
February 14, 1863.

SIR: I have the honor to submit to the War Department the following final report of my labors and operations in connexion with the exploration, location, and construction of the military road from Fort Walla-Walla, on the Columbia, to Fort Benton, on the Missouri river, comprising a period from March, 1958, to September, 1862. At short intervals, while engaged in the field, sub-reports in full detail were submitted to the bureau, and your department was kept advised of the prosecution and progress of the plan of the work; also the causes that let to the location of each special section of the line as it was handled en route. The material, however, contained in those sub-reports, though important to be known to the bureau at the time of the location and construction of the road, has lost much of its special value since the road has become completed. In making to you, therefore, this my final report, I have deemed it due to the character of our work and to the labors of those who have followed and assisted it to a successful completion through so long a period, to give a brief outline memoir of the causes that led to its first exploration and location, the special difficulties under which this construction was had, and the ulterior views and ends sought to be accomplished in part by the completion of the work.

* * *

That the field of labor assigned to Governor Stevens, owing to the meagre Information possessed at that date, was the most difficult to be explored. I believe few will doubt; and that he filled it with an ability and energy, so characteristic of the man, I can personally vouch. His labors have left to the country a very correct outline of the geography of the Rocky Mountain sections, examined by his parties, which needs hereafter only the minutiae which the more detailed surveys and time will supply, to complete our knowledge of the entire north Pacific region. In connexion with the proper location and construction of a railroad, one of the most essential aids in advance was a good wagon-road line; and looking at the necessity involve, this last became a subject of primary material over a long line from eastern to western depots, which the Pacific railroad on all lines will necessarily involve, this last became a subject of primary importance, and reduced the spirit of my own work almost to exploring the country for practicable wagon-road locations, which, in time, should lend themselves as aids to the construction of our railroad lines. The attention of Stevens was especially given to this matter at an early date of our explorations, and in his instructions to me was dwelt upon with more than ordinary emphasis and stress; and hence my mission in the winter of 1853 was to solve the problem of a proper connexion, through a practicable mountain pass, of the plains of the Missouri with the plains of the Columbia, between the 45th and 48th degrees of north latitude, for either wagon road or railroad lines, and to make my reports thereon; and, therefore, my present connexion with the Fort Walla-Walla and Fort Benton military road dates therefrom.

* * *

The question of the navigation by steam of the upper Columbia and Missouri rivers was, at that date, in the infancy of its discussion, but was deemed of such importance that its practical solution was looked upon by the friends and advocates of the railroad line as the *sine qua non* to the full and speedy settlement of the country between them, as well as the all-important aids in the construction of the country between them, as well as the all-important aids in the construction of a Pacific railroad *via* a northern route.

* * *

JA 868

WAR DEPARTMENT.

REPORT

OF A

RECONNAISSANCE

FROM

CARROLL, MONTANA TERRITORY, ON THE UPPER MISSOURI

TO THE

YELLOWSTONE NATIONAL PARK, AND RETURN,

MADE IN

THE SUMMER OF 1875,

BY

WILLIAM LUDLOW,
CAPTAIN OF ENGINEERS, BREVET LIEUTENANT-COLONEL, U.S. ARMY,
CHIEF ENGINEER DEPARTMENT OF DAKOTA.

WASHINGTON:
GOVERNMENT PRINTING OFFICE
1876.

* * *

July 27.—Carroll was reached at 7 p.m. I found a note from Lieutenant Thompson to the effect that the vicinity of Carroll had been examined and the necessary observations taken; and, finding that forage and rations were becoming scarce, it has been determined to proceed on the road toward Camp Baker in order to save delay.

A courier was dispatched to Camp Lewis for escort and transportation by Lieutenant-Colonel Otis, assistant inspector-general of the department, who was *en route* to Helena, and we awaited the reply.

Carroll is a frontier "town" of perhaps twenty or twenty-five log buildings, on the south bank of the river, six hundred and forty miles above Bismarck and one hundred and sixty-five miles below Fort Benton, the limit of navigation on the Upper Missouri. The town is situated on a timbered Plateau 15 or 20 feet above the level of the streams at low water, in the river-valley, which is some 800 to 900 feet in depth, with steep clay slopes covered with pine. It owes its existence to its being the terminus of the road recently opened from Helena, and the point at which freights are transferred to and from the boats.

Montana has long suffered from its isolation and from the want of an outlet for its productions. Until the opening of the Carroll road, the only regular communication with the outer world was by the road from Helena to Corinue, on the Union Pacific Railroad, a distance of over four hundred and fifty miles. The distance from Helena to Carroll is more than two hundred miles less than this, a difference which, to the

heavy bull-trains averaging only twelve or thirteen miles per day, represents a saving of fifteen or sixteen days in time. The Missouri River as far up as Carroll is generally navigable for the flat-bottomed stern-wheel boats that ply upon it until some time in October; and it is evident that by the aid of a connection at Bismarck with the Northern Pacific an important and valuable outlet for the wealth of the Territory has been discovered, available from the opening of navigation in the spring until quite late in the falls, a period of over five months.

* * *

REPORT OF THE CHIEF OF ENGINEERS

* * *

M 3.

EXAMINATION OF THE MISSOURI RIVER ABOVE THE MOUTH OF THE YELLOWSTONE

UNITED STATES ENGINEER OFFICE,
Saint Louis, Mo., July 23, 1875.

GENERAL: In accordance with the instructions conveyed by your letter of April 8, 1875, I have investigated, as far as I was able, the question of the improvement of the Missouri River above the mouth of the Yellowstone, and I beg to submit the following report, with accompanying approximate estimate of the cost of the contemplated improvement.

We have two careful reports on the navigation of the Upper Missouri River, one made in 1868 by Capt. C. W. Howell, Corps of Engineers, and published with the report of Col. J. N. Macomb, Corps of Engineers, (see Report of Chief of Engineers for 1868, page 621.) the other by Mr. Thomas P. Roberts, in 1872, and published by the War Department in 1875, for the use of the Corps of Engineers.

I have read both these reports carefully, and find that Captain Howell and Mr. Roberts agree substantially as to the nature and extent of the improvement required. For want of accurate surveys, neither of these gentlemen felt able to submit definite estimates, but from the character of the work, and the

peculiar county in which it must be carried on, this will not be a serious drawback.

* * *

PROJECTED WORK OF 1879.

One party will continue the work at Dauphin's Rapids, and it is expected that in this connection Bird's Rapids will be improved.

The work upon this portion of the river necessarily progresses slowly, but the results attained are sure and permanent.

Another party will complete the improvement of Grand Island, and then proceed to Shonkin Bar to commence the work at that point.

It was the intention to send a third party to Half-breed Island, on the river above Benton. However, it was so late in the season before the appropriation was made available, the distance so great, and the facilities of transportation and purchase of the necessary lumber so uncertain, that I concluded it would be better to put the third party at work on Kipp's Rapids, where improvement is very much needed. In addition, I learned that the proposed boat to be placed on the upper river has not been built, and there was an uncertainty as to when the project would be carried out. When I pass through Helena this summer I will investigate the subject thoroughly, and will submit a special report upon the river above Benton. I have at present only Mr. Robert's report to depend upon, and should prefer to have more data at my command than

are now in my possession before making any further recommendations.

* * *

* * *

REPORT OF THE CHIEF OF ENGINEERS, U. S. ARMY.

II.

[Extract from Report of the Chief of Engineer, Part I, 1878]

SPECIAL REPORT ON IMPROVEMENT OF THE MISSOURI RIVER ABOVE THE MOUTH OF THE YELLOWSTONE

UNITED STATES ENGINEER OFFICE,
HEADQUARTERS DEPARTMENT OF DAKOTA,
Saint Paul, Minn., January 3, 1878

GENERAL: I have the honor to transmit herewith a report upon "The improvement of the Missouri River above the mouth of the Yellowstone."

. . . . . .

THE SECTION OF COUNTRY TO BE SPECIALLY BENEFITED.

The section of the country to be specifically benefited by the improvement of the Upper Missouri River is the Territory of Montana, which lies about midway between the great lakes an the Pacific Ocean. Embraced between the forty-fifth and forty-ninth parallels and 104° and 115° west longitude, it is 276 miles wide from north to south and a little over 520 miles wide from east to west. It contains 143,776 square miles, above one-tenth of which (9,000,000 of acres) is farming land. About one-fourth of the

inhabitants are miners, one-eighth stockmen, and the remainder tradesmen and professional men.

* * *

Of the shipments to the Territory, about one-fourth are to Benton and the remainder to Helena via Benton. Helena, the principal distributive depot, is about 140 miles from Benton, the transportation between the two places being by means of wagon-trains.

The establishment of three new posts, and the increase of the number of troops stationed in the Territory, will give an impulse to the settlement of the country by at least a partial removal of the two barriers to such settlement – insecurity of life and property.

In regard to the mineral wealth of the Territory, it has been said that as a gold-bearing country Montana stands next to California, and in silver she ranks first in quality possessed, and second to Nevada in the amount produced.

* * *

REPORT OF THE CHIEF OF ENGINEERS, U. S. ARMY

[1880]

* * *

The slope of the river from Stubbs Ferry to the foot of Bear's Teeth Shoal is 4.05 feet per mile; from the foot of Bear's Teeth Shoal to Gibson's Ferry it is 3.54 feet per mile. The most excessive slopes are at Bear's Teeth Rapids, Bear's Teeth Shoal, and Lone Pine Rapids, being, respectively, for ¼ mile, 20.4 feet per mile; for 3/4 miles, 12.36 feet per mile; and for ½ mile, 18.35 feet per mile. I use the name Lone Pine Rapids instead of Half-Breed Rapids, for the reason that the former is the old Lewis and Clark name, and I can see no good reason why Roberts should have changed it.

Accepting the water of April 21, the lowest water observed, as low-water, there are but three places of a less depth than 2½ feet. Of those the most important is Bear's Teeth Shoal. Here, as will be seen by the tracing, the river is divided by two islands. The bottom is of gravel and of stone from 4 to 12 inches in diameter. The width of the main channel is 500 feet. The soundings show a channel depth near the head of the lower island of 2 feet. From about the middle point of the island, towards the foot, nature has contracted the stream and a good depth is found.

Bear's Teeth Rapids has a crooked 3-foot channel choked with rocks.

Lone Pine Rapids is a very dangerous place. An island divides the river. At the foot of this island 2

reefs make from the opposite banks, overlapping in the channel.

From Gibson's Ferry to Sun River, the Missouri, for the purpose of such navigation as can be accommodated by the river above, is all that can be desired. The slope, nearly uniform, is only 0.56 foot per mile; the current is sluggish, and the channel is free from snags, rocks, and sand bars.

At a point 8/10 mile below Sun River, where the survey terminated, a series of falls commence, and this point is the foot of navigation on the Missouri River above the Great Falls.

Assistant Engineer Wood, with one overseer and one laborer, will leave Saint Paul for Helena on the 20th instant. A party will be organized in Helena where, also, the lumber and subsistence supplies will be purchased. Most of the material will be taken from the depot at Chimney Bend.

Work will be commenced at Bear's Teeth Shoal, where the party will construct the necessary dams. That work completed, the rocks will be removed from Bear's Teeth Rapids, and at the close of operations there the party will proceed to Lone Pine Rapids. It is expected that this work will be carried on until December next.

In referring to the assistant engineers it is only necessary to state that Mr. H. E. Stevens brought his accustomed energy and ability to bear upon the work both in field and office, and that credit is due Mr. W. H. Wood for his close attention to and good execution of the work assigned to him.

Money statement.

July 1, 1879, amount available	$52,279.62	
Amount appropriated by act approved June 14, 1880	25,000.00	
		$77,279.62
July 1, 1880, amount expended during fiscal year	30,389.15	
July 1, 1880, outstanding liabilities	338.59	
		30,727.74
July 1, 1880, amount available		46,551.88
Amount that can be profitably expended in fiscal year ending June 30, 1882		150,000.00

47TH CONGRESS, *1st Session* | HOUSE OF REPRESENTATIVES | EX. DOC. 1, Part 2.

REPORT

OF THE

SECRETARY OF WAR;

BEING PART OF

THE MESSAGE AND DOCUMENTS

COMMUNICATED TO THE

TWO HOUSES OF CONGRESS

AT THE

BEGINNING OF THE FIRST SESSION OF THE FORTY-SEVENTH CONGRESS

IN FOUR VOLUMES.

VOLUME II.

PART 2.

WASHINGTON
GOVERNMENT PRINTING OFFICE
1882

APPENDIX T.

IMPROVEMENT OF MISSOURI RIVER ABOVE MOUTH OF YELLOWSTONE—IMPROVEMENT OF YELLOWSTONE RIVER.

REPORT OF CAPTAIN EDWARD MAGUIRE CORPS OF ENGINEERS, OFFICER IN CHARGE, FOR THE FISCAL YEAR ENDING JUNE 30, 1881.

UNITED STATES ENGINEERS OFFICE,
Saint Paul, Minn., July 13, 1881.

GENERAL: I have the honor to transmit herewith my annual reports upon the works of river improvements in my charge, for the fiscal year ending June 30, 1881.

Very respectfully, your obedient servant,

EDWD. MAGUIRE,
Captain of Engineers.

THE CHIEF OF ENGINEERS, *U. S. A.*

T I.

IMPROVEMENT OF THE MISSOURI RIVER ABOVE THE MOUTH OF THE YELLOWSTONE.

Last season the work of improving the Missouri River above mouth of Yellowstone was carried on in two distinct sections of the river, viz, above the Great Falls and below Benton.

THE WORK ABOVE THE GREAT FALLS.

One assistant engineer, accompanied by an overseer and blacksmith, left Saint Paul July 18, 1880, and arrived at Stubbs Ferry August 11. The material was all purchased and the boats finished by September 1. It was very difficult to hire laborers and mechanics at all, and impossible to obtain first-class men.

The experiment of employing Montana labor has been made now, and it has proved a failure. On September 3, work was commenced at Bear's Teeth Shoal. The river at that point is divided into three channels by two islands. The shoal lies at the head of the lower island, and had less than 2 feet of water on it at the time of the survey made during April and May, 1880. The Montana Navigation Company had undertaken to improve this shoal. They closed the upper chute with a stone dam, and built about 150 feet of a dam to close the lower chute. The upper dam had a large break in it, made by the ice. This was temporarily repaired, and the lower dam completed. A dame was then built above the upper one. The immediate result of this work was an increase of depth on the shoal to full 2½ feet. There were 822 cubic yards of stone placed in these dams. The work was finished September 28. On October 1, work was commenced at Bear's Teeth Rapids. At this point 93 cubic yards of stone were taken out of the river, clearing a channel 70 feet wide to a depth of 2½ feet scant.

On October 25, work was commenced at Lone Pine or Half Breed Rapids. At this point a channel 100 feet in width was cleared, necessitating the removal of 106 cubic yards of stone.

On November 5, the season's work was closed, the laborers paid off and discharged in Helena. The assistant engineer and overseer arrived in Saint Paul November 24.

* * *

48TH CONGRESS, *1st Session* | HOUSE OF REPRESENTATIVES | EX. DOC. 1, Part 2.

REPORT

OF THE

SECRETARY OF WAR;

BEING PART OF

THE MESSAGE AND DOCUMENTS

COMMUNICATED TO THE

TWO HOUSES OF CONGRESS

AT THE

BEGINNING OF THE FIRST SESSION OF THE FORTY-EIGHTH CONGRESS

IN FOUR VOLUMES.

VOLUME II.

PART 2.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1883.

* * *

APPENDIX V.

IMPROVEMENT OF MISSOURI RIVER FROM SIOUX CITY, IOWA, TO FORT BENTON, MONTANA – IMPROVEMENT OF YELLOWSTONE RIVER.

REPORT OF CAPTAIN EDWARD MAGUIRE, CORP OF ENGINEERS, OFFICER IN CHARGE, FOR PART OF THE FISCAL YEAR ENDING JUNE 30, 1883.

IMPROVEMENTS.

1. Missouri River from Sioux City, Iowa to Fort Benton, Montana.

2. Yellowstone River, Montana and Dakota.

SAINT PAUL, MINN., *March* 17, *1883*.

GENERAL: I have the honor to submit the following reports on the works in my charge.

Very respectfully, your obedient servant,

EDWD. MAGUIRE,
Captain of Engineers.

VI.

IMPROVEMENT OF THE MISSOURI RIVER FROM SIOUX CITY, IOWA, TO FORT BENTON, MONTANA.

The Missouri River is formed by the union of the Jefferson, the Madison, and the Gallatin, at what is called "The Three Forks," in about 111° 30' longitude west of Greenwich and 45° 52' north latitude. It flows in a general northerly direction to Fort Benton, thence in an easterly direction to Fort Buford, and thence in a general southeasterly direction to its mouth. At about 200 miles below "The Three Forks" commence the Great Falls, which separate the river into the two natural divisions, "Missouri River above the Falls" and "Missouri River proper." The latter portion is subdivided into the Rocky River, which we may suppose to be comprised between Benton and Carroll, and the Sandy River, from Carroll to the mouth.

MISSOURI RIVER ABOVE THE FALLS.

In 1872 Mr. Thomas P. Roberts, assistant engineer of the Northern Pacific Railroad, made an examination of this portion of the river. In 1880 there was made under my direction a survey from Stubbs' Ferry (12 miles from Helena) to the mouth of Sun River. No steamboat has ever been on this portion of the river.

The length of river surveyed was 130.7 miles. The additional length of 73 miles to "The Three Forks" is, from all accounts, as easily navigable as the upper

portion of that surveyed. No definite low-water marks could be found. Roberts states that for a distance of 130 miles below Gallatin City the river at no point rises more than 7 feet in its flood-stage, and in the Long Pool, ending at Sun River, head of the falls, the greatest rise is not over 11 feet. Gauges were established April 10, 1880, and readings taken until November 6. A comparison of those readings with those taken on the river below Benton indicate that the water of April 10, 1880, was 0.5 foot above low water of 1874 as assumed for the lower river.

A very marked change occurs in the river near Gibson's Ferry, 75 miles below Stubbs' Ferry. Above Gibson's the slope and current are very great, while below Gibson's deep, flat river presents no obstacles to easy and rapid navigation.

The discharge at Stubbs' Ferry for a stage of +0.5 foot was determined by gauging to be 3,770 cubic feet per second. The discharge just below the mouth of Sun River for a stage of +3.05 feet was found to be 19,425 cubic feet per second. The discharge of the river between Stubbs' Ferry and the Three Forks is about that at the former place. The three tributaries of any consequence below Stubbs' Ferry are Dearborn River, Deep Creek, and Sun River. At high water stage of the Missouri the discharge of the Dearborn was 622 cubic feet per second. For a stage of +2.75 feet in the Missouri the discharge of Deep Creek was 1,800.5 cubic feet per second, and for a stage of +3.05 feet in the Missouri the discharge of Sun River was 4,269.5 cubic feet per second.

There is sufficient water for light-draught boats. The practical difficulties are the great slope and

consequent rapid current and the narrowness of some of the chutes. From Stubbs' Ferry to the foot of Blackbird Ripple, a distance of 68 3/4 miles, there is an average fall of 3.89 feet to the mile. This comprises the canon section of the river. The obstructions are gravel shoals, in wide or divided reaches of the river, and bowlders. Between Stubbs' and Gibson's Ferries there are fifteen places at which the depth at low water is less than 2.5 feet, and twenty-eight places at which the depth is less than3 feet. Of the fifteen places there are three at which the shoal is short and smooth, and the water is barely less than 2.5 feet. No improvements have been estimated for at those places. From Gibson's Ferry to Sun River the slope is very uniform and about 0.49 foot to the mile. The river is sinuous, the cross-section very much large than above, and the depth everywhere sufficient for low-water navigation.

Below is given a table of locations and estimated cost of improvements necessary to obtain a channel depth of 2.5 feet. The estimates are for dams of stone alone. The depth of 2.5 feet is considered sufficient for the demands of any commerce which may resort to this portion of the river. A possible landing for Helena freight is just below Twin Islands. From that point to Helena the distance is 17 miles. From Stubbs' Ferry to Helena it is 12 miles. Hence, with an additional land haul of 5 miles there would be saved a haul of 18 miles of the most difficult portion of the river, and improvements costing about $17,000, or about one-third of the total cost of improving the 130 miles of river. From Twin Islands to Sun River, 112 miles, the cost of improving the river to a depth of 2.5 feet would be about $33,000, or about $300 per mile. Considering only the portions upon which these improvements

would be made, the cost of the 47 miles from Twin Islands to the foot of Lone Pine (Half-Breed) Rapids would be about $700 per mile.

Table showing slopes and location of improvements required, and estimated cost of same to obtain a 2.5 foot channel depth from Stubbs' Ferry to Sun River, in the Missouri River.

[Table omitted]

The profitable use of steamboats is made questionable, as far as the river alone is concerned, only by the great slopes. The swiftest observed current was over a slope of 7.33 feet to the mile and was 5 miles per hour. The current at Lone Pine Rapids, having a slope of 18.16 feet per mile, is only 4.5 miles per hour for one-half mile.

The greatest slopes are given in the above table. From the head of Lone Pine Rapids for a distance of 2 1/4 miles there is an average slope of 9.77 feet per mile. For a comparison of the slopes with those of a stream of the same type which has been and is navigated, the Yellowstone affords an opportunity. The maximum fall of the Yellowstone (as far as surveyed) is for 33 miles below Fort Keogh at the rate of 4 feet per mile. The maximum fall for a distance of 68 miles (the length of the Missouri slope from Stubbs' Ferry to the foot of Blackbird Ripple) is 3.55 feet per mile, or 0.34 foot less per mile than for the Missouri. A graphical comparison of the slopes exhibits the following: Both rivers show a succession of pools and rapids. The changes from one to the other on the Yellowstone are much more frequent. If the rapids are short, boats can run them by "spurts" or judicious

"bottling-up" of stream, while an increased length, even with less slope, demands "laying lines." The volume of water in the Yellowstone is greater than in the Missouri, the discharge being, near Fort Keogh, for a stage of +0.24 foot, 6,014.85 cubic feet per second, while at Stubbs' Ferry, on the Missouri, the discharge for a stage of +0.5 foot was 3,770 cubic feet per second.

All through freight carried on the river above the falls would have to be portaged from Benton to Sun River, a distance of 45 miles, or from the foot of the falls to Sun River, a distance of 25 miles. The river from Benton to the foot of the falls may be navigated, but its great slope would render navigation difficult. It is thus to be seen that there would have to be two rehandlings of freight, one at Benton, or at the foot of the falls, and one at Sun River, and thus a great expense incurred. A railroad is either now being built or will shortly be built from Helena to Benton. I do not believe the river above the falls will ever be navigated by steamboats, except perhaps at some future day one or two small pleasure boats may be placed on the river for the benefit of tourists. The river is beautiful, and the adjacent country was in 1880 well stocked with game of all kinds. The scenery is grand beyond description. The almost vertical sides of the canon rise to great heights, and are rendered very picturesque by the dark-green pines, the rocks of every possible shade, from pure white to dark purple, green, and black, and the vivid scarlet, yellow and green mosses and creeping plants which here and there cover the faces of the rocks.

* * *

REPORT OF THE CHIEF OF ENGINEERS, U.S. ARMY

[1885, v. II]

* * *

. . .On the one hand it is held that the first and most important object of the appropriations is to check the ravages now being suffered by private, corporate, and municipal property on the banks; that an appropriation made by law to apply to a long reach of river should be distributed somewhat uniformly over it, due attention being paid to the relative value of the interests endangered at different points; that the commerce now actually existing upon the river is of small importance, and that works for its exclusive benefit may well be deferred until the tangible property now visible be secured from injury. Naturally the persons holding these views have most frequently and most vigorously made themselves known to the Commission.

On the other hand, it is held by the Commission that the appropriations are intended as a business investment made by the Government with the object with which any other capitalist enters upon a great enterprise, viz, a return of the capital together with interest; that the primary object of the improvement is to deepen the channel and thus to provide cheap through transportation for freight by which the country may be developed and the money paid out be finally returned to the Treasury of the United States; that the cost of protecting any portion of the bank from erosion is so great that it is only in exceptional cases that the annual interest upon the investment does not

exceed the annual loss without protection; that while it is true that there is but a small amount of commerce upon the river at this time, the object is to increase that commerce, and that if that object fails the whole scheme is a financial failure whether the destruction of property may have been stopped or not; and, finally, that to distribute the appropriations over numerous points separated from each other by long distances is to insure greater expense in the use of plant and in administration to postpone the realization of any benefits from the partially completed improvement, and probably also to have insufficient means at all points, with the disastrous results that have heretofore attended that policy.

Holding these views, the Commission have determined to concentrate their means and to apply them where there is the best promise of obtaining substantial benefits to the general commerce of the United States, at the earliest practicable date, and before the entire completion of the improvement. Evidently useful results can be most quickly obtained by improving the lower end of the river, providing an outlet to the Mississippi. Engineering necessities require that the work should progress down stream. The initial point must, therefore, be at some distance above the mouth. The Commission have selected Kansas City, 386 miles, above the mouth, because it is the first important commercial center to be met with in proceeding up-stream. They would have preferred an initial point at a less distance from the mouth than 386 miles, but believing that no very great benefit would be conferred upon the commerce of the United States before the improvement shall extend from the mouth to Kansas City, they have allowed the following considerations to control, viz, that it was desirable to

begin the work near a good base of supplies, and that some detached work had already been done here under previous appropriations which could be utilized as part of a general scheme of improvement.

* * *

40TH CONGRESS, *1st Session* | HOUSE OF REPRESENTATIVES | EX. DOC. 1, Part 2.

REPORT

OF THE

SECRETARY OF WAR;

BEING PART OF

THE MESSAGE AND DOCUMENTS

COMMUNICATED TO THE

TWO HOUSES OF CONGRESS

AT THE

BEGINNING OF THE FIRST SESSION OF THE FORTY-NINTH CONGRESS

IN FOUR VOLUMES.

VOLUME II.

PART 4.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1885.

APPENDIX X X.

REPORTS OF THE MISSOURI RIVER COMMISSION.

X X:

REPORT FOR 1884.

WAR DEPARTMENT,
Washington City, January 7, 1885

In accordance with the act of Congress approved July 5, 1884, creating the Missouri River Commission, the Secretary of War has the honor to transmit herewith to the United States Senate the annual report of said Commission for 1884.

The recommendations of the Commission for appropriations for the fiscal year ending June 30, 1886, have been forwarded to the Secretary of the Treasury for transmission to Congress, as required by section 2 of the act of July 7, 1884. (Pamphlet Laws U.S. 1883-'84, page 254.)

ROBERT W. LINCOLN
Secretary of War.

THE PRESIDENT PRO TEMPORE OF THE SENATE.

REPORT.

MISSOURI RIVER COMMISSION,
Saint Louis, MO, December 9, 1884

SIR: The Missouri River Commission created by the act of July 5, 1884, is required by law to submit annually for transmittal to Congress, at the beginning of the regular session in December, "a full and detailed report of all their proceedings and actions, and of all such plans and systems of work as may now be devised and in progress and carried out by them and of all such additional plans and systems of work as may be devised and matured by them, with full and detailed estimates of the cost thereof and statements of all expenditures made by them." "The duties prescribed to the Commission by the same act were—

To superintend and direct such improvement of said river, and to carry into execution such plans for the improvement of the navigation of said river from its mouth to its headwaters as may now be devised and in progress and to continue and complete such surveys as may now be in progress, and to make such additional surveys, examinations and investigations, topographical, hydrographical, and hydrometrical, and to consider, devise, and mature such additional plan or plans and all such estimates as may be deemed necessary and best, to obtain and maintain a channel and depth of water is said river sufficient for the purposes of commerce and navigation; [and] under the direction and with the approval of the Secretary of War, superintend, control, and expend for the purpose of this act all appropriations or unexpended balances heretofore made for the improvement of said river and which may hereafter be made for said river, or so much thereof as may be necessary.

In the same act were the following items, appropriating money for the execution of these duties:

(1) Improving Missouri River from its mouth to Sioux City, Iowa, including such harbors on said river as in the judgment of the board of engineers herein created will benefit commerce and navigation, $500,000.

(2) Improving Missouri River from Sioux City, Iowa, to Fort Benton, Mont. Continuing improvement, $125,000; of which sum $15,000 shall be used in the purchase of a snag boat to be operated on the Missouri River above Sioux City, and on the Yellowstone River.

(3) For a survey of the Missouri River above the Missouri River Falls at Fort Benton, $15,000.

Upon assuming their duties the Commission found that a continuous survey of the river had been made from its mouth to Fort Pierre, Dak., a distance of 1,174 miles, and also from the mouth of Sun river, at the head of the Falls, to Stubbs Ferry near Helena, a distance of 130.7 miles, leaving unsurveyed the portions extending from Fort Pierre to the mouth of Sun River, a distance estimated at about 1,390 miles, and from Stubbs Ferry to the headwaters of the Missouri, at Three Forks, a distance estimated at 73 miles. They found that the head of navigation was at Fort Benton, situated about 250 miles below the headwaters and about 2,519 miles above the mouth of the river; that works of improvement had been executed at various points from Saint Charles, Mo., 25 miles above the mouth, to Kippp's Rapids, 58 miles below Fort Benton, besides some small works constructed in 1880 above the Falls.

For convenience of administration, the river had been divided into two districts, the first district extending from the mouth to Sioux City, a distance of 803 miles and the second from Sioux City to Fort Benton, a distance of about 1,716 miles. The division was an artificial one, made simply for convenience, there being no marked change in the character of the river for a long distance above and below Sioux City.

* * *

MISSOURI RIVER ABOVE THE FALLS

The Commission are informed that no steamboat has ever been upon the river above the Falls. This obstacle, extending from a point 45 miles to a point 20 miles above Fort Benton, completely and permanently cuts off the extreme upper portion of the river from all open channel connection with the lower. Of the 204 miles of river between the Falls and the headwaters of the Missouri at Three Forks, 131 miles have already been surveyed, leaving unsurveyed the 73 miles immediately below the Three Forks. There seems to be no immediate necessity for further surveys in this portion of the river. The Commission have ventured to suspend the expenditures of the appropriation of $15,000 contained in the act of July 5, 1884, until the matter can again be brought to the attention of Congress. They recommend that the amount be reappropriated and made available for the general survey of the river from its mouth to its headwaters.

* * *

52D CONGRESS, *1st Session* | HOUSE OF REPRESENTATIVES | EX. DOC. 1, Part 2.

REPORT

OF THE

SECRETARY OF WAR;

BEING PART OF

THE MESSAGE AND DOCUMENTS

COMMUNICATED TO THE

TWO HOUSES OF CONGRESS

AT THE

BEGINNING FO THE FIRST SESSION OF THE FIFTY-SECOND CONGRESS.

IN FIVE VOLUMES.

VOLUME II – IN SIX PARTS.

PART 1.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1891.

* * *

IMPROVEMENTS OF MISSOURI RIVER ABOVE SIOUX CITY, IOWA, AND OF YELLOWSTONE RIVER, MONTANA AND NORTH DAKOTA.

Officer in charge, Capt. Chas. F. Power, Corps of Engineers, since November, 1890; Division Engineer, Col. O. M. Poe, Corps of Engineers.

1. *Missouri River between the Great Falls, Montana, and Sioux City, Iowa.* – This work had been under the control of the Missouri River Commission. The river and harbor act of September 19, 1890, having made a separate appropriation for the river above Sioux City, to be expended in the discretion of the Secretary of War, the work was, November 30, 1890, placed in charge of Capt. Charles F. Power, Corps of Engineers, under the supervision of the Chief of Engineers.

The river above Fort Benton, the head of navigation, to the foot of the falls is seriously obstructed by numerous rapids and rocks. This part of the river is the tailing out of the Great Falls. No work has been done upon it and none is proposed.

* * *

52D CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | EX. DOC 1, pt. 2, vol. II.

ANNUAL REPORT

OF THE

CHIEF OF ENGINEERS,

UNITED STATES ARMY,

TO THE

SECRETARY OF WAR,

FOR

THE YEAR 1892.

IN FOUR PARTS AND ATLAS.

PART II.

WASHINGTON:
GOVERNMENT PRINTING OFFICE
1892.

* * *

A A 3

[Printed in House Ex. Doc. No. 114, Fifty-second Congress, first session].

PRELIMINARY EXAMINATION OF MISSOURI RIVER, MONTANA, BETWEEN GREAT FALLS AND CANON NEXT BELOW STUBBS FERRY.

ENGINEER OFFICE, UNITED STATES ARMY,
St. Louis, Mo., March 19, 1891.

GENERAL: I have the honor to report from an examination made by me that the Missouri River between Great Falls and canon next below Stubbs Ferry is worthy of improvement.

The water named is readily susceptible of improvement for a profitable light-draft navigation. The country tributary to it is now productive in a small measure (and will be, it is judged, extensively productive) of articles of heavy traffic, which generally seek water transportation. It is timbered and mineral, or in part grazing and agricultural. Useful stone and coal are also reported. A market for the products indicated exists at Great Falls, a place whose shipping and manufacturing interests, especially ore smelting and lumber ones, are rapidly growing. This city, barely 7 years old, already ranks in population as the third one in Montana. It has an excellent site for a large town, is the natural center of an extensive country, has good railroad facilities, and a water power, furnished by the adjacent falls of the Missouri River, not excelled in the United States.

Detailed commercial statistics and a history of navigation on the Missouri River above Great Falls are given in an extract of a report herewith of Lieut. J. C. Sanford, Corps of Engineers, concerning the obstruction of navigation by the building of a proposed dam and bridge across the Missouri at the canon next below Stubbs Ferry. Attention is also invited to the appended statement of a committee of the Great Falls Board of Trade.

Stubbs Ferry is about 12 miles northeast of Helena; the canon is 3 or 4 miles downstream. The new settlements of Cascade and St. Clair are about 76 miles further; and Great Falls is 50 miles below them. Gallatin, near the junction of the three forks which form the Missouri, is 78½ miles above Stubbs Ferry and 40 miles above Townsend, a point mentioned in Lieut. Sanford's report. Sun River empties into the Missouri just above Great Falls.

In 1880, under orders of the Engineer Department, Capt. Edward Maquire, Corps of Engineers, made a survey of the Missouri River from Stubbs Ferry to Sun River. Following the survey some work of improvement, consisting of stone dams and rock removal, was executed in that year. In 1890 the Missouri River Commission made a detailed survey of the river from Gallatin to Fort Benton, below Great Falls, and at a very low stage of river and one considerably lower than obtained during the first survey.

There is no need therefore, of a new survey. A plan of improvement can be prepared from the maps and other data of the two surveys. The maps of the Commission survey are, I am lately informed,

unavoidably delayed, and for assistance in the mapping of the part from the canon to Great Falls, in order to secure prompt use of the maps useful in preparing the plan, I estimate that $750 are needed.

Very respectfully, your obedient servant.

CHAS F. POWELL,
Captain, Corps of Engineers

Brig. Gen. THOMAS L. CASEY,
Chief of Engineers, U. S. A.

(Through Col. O. M. Poe, Corps of Engineers,
Division Engineer, Northwest Division.)

[First indorsement.]

U. S. ENGINEER OFFICE,
Detroit, Mich., March 17, 1891.

Respectfully forwarded to the office of the Chief of Engineers.

It is with great reluctance that I concur in the opinion of the local engineer that the Missouri River between Great Falls and canon next below Stubbs Ferry is worthy of improvement by the General Government; but the commercial developments of the locality have been so rapid as to seem to justify the prompt mapping of the surveys already made.

I therefore recommend that the proposition of Capt. Power be approved; if not for the full amount named by him, at least for a portion of it.

O. M. POE,
Colonel, Corps of Engineers, etc.,
Division Engineer, Northwest Division.

REPORT OF LIEUTENANT J. C. SANFORD, CORPS OF ENGINEERS.

ST. LOUIS, MO., *September 16, 1890.*

SIR: * * * The first effort toward navigating the upper river by steamboats was made in 1879 by the Montana Navigation Company, composed of five of the leading business men and shippers of Helena. At that time Helena was the principal and only important distributing point in Montana. Nearly all the Montana supplies came up by steamboat to Benton, and thence were hauled by wagon to Helena, 140 miles. The object of the company was to reduce this wagon haul, substituting water transportation for about three-fourths of the distance. The company expended (so one of its members informed me) about $10,000 on the improvement of the river; but, before a steamboat was procured, the idea was abandoned.

ENG 92——120

* * *

54TH Congress, *1st Session* | HOUSE OF REPRESENTATIVES | DOCUMENT No. 2.

REPORT

OF THE

SECRETARY OF WAR;

BEING PART OF

THE MESSAGE AND DOCUMENTS

COMMUNICATED TO THE

TWO HOUSES OF CONGRESS

AT THE

BEGINNING OF THE FIRST SESSION OF THE FIFTY-FOURTH CONGRESS.

IN THREE VOLUMES.

VOLUME II – IN SEVEN PARTS.
PART 1.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1895

* * *

IMPROVEMENT OF MISSOURI RIVER AT AND ABOVE SIOUX CITY, IOWA, AND OF YELLOWSTONE RIVER, MONTANA AND NORTH DAKOTA.

This district was in the charge of Capt. Harry F. Hodges, Corps of Engineers; Division Engineer, Col. O. M. Poe, Corps of Engineers.

1. *Missouri River, between Stubbs Ferry, Montana, and the lower limits of Sioux City, Iowa.*- Between Stubbs Ferry and a rapid just below Cascade, a distance of 77 miles, the river is steep and much obstructed by rocks and dangerous rapids. The average low water slope is 3.73 feet per mile.

Between the rapids just below Cascade and Great Falls, a distance of 54 miles, the fall is very gentle and the river readily susceptible of regulation. The average slope is 0.52 feet per mile, and the natural depth sufficient for a draft of 36 inches, except at six bars, over which the low-water depth is 1.8 feet or more.

Between the Great Falls and Fort Benton, 37 miles below, the channel is unnavigable, being obstructed by rocks and having a very steep slope. No effort has ever been made to improve it, and none is contemplated.

* * *

The projects and works on the river are as follows:

Between Stubbs Ferry and Great Falls – The project contemplates the removal of snags and bowlders and the construction of closing and wing dams. Before June 30, 1894, no work of river improvement had been done. During the fiscal year ending June 30, 1895, the works projected at two of the bars have been finished and those at the third obstruction begun. The expenditures have been $9,164.90 from the allotment of $20,000 in the river and harbor act of August 17, 1894.

Between Great Falls and Fort Benton -- No work is projected.

* * *

COPY

Subject: Maintenance of Dam, Black Eagle Falls, Mo. River.

File No. 4312.

WAR DEPARTMENT

Washington, D. C., November 2, 1896

Sir:

In reply to your letter of July 22nd last, asking whether formal permission of this Department is necessary to permit the maintenance of a dam which has been constructed by your Company across the Missouri River near Great Falls, Montana, I beg to say that no section of the War Department is required, as appears from the report of this local U. S. Engineer Officer dated October 24, 1896, a copy of which is enclosed.

Very respectfully,

(Sgd) Daniel S. Lamont,

Secretary of War

Samuel Hill, Esq.,
President, Townsite Company,
Saint Paul, Minn.

(Inclosure: Copy of Report referred to.)

JA 909

(COPY OF COPY

United States Engineer Office,

Sioux City, Iowa

October 24, 1896

Respectfully returned to the Chief of Engineers.

The dam referred to is located just above the Black Eagle Falls of the Missouri River, and is 3 1/4 miles below the railroad bridge at the town of Great Falls. Above 400 feet above this bridge begins the series of rapids and falls in which the river falls 412 feet in a distance of 11 miles. Black Eagle falls is the upper of the five principal falls comprised within the above series. I have endeavored to obtain the exact fall of the river in the rapids above these falls, but have not yet been able to do so. It is safe to say, however, that the fall is not far from 60 feet. The height of the dam is about 13 feet above the original low water surface. This portion of the river can, in my judgment never be made navigable at a cost that the demands of commerce will ever justify. While the dam is in a stream which in the greater portion of its length is a "navigable stream" it is situated in a portion of this stream which is not now navigable and which in all probability never will be.

For these reasons it appears to me that the permit referred to is unnecessary.

J. C. Stanford,
Captain, Corps of Engineers, U.S.A.

JA 910

54TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | DOCUMENT No. 2.

REPORT

OF THE

SECRETARY OF WAR;

BEING PART OF

THE MESSAGE AND DOCUMENTS

COMMUNICATED TO THE

TWO HOUSES OF CONGRESS

AT THE

BEGINNING OF THE SECOND SESSION OF THE FIFTY-FOURTH CONGRESS.

IN THREE VOLUMES.

VOLUME II – IN SIX PARTS.
PART 1.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1896.

* * *

IMPROVEMENT OF MISSOURI RIVER AT AND ABOVE SIOUX CITY, IOWA, AND OF YELLOWSTONE RIVER, MONTANA AND NORTH DAKOTA.

This district was in the charge of Capt. Harry F. Hodges, Corps of Engineers, to January 29, 1896, and in the temporary charge of Lieut. Co. W. A. Jones, Corps of Engineers, since that date. Division Engineers, Col. O. M. Poe, Corps of Engineers, to October 2, 1895, and Col. Henry M. Robert, Corps of Engineers, from December 14, 1895, to January 29, 1896.

1. *Missouri River between Stubbs Ferry, in Montana, and the lower limits of Sioux City, Iowa.* – From Stubbs Ferry to Great Falls the distance is 131 miles; from the former place to Cascade, 77 miles, the low-water depth is 2½ feet. The current is very swift, with numerous rapids, rendering it unnavigable at low water. At Cascade the river changes from a rapid stream to one with a very gentle slope, having an average descent of but 0.52 feet per mile. The low-water depth is generally over 3 feet except at six bars that can be easily regulated so as to give a 3-foot depth over this reach.

Between Great Falls and Fort Benton, a distance of 37 miles, the river is unnavigable, having three sheer falls of 90, 50, and 26 feet. The river is very rapid between the different falls; in the 37 miles it has a descent of 547 feet.

* * *

The projects and works on the river are as follows:

Between Stubbs Ferry and Great Falls – The project contemplates the removal of snags and bowlders and the construction of closing and wing dams.

Prior to April 1, 1895, little work had been done here, and the river was in the condition as heretofore described. At the end of the fiscal year, June 30, 1895, the works projected at two of the bars had been completed and those at a third obstruction begun.

The work done during the fiscal year ended June 30, 1896, has resulted in an improved channel of the required depth from Great Falls to Wescott Island, a distance of 9 miles.

Amount expended during the fiscal year, $10,611.15.

Amount annually required for maintenance, $4,500.

The present commerce consists wholly of passenger travel. During the season of 1895 two small steamers of less than 50 tons were in use, and are reported to have carried 2,204 passengers between Great Falls and Stubbs Ferry.

Between Great Falls and Fort Benton – No work is projected.

* * *

55TH CONGRESS, *3d Session* | HOUSE OF REPRESENTATIVES | DOCUMENT No. 2.

ANNUAL REPORTS

96681

OF THE

WAR DEPARTMENT

FOR THE

FISCAL YEAR ENDED JUNE 30, 1898.

REPORT OF THE

CHIEF OF ENGINEERS.

PART 1.

WASHINGTON:
GOVERNMENT PRINTING OFFICE
1898.

* * *

IMPROVEMENT OF MISSOURI RIVER AT AND ABOVE SIOUX CITY, IOWA, AND OF YELLOWSTONE RIVER, MONTANA AND NORTH DAKOTA.

This district was in the charge of Capt. J. O. Sanford, Corps of Engineers. Division Engineer, Col. J. W. Barlow, Corps of Engineers.

1. *Missouri River between Stubbs Ferry, Montana, and the lower limits of Sioux City, Iowa.* – The river distance between the above points is 1,660 miles. By its physical characteristics this portion of the river is divided into four sections: The first, Stubbs Ferry to Greatfalls, Mont., 130 miles, is the navigable portion above the "Great Falls;" the second, Greatfalls to Fort Benton, Mont., 49 miles, is an unnavigable section, occupied by cataracts and dangerous rapids; the third, Fort Benton to Carroll, Mont., 172 miles, known as the "Rocky River," contains numerous rapids and rock obstructions but has carried a heavy commerce; the fourth, Carroll to Sioux city, 1,309 miles, known as the "Sandy River," is characterized by muddy water, sand bars, and a shifting channel, with easily eroded and constantly eroding banks. Navigation is difficult at low water, due to the too great width of the river in many places. The upper 158 miles forms a transition portion between the "Rocky" and "Sandy" rivers.

Between Stubbs Ferry and Greatfalls. – This reach consists of two distinct portions. From Stubbs Ferry to just below the town of Cascade, 76 miles, the average slope is 3.73 feet per mile. Numerous rapids and rock obstructions exist in this reach. A channel depth of

less than 2.5 feet at low water is found at a number of places (said to be fifteen). Below this rapid portion the "Long Pool" extends to Greatfalls, 54 miles. The average slope is only 0.52 foot per mile. A channel depth of 3 feet originally existed throughout the greater part of the pool, though a less depth was found at a number of places.

In 1880 a small amount of rock removal work had been done at the worst two rapids above Cascade, under all appropriation for improving the Missouri River above the mouth of the Yellowstone River.

The original project, submitted January 23, 1892, contemplated obtaining a channel 3 feet deep at low water from Greatfalls to Cascade and a channel of 2.5 feet low-water depth from Cascade to the canyon next below Stubbs Ferry, at an estimated cost of $115,837.50. The only work contemplated between Greatfalls and Cascade was on the 4 miles next below Cascade.

This project was based on maps of survey made in the spring of 1880, on which, as appears from recent data, the stages shown were from 2 to 3 feet too low. A revised project, contemplating the same results, but providing for improvement of a number of shoals found in 1894 nearer Greatfalls, and for the removal of certain artificial obstructions, in addition to the work provided for in the original project, was adopted November 20, 1894. In this project the estimate for the whole work was increased to $165,812.50. An examination made in September, 1897, between Greatfalls and Cascade showed that at a number of places, the improvement of which was not contemplated in the project of November 20, 1894, a

less depth than 3 feet then existed, and at other the depth reduced to low water would have been less than 3 feet, some of these latter being, however, as shown by later observations, only temporary obstructions. A further revision of the project, increasing the amount of work below Cascade and its estimated cost, was therefore necessitated. This revised project was adopted January 4, 1898. In it the estimate for the whole work is increased to $213,646.50, the same results being contemplated as in the two previous projects and the same amount of work above Cascade being provided for. The project also contains an estimate, as did the previous projects, of $4,500 for annual maintenance.

To June 30, 1897, there had been expended on the project of November 30, 1894, $31,207.46, by which a channel of the proposed depth had been obtained from Greatfalls to Griffin Bar, about 12 miles. The shortness of the improved channel had prevented any marked effect on commerce.

During the fiscal year $16,486.58 has been expended, carrying the 3-foot channel to Buckshot Island, about 16 miles above Greatfalls, and beginning the improvement of Bird Creek Shoal, the present head of the 2½-foot channel, about 48 miles above Greatfalls.

The maximum draft that can now be carried at low water over the shoalest part of the locality under improvement is about 2 feet at Bird Creek Shoal.

Between Greatfalls and Fort Benton. – Original condition described above. No work has ever been projected for this difficult reach.

* * *

JA 918

ANNUAL REPORTS, WAR DEPARTMENT

FISCAL YEAR ENDED JUNE 30, 1915

REPORT OF THE

CHIEF OF ENGINEERS

U. S. ARMY

1915

IN THREE PARTS

PART 2

[SEAL]

WASHINGTON
GOVERNMENT PRINTING OFFICE
1915

* * *

HISTORICAL SUMMARY GIVING SCOPE OF PREVIOUS PROJECTS FOR IMPROVEMENT OF RIVERS AND HARBORS IN THE KANSAS CITY, MO., DISTRICT.

---

1. MISSOURI RIVER.

The early appropriations were for the removal of obstructions and later for the improvement of selected localities. The acts continually changed the geographical limits of the divisions of the river. The first division of the river into sections was made by the river and harbor act of August 7, 1882, viz, mouth to Sioux City, Iowa (807.4 miles); Sioux City, Iowa, to Fort Benton, Mont. (1,477.4 miles).

In the river and harbor act of July 25, 1912, Congress formally recognized three divisions of the river, viz, (a) Kansas City to the mouth (392 miles); (b) Kansas City to Sioux City (415.4 miles); (c) Sioux City to Fort Benton (1,477.4 miles). The previous projects will be given separately for these divisions, and to complete the description of a fourth section is added, (d) Fort Benton to Stubbs Ferry (179 miles).

* * *

(*d*) *Fort Benton to Stubbs Ferry.* – As far as navigation is concerned the headwaters of the Missouri are completely and permanently separated from the river below. Between Fort Benton and Great Falls, 49 miles, the river has a descent of 695 feet, with three sheer falls of 90, 50, and 26 feet, and numerous rapids

and small cascades. Navigation is impossible, and the section has never been regarded as susceptible of improvement. Between Great Falls and Stubbs Ferry, however, there have been possibilities of navigation, and attempts have been made to improve these, the first work being accomplished in 1881 under an appropriation for improving the river above the mouth of the Yellowstone. It consisted in the removal of rocks and the construction of wing dams at two of the worst rapids above Cascade, about $15,000 being thus expended. On the 76-miles reach between Stubbs Ferry and Cascade the average fall was 3.73 feet per mile, with depths less than 2.5 feet a number of shoals. Bowlders, a constant succession of gravel shoals, and a narrow, sinuous channel in conjunction with a swift current, offered serious obstacles to prospective navigation. The work accomplished resulted in slightly increased depths at the improved places.

The original project, based on the survey of 1880 and submitted January 23, 1892, revived for a time the improvement above Fort Benton in providing for work on the "Long Pool,: that 54-mile stretch of river between Cascade and Great Falls. With an average slope of 0.52 foot per mile, and navigable depths over the greater part of the distance, the opportunities for the limited operation of light-draft boats were, nevertheless, defeated by several shoals where the average low-water depth was less than 2 feet. The project proposed to obtain a channel 3 feet deep at low water from Great Falls to Cascade and 2.5 feet for the remaining distance to Stubbs Ferry. The cost was estimated at $115,837.50, but the revised project of November 30, 1894, increased the estimate to $165,812.50, and the revision of January 4, 1898,

raised it still further to $213,646.50, the scope of the work being unchanged.

The river and harbor act of August 18, 1894, extended the upper limits of the river under improvement above Sioux City, from Fort Benton to Stubbs Ferry, thus enabling appropriations to be applied to the renewal of work above the falls. With the funds appropriated 19 closing and wing dams with an aggregate length of 9,481 feet with built during the period 1895-1898, and obstructions were removed from the channel. In this manner $65,933.73 was expended to June 30, 1899, in securing a 2.5-foot channel from Great Falls to 16 miles above, without producing a noticeable effect on commerce, partly due to the shortness of the improved waterway. Upon completion of this portion of the project, operations were suspended owing to lack of funds and the absence of incentive to further improvement. No appropriations for work above Great Falls were made after June 3, 1896. The commerce on this part of the river had always been small; in 1895 it was carried by two small passenger steamers.

The unexpended balance of $66.27 was turned into the Treasury June 20, 1899, and no appropriations were made thereafter for work above Fort Benton.

* * *

JA 922

Rebuttal Report

By: Stanley A. Schumm, Ph.D., P.G.

/s/ Stanley A. Schumm

Mussetter Engineering, Inc.
1730 S. College Avenue, Suite 100
Fort Collins, Colorado 80525
MEI Project: 06-17

Prepared for PPL Montana, LLC

July 13, 2007

[Table of Contents and Table of Authorities omitted in printing of this appendix]

* * *

INTRODUCTION

I was asked to investigate the "navigable" condition of the Madison and Missouri Rivers and the Clark Fork of the Columbia River in 1889, the year Montana became a state. My report of June 15, 2007, "Navigability of Three Rivers (Madison, Missouri, and Clark Fork)," described my investigation of historical maps and surveys, current topographic maps, photographs, historical hydrologic data, and personal observations of these rivers, and also sets forth my qualifications. After completing my study, I concluded that the Madison River was clearly not navigable in 1889, and that there were so many obstacles to navigation on both the Missouri River above Fort Benton, and the Clark Fork River above Thompson Falls, that commercial navigation was not feasible on the relevant reaches of these rivers.

Since completing my study, I have been asked to evaluate the June 15, 2007 report of Ray H. Breuninger. Dr. Breuninger was hired by the State of Montana to investigate the condition of the Madison, Missouri and Clark Fork rivers at the time of statehood as well. In summary, Breuninger made the following conclusions:

Madison River: Breuninger claimed that "most of the channel was usable by small boats" for part of the year, but again conceded that annual flooding, annual freeze-ups, and numerous rapids would

prevent navigation at certain times and make a "difficult passage" even for small boats.

Missouri River: Breuninger found that the waterfalls near Great Falls and the annual freeze-ups would prevent navigation, but claimed that the "channel was usable by small boats and by log drives" for part of the year.

Clark Fork River: Breuninger claimed that "most of the channel was usable" but conceded that the river would not be navigable during annual flooding and annual "freeze-ups," and further noted that Thompson Falls, as well as "seven channel sections which contain rapids" were also barriers to navigation.

After analyzing carefully Breuninger's methods, data, assumptions, and findings, my opinion on the condition of the Clark Fork, Madison, and Missouri Rivers has not changed. Commercial navigation was not feasible on any of these rivers in 1889. For purposes of my conclusions, I understand the test for navigation to be whether the relevant reaches of a river were susceptible to being used, in their ordinary condition, at statehood, as highways for useful commerce, in the customary modes of trade and travel on water. Breuninger's report did not change my opinions for several reasons: (i) Breuninger's extrapolation of gaging station data is inappropriate for determining depths of the rivers as a whole; (ii) Breuninger recognized many of the features of the three rivers that made commercial navigation unfeasible; (iii) Breuninger's report focuses on the modern rivers, rather than their characteristics in 1889; (iv) Breuninger does not adequately evaluate

historic boats' ability to navigate the rivers at the time of statehood; and finally, (v) Breuninger relies on an incorrect understanding of the term "anastomosing" and "island braided."

This Rebuttal Report will address and refute Breuninger's premises and conclusions. First, it will discuss Breuninger's analysis of the depths of the relevant rivers and conclude that his findings are unreliable; Breuninger ignores the variations in width and depth as measured at the gaging stations as compared to other stretches of the rivers. Second, it will discuss the many river obstacles that Breuninger recognizes, all of which make commercial navigation unfeasible. Third, it will illustrate that Breuninger bases his conclusions wrongly on the character of the modern rivers, rather than what the rivers were like at the time of statehood. Fourth, it will show how Breuninger relies on inaccurate or incomplete information regarding historic boats and log drives. Finally, it will discuss the misuse by Breuninger of the applicable terms relevant to navigability of rivers and how his specialties really concern other areas of geology.

I. VARIABILITY OF CHANNELS

Breuninger's methodology applies two significantly erroneous assumptions that compel an erroneous result. These assumptions lead Breuninger to claim that there are depths of water for navigation purposes that simply do not exist throughout the rivers.

Breuninger bases his conclusions regarding depth of the relevant reaches of the rivers at the time of statehood on data collected only at a few discrete

locations, i.e., the gaging stations. Thus, in Breuninger's Appendix 4B, two significant assumptions concerning water depth are made:

1. Water depth at gaging stations is representative of the river for 20 or 30 miles upstream and downstream if discharge channel shape and bed material are about the same; and

2. The shape of the channel has not changed significantly since statehood.

These assumptions are inaccurate. First, gaging stations are located purposely where the river is relatively stable and relatively narrow, which is not customarily representative of the river elsewhere. Therefore, extrapolation from a gaging station to estimate width and depth is inappropriate for even a minimal distance upstream and downstream. Furthermore, Breuninger did not investigate the key "if" in his primary assumption; he did not confirm whether channel shape and bed material are the same for the entire lengths of the rivers, and indeed they are not. Second, the shape and pattern of a river channel change continuously, as his Figure 18 illustrates. The anastomosing reaches of the Madison and Missouri River show changes since the time of statehood specifically. Given the serious errors in assumptions, it is not surprising that the conclusions regarding each of the rivers at issue are also in error.

When compared with the character of the rivers at the gaging stations, other stretches of the river are much wider, and/or are split into numerous channels, as discussed in detail below. Accordingly, the depths Breuninger cited are not representative because away

from the gaging stations the same amount of water is spread out over a larger physical area. This potential inaccuracy is magnified because of the differences in the shape of the channels between now and 1889. For example, at its mouth the Madison had more channels in 1889 than it does now; there were four channels that were more narrow than the two that exist today. The actual depths in certain reaches of the rivers may have been as little as a 25 percent of the depths discussed by Breuninger for the Madison, 20 percent of Breuninger's depths for the Clark Fork, and 25 percent of the depths for the Missouri. These differences impact the rivers' susceptibility to navigation and makes Breuninger's ultimate conclusions inaccurate and unreliable.

A. Madison River

Breuninger based his conclusions regarding depth of the historic Madison River largely on data from the gaging station in the canyon (below Ennis Lake at McAllister), and not on any of the other three gages on the Madison. This overstates the depth of the river as a whole because given the extreme differences of width at other portions of the river, where the same amount of water is spread over a wider area, the water is necessarily shallower. Variations of width can be measured using U.S. Geological Survey (USGS) topographic maps. To illustrate the variability of the Madison, the minimum width and the maximum width of the channel was measured on the quadrangles from Manhattan SW to Cliff Lake (**Table 1**). Over this distance, the minimum width was 150 feet, and the maximum width was 850 feet. Taking the Manhattan SW map as an example, the maximum width (800 feet) was four times the minimum width (200 feet) and

therefore, at a width of 800 feet, the depth would be about one quarter of the depth at the 200-foot width. At the gaging station in the canyon channel width is about 180 feet, which is a very atypical width, leading to deeper water than at other stretches of the river. Clearly, data on water depth at this gaging station cannot be extrapolated for miles downstream. In fact, it cannot be extrapolated at all below the canyon.

Table 1. Madison River

Topographic Map	Minimum Width (ft)	Maximum Width (ft)
Manhattan SW	200	800
Three Forks SE	200	700
Norris	200	650
Bear Trap Creek	150	500
Ennis	200	850
Cameron	200	350
Bucks Nest	200	350
Granite Mountain	200	300
Squaw Creek	200	400
Cliff Lake	200	300

The widths stated in the above table represent locations where the river is in a relatively confined channel. Where the river was anastomosing, there were multiple channels and many were narrow. For example, on a map of the Ennis Lake area, MD02168,

the single channel Madison River was about 320 feet wide, whereas the multiple channel anastomosing reach was about 880 feet wide. The anastomosing channels appear to range from approximately 40 feet to 240 feet wide.

Ultimately, given that the width of the channel at the gaging station is 25% or less of the width of numerous stretches of the river, the depths at various stretches of the river are and were also much lower than Breuninger claims. Accordingly, Breuninger's attempt to extrapolate Madison River depths from gaging station data is inaccurate and unpersuasive, and not useful in determining the navigability of the river.

B. Missouri River

As with the Madison River, width along the Missouri varies significantly. The widths on the topographic maps range from 250 to 1,200 feet (**Table 2**). Clearly, the width differences reflect major depth differences, which would affect significantly navigation in reaches between rapids. For example, on the Cascade map, the minimum width is 300 feet and the maximum width is 1,200 feet, indicating that at some locations, water depth is only 25 percent of the maximum depth.

Table 2. Missouri River

Topographic Map	Minimum Width (ft)	Maximum Width (ft)
Lombard Quad	250	1,100

Toston	400	800
Craig	300	900
Hardy	250	550
Rocky Reef	400	1,000
Cascade	300	1,200
Nelson Island	300	800
Ulm	300	900
Antelope Butte	400	700
SW Great Falls	300	1,000
Fort Benton	500	950
O'Hanlon Coulee	500	1,100
Loma East	500	1,000

The channel width at the gage at Fort Benton is about 600 feet or about half of the maximum width of the river (1,200 feet). Accordingly, the depth at the widest stretches of the river would be expected to have only approximately half of the depth at the gaging station. Again, Breuninger's gaging station data cannot give an accurate picture of historic depths for the entire river, and thus, his conclusions based on this data are inaccurate and unpersuasive.

C. Clark Fork

The Clark Fork is described by Breuninger as being remarkably uniform (p. 13). Without any justification, he also estimates that the minimum depth along the

thalweg is only a "little less" or "slightly less" than it is at the Plains gaging station. (p. 11). However, variations are significant. For example, when the maximum and minimum widths of stretches of the river are measured on each USGS topographic map, the difference is large, more than double in some cases, ranging from 200 to 1,600 feet (**Table 3**)

Table 3. Clark Fork		
Topographic Map	Minimum Width (ft)	Maximum Width (ft)
Paradise	260	1,100
Plains	400	950 or 1,600
Weeksville	200	550
Big Hole Peak	300	800
Eddy Mountain	400	950
Thompson Falls	---	---

This has a major effect on depth. If, for example, on the Paradise Quadrangle, width almost doubles, then depth would decrease by one-half. Such depth variations could seriously affect navigation. Width at the gage (Clark Fork at Plains) is about 570 feet, which is about the minimum width on the Paradise Quadrangle. Again, width at the gage is relatively small. As with the Madison and the Missouri, Breuninger bases his conclusions for the Clark Fork largely on his claimed depths of the river. His assertions regarding the river depths are wrong, and

therefore, his claim that the Clark Fork is navigable is unreliable at best.

Given Breuninger's incorrect assumptions, his ultimate conclusions regarding navigability are also inaccurate. I still believe that neither the Madison, the Missouri nor the Clark Fork were commercially navigable in 1889.

II. IMPEDIMENTS TO NAVIGATION

Waterfalls, riffles and rapids occur clearly in the channels of the three rivers. They are impediments to navigation. Breuninger's own figures (1, 13, and 22) show these numerous impediments. Breuninger also recognized that seasonal changes in water flow make boating impossible for much of the year. For example, the rivers are usually frozen during December, January, February, and March (pp. 4, 8, 12), and flooding will pose problems in April, May, June and July. Low water could also cause problems during August, September, October, and November. The annual cycle of high and low flows, i.e., deep and shallow waters, were more extreme at the time of statehood, as Breuninger concedes, and therefore, the many physical barriers were even more difficult to navigate. Ultimately, these rivers are not suitable for commercial navigation in 1889.

A. Madison River

1. Hydrology:

In his report on the Madison River, Breuninger recognizes that a combination of the "winter-freeze up," "the annual flood peak," and the "low flow" period

curtailed, for most of the year, any possible navigation on the Madison River at the time of statehood. First, Breuninger concedes that during "December, January, February, and March, ice built out into the channel from banks and covered the river completely." (p. 23). Plainly, "Dice precluded boat and log use during this period." (p. 23). The "freeze-up" was followed shortly by annual flooding. (p. 22). Breuninger observes that the "highest flood peaks" could last "up to several weeks" and prevented navigation. (pp. 21-22). Given the physical characteristics of portions of the Madison, Breuninger specifies that these floods "curtailed log drives at the major rapids" and prevented boat travel "at rapids in Madison Canyon and Bear Trap Canyon". (pp. 22, 25). After the floods subsided, Breuninger reports that the water depth of the Madison decreased in August and remained low through November. As discussed above, many portions of the Madison were probably even shallower than claimed by Breuninger, and accordingly, the "normal low flow" months would have impeded navigation as well.

2. Physical Barriers:

Breuninger also reports on many physical impediments to navigation along the Madison River. First, Breuninger acknowledges that there are many "large boulders" along numerous sections of the river, including in Yellowstone National Park ("A scatter of large boulders studied the river bed." (p. 26); between river miles 101-91 ("The boulders are closely spaced with small rapids, eddies, and chutes, so that floating or paddling small boats and rafts is not easy under most flow conditions." (p. 27); at river miles 83-91 ("Many boulders stud the river bed and emerge during low flow." (p. 28); in Bear Trap Canyon ("The channel

is narrowed and forced against the opposite valley side, producing boulder rapids; often, a train of boulders extends downstream as much as 0.3 miles." (p. 29); and finally, at river miles 11-27 (describing a "channel, locally studded with large emergent boulders" (p. 31).

Breuninger also describes several stretches of rapids along the Madison. Breuninger uses the International Scale of River Difficulty, which ranks rapids, or whitewater, from Class Ito Class VI. (pp. 68-71). As Breuninger only has "experience with Class I and II rapids," Class Ill rapids "can swamp an open canoe," and "whitewater crafts such as rubber rafts and kayaks did not have counterparts commonly used on Montana rivers before 1889," Breuninger concedes apparently that Class II rapids represent the limit of navigability at statehood. (pp. 3, 6, and 69). According to Breuninger's figure 13, "Three channel sections contain rapids: a short Class III rapids in Madison Canyon, a long Class II rapids in upper Fifty-mile Riffle, and four difficult rapids in Bear Trap Canyon...". (See Exhibit A to this rebuttal report, which contains a map of the Madison for the approximate location of certain rapids from Breuninger's source, Thompson). While even Breuninger describes some of the rapids here as "Class III", one of the sources cited in his report describes a "10.4" mile stretch from "Quake Lake slide dam to Madison Campground" with "Class V-Vl (upper)" whitewater. Thompson at 146. Breuninger describes at least one rapid at Bear Trap Canyon as Class IV, which corresponds to the "9.3 mi. Class IV" whitewater from "Madison Dam to Hwy. 84 access" also described by his source. (pp. 30-31; Thompson at 146 (emphasis

added). Breuninger concedes that logs could not have been driven through Bear Trap Canyon. (p. 22).

Accordingly, even under Breuninger's own standards, significant portions of the Madison were not commercially navigable at the time of statehood, including the portions where the Madison and Hebgen dams are located.

B. Missouri River

Overall, Breuninger concedes that the Missouri river was not navigable at the time of statehood, either by "small boats" or by "log drives," at the waterfalls near Great Falls, and during winter freeze-up from November to March." (p. 34).

1. Hydrology:

As with the Madison, the Missouri river followed an annual cycle of freeze-up, flood, and low water, affecting navigation. As Breuninger states, "in November or early December the [Missouri] began to freeze over, stopping the use of small watercraft and other uses of the river." (p. 36). The Missouri remained frozen into April. (p. 34). Next, "during the various flows at the annual flood, the river above Great Falls was marginal for medium boats." (p. 35). Finally, the cycle would end in "low flow," which according even to Breuninger, would prevent steamboats from using the Missouri. (pp. 35-36).

2. Physical Characteristics:

The chief physical impediment to navigation in the Missouri is ""The Great Falls of Missouri." (p. 41). This

term included several waterfalls (p. 41): Coulter (14 feet), Rainbow (37 feet), Crooked (19 to 20 feet), Big Falls (75 feet); all of which required portages and were not navigable. Breuninger (figure 22). Given the "many difficult, shelf-like rapids ...between the falls, ... a single portage [was] more desirable." (p. 41) (See Exhibit B to this rebuttal report, Thompson's map of the Missouri, for the approximate location of the falls and rapids). This is where many of the hydropower projects at issue are located. Ultimately, the State's expert concedes that, in the area of the Great Falls, the area of a number of PPL Montana's hydropower projects, "11.1 miles is Class III rapids, and 9.8 miles is waterfalls and difficult rapids estimated at more than Class III." (p. 42). This area was not commercially navigable at statehood.

In other stretches of the river "the main difficulties would be Halfbreed Rapids at Hardy and Beartooth Rapids... ." (p. 35) Breuninger also concedes that, "during the various flows at the annual flood, the river above Great Falls was marginal for medium size boats." There were a number of other physical impediments to navigation, including the "8.4 miles of rapids below Big Falls (Great Falls) and Morony, also Class III." (p. 41); "large boulders" and a "narrow canyon" between river miles 262.7 and 235 (p. 38); and "submerged rocks ... which ... could hinder boat movement" between river miles 186.3 and 117.3 (p. 39).

The Missouri river, and especially the stretches of the river were PPL Montana's dams are located, were not commercially navigable in 1889.

C. Clark Fork

1. Hydrology:

Breuninger concedes that the annual hydrology cycle of the Clark Fork affected negatively its navigability at the time of statehood. Like the Madison, the Clark Fork froze in December, January, February, and March, and according to Breuninger, "[i]ce precluded boat and log use during this period." (pp. 9, 12). After the freeze up, the Clark Fork also experienced the "annual flood" which peaked in "May and June." (p. 8). Breuninger reports that during such flood peaks, "velocities, turbulence, and standing waves limited small boat use, and possibly curtailed use of even medium-sized boats and log drives." (p. 8). Furthermore, such high water would have also caused log jams if anyone attempted a log drive in the area of Thompson Falls or over other rapids. (pp. 8, 11, admitting that "With greater depths comes greater water velocity, and at some point, not determinable by my study, guiding a craft along the Clark Fork in very fast water becomes unfeasible."). Finally, the Clark Fork would return to "normal low flow" for September, October and November, during which "Thompson Falls remained a barrier to all boat traffic." (p. 9). As Breuninger concedes, the ups and downs of the hydrology cycle were a barrier to commercial navigation.

2. Physical Characteristics:

As Breuninger states succinctly "[t]he main problems to river use were Thompson Falls and associated rapids, and six section with rapids." (p. 13). (See Exhibit C to this rebuttal report, Thompson's map

of the Clark Fork, for the approximate location of the falls and rapids). Breuninger first discusses the Plains Rapids: "the middle rapids at Plains is rated Class III" although the Plains includes additional stretches that are Class I and II. (pp. 14-15). Next, Breuninger evaluates Thompson Falls and related rapids, conceding that "the falls was [sic] a barrier to boat traffic, because of fast currents [that] funneled through a narrow, bedrock-walled channel, and projecting rock islands in a narrow channel." (p. 17). Breuninger also describes the Thompson Falls rapids as "similar to the Plains Class III rapids." (p. 16). According to Breuninger (figure 1), in addition to Thompson Falls, there are seven reaches that with rapids: three Plains Rapids, rapids at Thompson Falls, three rapids near Thompson Falls State Park (Unnamed Rapids), Trout Creek Rapids, Noxon Rapids, and Heron Rapids. (p. 8) "All rapid reaches could be portaged, but the potential for log jams at Thompson Falls and Heron and Noxon rapids would have to have been cleared manually", another impediment to navigation. (pp. 17-20). Breuninger describes much of these rapids as Class III. (pp. 17-20). Finally, the gradient at the rapids (p. 13) is relatively steep when compared to the 4 ft/mi limit stated by Capitan Mellon. The gradients (p. 13) are 0.002 (11 ft/mi), 0.003 (16 ft/mi), 0.007 (37 ft/mi), and 0.017 (90 ft/mi).

Because of the rapids, falls, and gradient that Breuninger describes, significant portions of the Clark Fork were not commercially navigable at the time of statehood.

In sum, the impediments to navigation set forth in Breuninger's own report negate the conclusions he reaches. The freeze-ups, floods, low-flows, rapids, and

falls on the Madison, Missouri, and Clark Fork rivers all made commercial navigation unfeasible in 1889.

III. BREUNINGER MISTAKENLY FOCUSES ON THE MODERN RATHER THAN THE HISTORIC RIVERS

The question that both Breuninger and I were asked to investigate is whether the Madison, Missouri, and Clark Fork rivers were commercially navigable in 1889. As I discussed in my original report, all of these rivers are significantly different now. The construction and operation of the hydroelectric projects and reservoirs have materially changed the flow characteristics of the rivers, making the flow lower during period of high flow and higher during periods of low flow. Breuninger concedes this point, admitting that "the river regime today is modified by operation of dams higher in the drainage– and especially that at statehood flood peaks were stronger and that post – flood flows (after July) were lower than they are now." (p. 10). The location and numbers of the river channels has also changed since the time of statehood. Accordingly, relying principally on an analysis of the modern rivers will lead to inaccurate conclusions regarding their commercial navigability in 1889.

Breuninger's investigation focused on several field studies of the modern, Madison, Missouri and Clark Fork. As just a few examples, Breuninger based his conclusions, in part, on (i) depth measurements he took on his field studies, (p. 3); (ii) an evaluation of the strength of the rapids and impact of other obstacles as they currently exist in the Clark Fork, (p. 15); and (iii) personal observations of the modern condition of the Madison, (p. 26). Breuninger alternatively claims that

portions of the rivers must have been the same in 1889 as they are now, or that he has adjusted for the change in depths, but he offers little justification or evidence for either assertion. Furthermore, Breuninger did all of the field work for his study in April and May. As he concedes, this is the period when the rivers are at their highest flows. Accordingly, the shallow stretches of the river that would have impeded navigation at statehood appear deeper than they were the rest of the year, and moreover, the threat to navigation posed by high velocity at high flows has been moderated by dam operation.

In sum, to the extent that Breuninger bases his conclusions regarding navigability on his modern field studies, such conclusions are inaccurate and unreliable regarding commercial navigation at the time of statehood.

IV. ABILITY OF HISTORIC BOATS TO NAVIGATE ACTUAL DEPTHS AND BARRIERS

Fundamentally, Breuninger bases his conclusions regarding navigability on the depths of the Madison, Missouri and Clark Fork rivers compared with the drafts of certain boats and logs. As discussed above, Breuninger's assertions regarding the depths of the rivers rely on faulty assumptions and are inaccurate; many portions of the rivers are much shallower than he claims. Breuninger's reliance on the drafts of certain boats and logs as a key to navigability is no more reliable. First, Breuninger discusses the drafts of modern boats which are not relevant to navigability in 1889. Second, adequate depth of a river vis a vis the draft of a boat is only one condition of commercial navigability. The width, velocity, and the obstacles in

a river are also important to consider regarding the maneuverability and durability of historic boats. Third, Breuninger's analysis does not discuss the characteristics of a river necessary for sustainable log drives. Ultimately, when considering together Breuninger's faulty conclusions regarding depths and historic boats, as done for each river below, I see nothing to change my opinion that the rivers at issue were not commercially navigable at the time of statehood.

Breuninger's conclusions regarding the navigability of the Madison, Missouri, and Clark Fork rivers are based on whether the depths of the rivers exceed the drafts of "small-draft boats," "medium-draft boats," and logs. Breuninger explains the different categories of drafts in his Table 1. (p. 5). A number of the measurements for "Small-Draft Boats" are not applicable because they concern modern boats, not boats in use in 1889. For example, the drafts of modern canoes and Hyde boats have nothing to do with commercial navigation at the time of statehood. These modern drafts were the key to Breuninger's conclusions; as he states, "I relied on measurements made on the two boats used in my own field work, a 17-foot aluminum Coleman canoe and a 16-foot Hyde drift boat." (p. 63). Again, as a modern analysis is the cornerstone of his analysis, his claims regarding historic navigability are not dependable.

Next, Breuninger concedes that "practical use of watercraft" depends not only on the draft of a boat, but also on "maneuverability (dodging large rocks, aiming for a deep part of a channel), freeboard (height of sides above water, at middle of boat) (important with large waves, strong currents), and presence of a deck (to

shed water in rough water; kayaks are decked, canoes and drift boats are not)." (p. 62-63). Maneuverability is especially important given the velocities and steep gradients of the rivers, as I discuss in my original report. And yet, Breuninger does not adequately consider these factors, as I discuss with regard to each river below. Breuninger's analysis does not contain any discussion of the maneuverability of historic boats. Maneuverability is a key issue because, as Breuninger concedes, the rivers at issue have numerous boulders, rapids, and other obstacles. Any boat must have also been able to navigate through the multiple channel anastomosing reaches of the rivers discussed in my previous report. Furthermore, Breuninger's report contains no discussion of the freeboards of historic boats, and concedes that the historic "small-draft boats" did not have decks. (p. 62-63). Finally, Breuninger completely ignores the significance of the difference in materials between modern and historic boats. Modern boats are not a good indicator of navigability in 1889 because where a plastic or aluminum boat could bounce off a boulder or go through a rapid relatively unscathed, a historic wooden boat may have been smashed apart. Ultimately, Breuninger's incomplete examination of the character of historic boats makes his navigability analysis unreliable.

Breuninger also does not adequately evaluate the characteristics of a river necessary for log drives. In making this observation, I rely on two historic sources which Dr. Emmons, a historian working with PPL Montana, has informed me are reliable. In sum, (i) stream channels should be wide and deep enough to float the largest and longest logs; (ii) there must be high banks to prevent the water from losing its force;

(iii) the channel must be straight so that logs will not be jammed at the bends; and (iv) there should be few obstructions. (Bryant, 387 and Brown, 233). Breuninger ignores all of these factors. Instead, he relies on an estimate of draft made up without any apparent research or citations. (p. 5). When these factors are considered, it is clear that the rivers were not well suited to log drives. First, the Madison contains long anastomosing reaches were the water is divided into narrow, shallow, sinuous channels with low banks. (See Section 2 of my report). The Clark Fork also has sections that run in narrow canyons or are island braided. (see p. 14 of my report). The Madison also has numerous substantial rapids. As discussed above, the Missouri and the Clark Fork also have falls and rapids which Breuninger concedes are not suitable to log drives. When the necessary characteristics of a river for a log drive are adequately considered, it is clear that neither the Missouri, Madison, nor the Clark Fork are amenable to commercial navigation.

Considering all of these factors, as well as the actual character of the rivers at the time of statehood, as discussed above and in my original report, Breuninger's claims regarding navigability for each river are not persuasive, as follows:

A. Madison River

Breuninger can only claim that a small draft boat, either a bull boat (with claimed drafts of 0.5 to 0.7 ft.) or a historic canoe (0.6 to 1.6 ft. draft), could travel down the Madison, based on his depth extrapolations. (pp. 23-26). As I explained above, those extrapolations are inaccurate and erroneous, and throughout the year

the 1889-era river would have been frozen solid, in roaring flood stage, or lower than Breuninger opines, particularly on the braided and anastomosing portions. Moreover, Breuninger gives little thought to gradient. I cannot tell from his report how a human-powered small craft -- assuming it did not run aground in the streambed -- could move upstream at the steep gradients of the Madison. I believe he concedes it could not, and thus concedes there could be no "through" commerce on the Madison, even in small craft. Breuninger also does not deal sufficiently with rapids and rocks which he concedes, are prevalent on the Madison. (pp. 22-31). Since I understand bull boats to have been round and paddled, in my opinion the ability to avoid rocks or run rapids -- upstream or downstream -- is questionable. The same is true for historic canoes, which -- it seems to me -- would have been crafted of historic materials and would have been more susceptible to damage from rocks and less streamlined (and thus less maneuverable) than Breuninger's modern aluminum canoe. Certainly, Breuninger has not offered anything approaching persuasive evidence that a bull boat or historic canoe could have navigated the Madison with anything approaching the degree of safety and certainty needed for men of commerce to put their goods at risk on a river, at any times of the year, much less at all or most times of the year. As Breuninger admits, "the line between what is reasonable or feasible depends on the judgment of the pilot and the specific hazards faced." (p.64). Breuninger's report does not offer credible evidence that a pilot with good judgment would have tried to transport goods in commerce in a historic boat on the 1889-era Madison river.

B. Missouri River

Breuninger's comments regarding potential historic boats on the upper Missouri river (Three Forks to Fort Benton) are equally flawed. As for small boats, he does not explain how they could travel the steep gradients upstream, and seems to concede they could not. He likewise does not explain how, at the steep gradients going downstream, such craft could maneuver around the various rocks and rapids, at the high speeds caused by the rapid flows in the relevant reaches. (pp. 34-36).

Breuninger also comments on "potential" steamboat use. I understand that Dr. Emmons has fully discussed "actual" attempted steamboat use of the river. In my experience, actual evidence is more useful than extrapolated "evidence" of the type offered by Breuninger, and I defer to Dr. Emmons on this issue. My sole comment regarding Breuninger's "potential" steamboats is that he again fails to sufficiently deal with gradient and maneuverability around rocks and rapids.

Breuninger also extrapolates that keelboats could have been used on parts of the upper Missouri. (p. 35). He gives the draft for such crafts as 1.7 to 2.5 feet. (p. 5). Again, I am not persuaded. Using proper estimations for depth, such boats Would have run aground in numerous portions of the upper Missouri. Also, Breuninger again fails to adequately discuss gradient and maneuverability. I understand a keelboat was pushed with poles. Breuninger does not say how one could proceed up the steep Missouri gradients, and seems to conclude it could not. Here again, he seems to concede no "through" commerce in

his historic craft of choice. Also, he does not explain how a poled boat could maneuver around the treacherous rocks and rapids at the fast speed the steep downstream flows would propel such a craft. Thus, his extrapolations again fail to persuade me.

Breuninger himself seems to concede non-navigability of the Great Falls reach by any type of historic craft, admitting the need for much portaging, and the Class III rapid status in between the Falls themselves. (pp. 36, 41-42). Thus, I see nothing persuasive in Breuninger's discussion that historic craft "could" have been used on the upper Missouri. Rather, Breuninger's report does not offer credible evidence that a pilot with good judgment would have tried to transport goods in commerce in a historic boat on the 1889-era upper Missouri river, thus failing to meet what seems to be his own standard for river navigability. (p. 64).

C. Clark Fork River

The same problems exist with Breuninger's comments regarding potential historic boat use on the upper Clark Fork River (above Thompson Falls). Breuninger says the river "could" have been navigated by small and medium craft -- apparently bull boats, historic canoes, keelboats and small steamboats. (pp. 8-10). My problems with this conclusion are the same as above. Breuninger does not discuss maneuverability, despite admitting the existence of a series of difficult rapids, and boulders strewn throughout the river. Also missing is sufficient discussion of gradient. Again, his discussion seems to focus on potential downstream use. This is likely because Breuninger realizes that upstream travel on

such a steep river is entirely unlikely, particularly by poled or paddled craft. However, downstream travel would have the different, but equally troubling, issue of maneuvering at high speeds around twists and turns, rapids and boulders. Again, I seen nothing in Breuninger's report on these issues that he, himself, admits are key to an assessment of navigability. (p. 64). It is my opinion that Breuninger's report fails to offer credible evidence that a pilot with good judgment would have tried to transport goods in commerce in a historic boat on the 1889-era upper Clark Fork River.

V. BREUNINGER'S MISUNDERSTANDING OF FLUVIAL GEOMORPHOLOGY TERMS CALLS INTO QUESTION HIS CONCLUSIONS

There is some confusion in Breuninger's report concerning island-braided channels and anastomosing or anabranched channel. (pp. 29, 31, Figures 20 and 21) They are very different. Dr. Breuninger states that there is "...no indication that the island-braiding is particularly unstable in terms of major channel shifts or abandonments..." However, changes are obvious in the anastomosing reaches at Madison River mouth and at the Ennis Lake area.

A braided river contains sand bars and/or islands. An anastomosing or anabranching river is actually a network of distinct channels separated by vegetated floodplain. Braided and island-braided rivers are very different from anastomosing rivers. Dr. Breuninger is mistaken when he identifies the anastomosing reaches of the Madison River as being braided or island-braided (Brice, 1984; Schumm et al., 1996). Because he failed to recognize the channels were anastomosing rather than island braiding, he failed to appreciate the

barriers to navigation posed by anastomosing characteristics. Anastomosing reaches involve larger islands, and longer separate channels, so more water is diverted from the main channel into more branches, with less water and less depth in each. Commercial navigation is thus less feasible on anastomosing or anabranching channels than simple island braided channels.

It is not surprising that Breuninger confuses the terms "anastomosing" and "anabranching" because his specialty is not in fluvial geomorphology. Fluvial geomorphology is the study of rivers characteristics and behaviors, and accordingly, it is the appropriate specialty for analyzing navigability. Breuninger admits his specialty is in stratigraphy and sedimentology. Generally stated, stratigraphy is the study of rock layers and layering and sedimentology looks at particular sedimentary layers, asks how those layers were formed, and draws conclusions about the environment at the time those layers were deposited. Stratigraphy and sedimentology are only peripherally related to fluvial geomorphology. Yet Breuninger's conclusions are not based on any stratigraphic or sedimentary analysis.

VI. CONCLUSION

My conclusions regarding the non-navigability of the three rivers have not been changed at all by Dr. Breuninger's analysis.

His extrapolation from his experience with craft of modern design and materials, deployed after hydropower and irrigation projects had stabilized river flows, and after some obstructions had been removed

from the river beds, is unpersuasive as an indicator of conditions at Statehood. His analysis of channel depths is unreliable: the stated depths are unrepresentative of the rivers because using the depth at gaging stations will skew the results of any depth analysis. Moreover, use of depth is far too simplistic a proxy for navigability. Gradient, velocity and physical obstructions, which Breuninger discussed in his report, must also be considered. The steeper the gradient and the higher the velocity, the harder it is to avoid obstructions. Likewise, variability must be applied: if a river can only be used in the limited periods of time when it is neither frozen, flooding nor at low flow, it probably has little or no use as a highway of commerce. Finally, Breuninger's conclusions seem to be based on an inadequate evaluation of historic boats' ability to navigate historic rivers.

In sum, it is still my opinion that the commercial navigation was not feasible on the Madison, Missouri, and Clark Fork rivers in 1889.

REFERENCES

Brice, J.C., 1984. "Planform properties of meandering rivers," River Meandering (Elliott, C.M. (ed), NY Amer. Sac Civil Engineers, Proc. Conference, River 83, p1-15.)

Brown, Nelson Courtland, 1936. Logging—Transportation: The Principles and Methods of Log Transportation in the United States and Canada (London: John Wiley & Sons).

Bryant, Ralph Clement ,1923. Logging: The Principles and General Methods of Operation in the United States (London: John Wiley & Sons, Inc.).

Schumm, S.A., Erskine, W.D., and Tilleard, 1996. Morphology, hydrology, and evolution of the anastomosing Ovens and King Rivers, Victoria, Australia, Geol. Soc. America Bulletin, v. 108, p. 1212-1224.

Thompson, Curt, 1993. Floating and Recreation on Montana Rivers: Curt Thompson, Lakeside, Montana.

U.S. Geological Survey Topographic Maps

Exhibit A

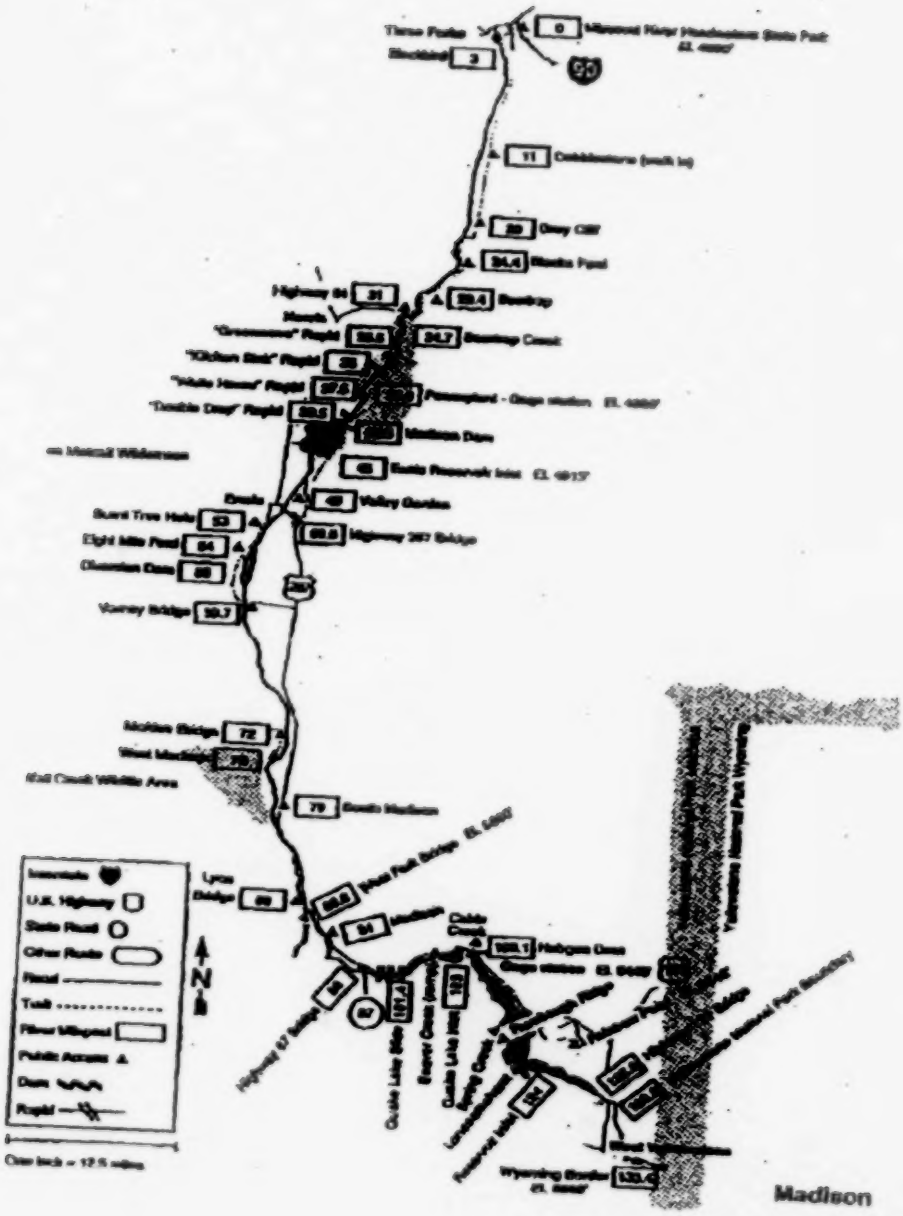
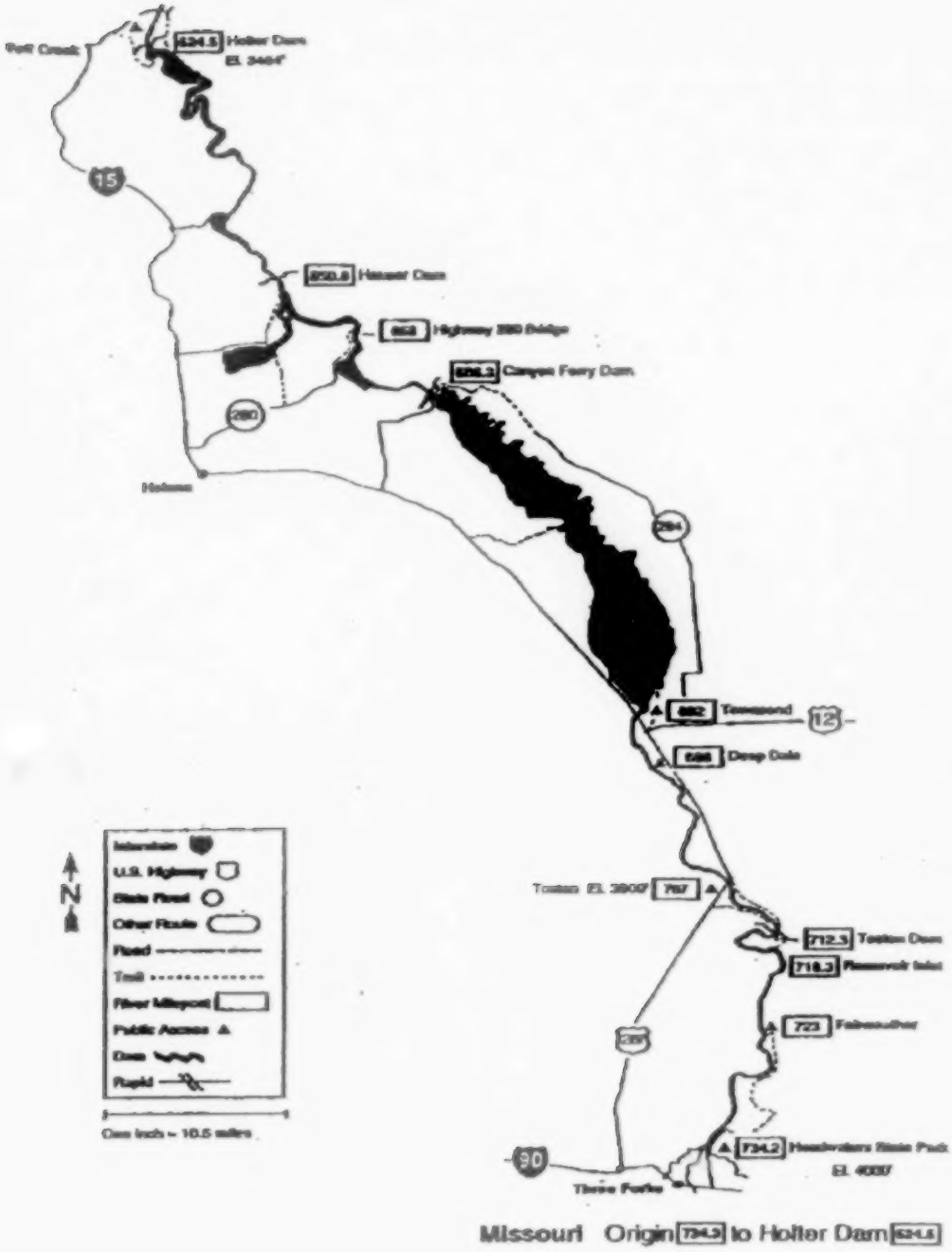

Three Forks
Blackbird
Cobblestone (walk in)
Gray Cliff
Blacks Pool
Highway 84
Beartrap
Beartrap Creek
"Greenstone" Rapid
"Kitchen Sink" Rapid
"White House" Rapid
"Double Drop" Rapid
Madison Dam
Valley Garden
Highway 287 Bridge
Sunt Tree Hole
Eight Mile Pool
Diversion Dam
Varney Bridge
Mokins Bridge
West Madison
Wall Creek Wildlife Area
Lyons Bridge
Madison
Cable Creek
Hebgen Dam
Gage station
Wyoming Border
Yellowstone National Park Wyoming
Interstate
U.S. Highway
State Road
Other Route
Road
Trail
Fiber Mileposts
Public Access
Dam
Rapid
N
Madison

Exhibit B



Missouri Origin 734.3 to Holter Dam 624.5

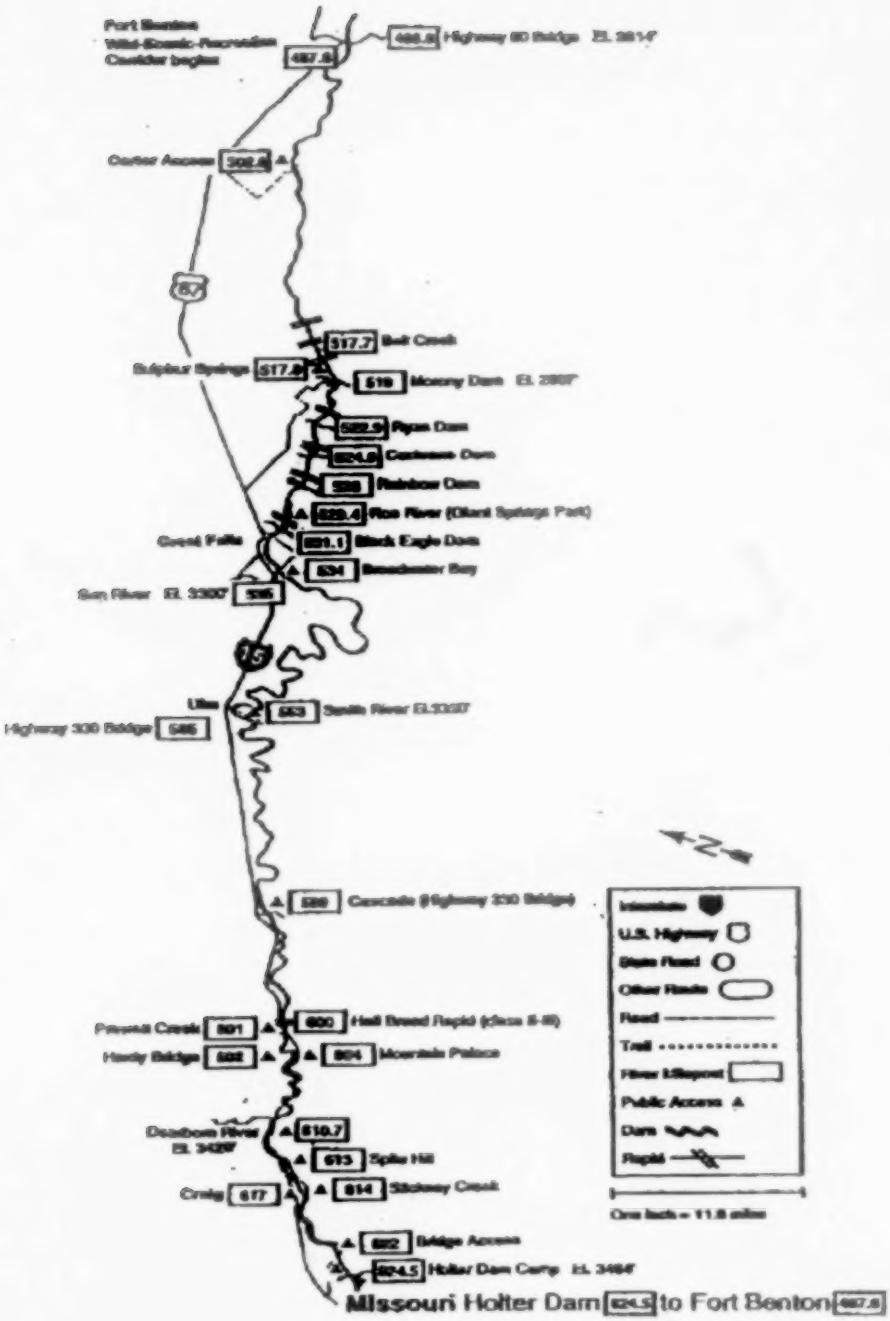
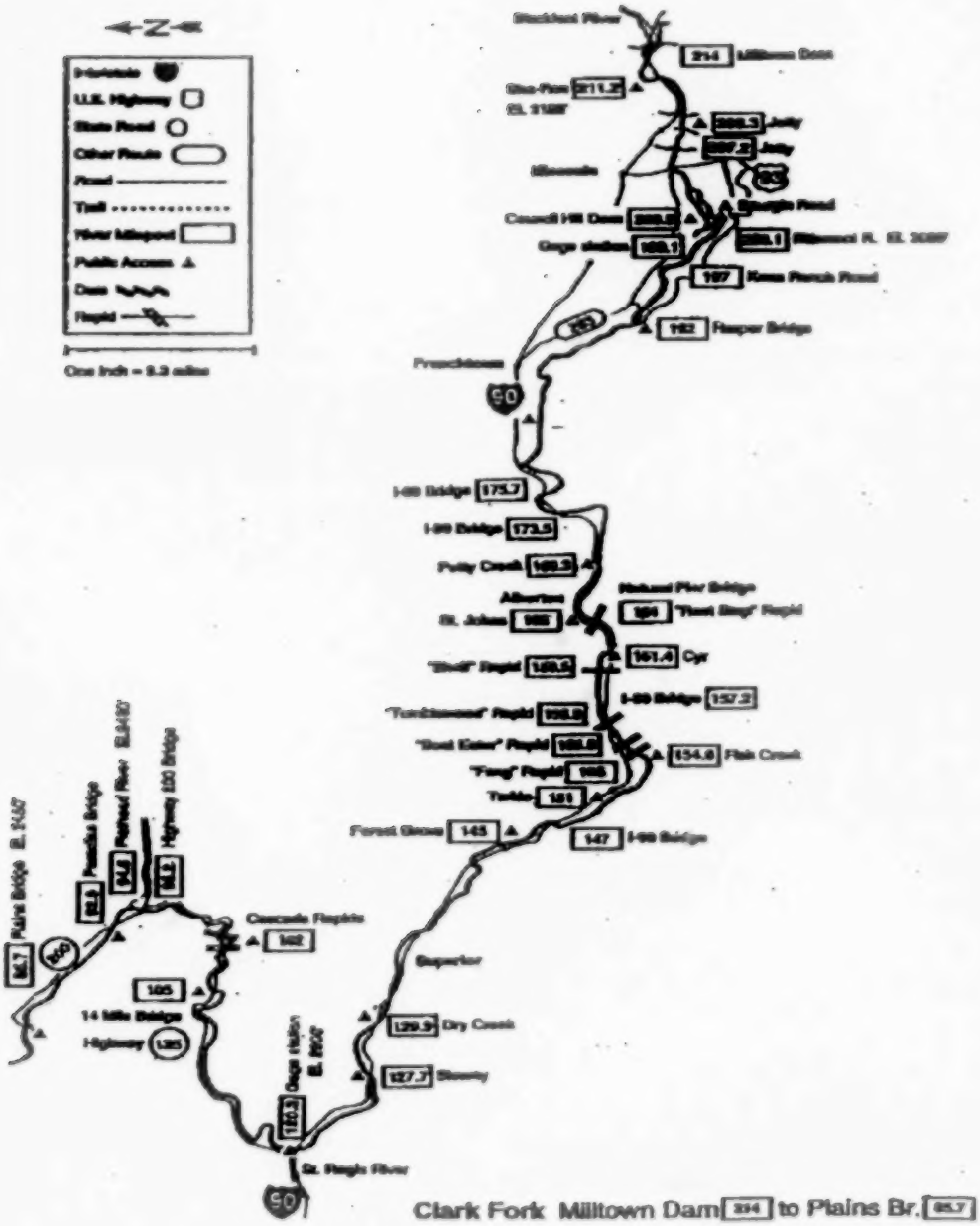

Missouri Holter Dam 824.5 to Fort Benton 667.6

Exhibit C

Thompson River
Thompson Falls Recreation Area
Thompson Falls Dam
Highway 200 Bridge
Spring Gulch
Vermilion River
White Pine
Trout Creek (ramp)
North Shore
Noxon Dam
Bull River
Noxon Bridge
Heron Bridge
Idaho border
Cabinet Gorge Dam
Idaho
Clark Fork Plains Bridge to Idaho Border
U.S. Highway
State Road
Other Route
Road
Trail
River Milepost
Public Access
Dam
Rapid


Clark Fork Milltown Dam 334 to Plains Br. 85.7

[Table of Contents and Table of Authorities omitted in printing of this appendix]

* * *

Pamela D. Bucy
Harley R. Harris
Luxan & Murfitt, PLLP
P.O. Box 1144
Helena, MT 59624-1144
{hone: 406-442-7450
Fax: 406-442-7361
E-Mail: pbuch@luxanmurfitt.com

Attorneys for Amicus Curiae
MEA-MFT, Montana School Board Association,
School Administrator of Montana, Montana Rur
Education Association,
Montana Quality Education Coalition

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 08-0506

PPL MONTANA, LLC, A Delaware limited liability corporation,

Plaintiff and Appellant,

v.

STATE OF MONTANA,

Defendant and Appellee.

AMICUS BRIEF OF SCHOOL TRUST REPRESENTATIVES

MEA-MFT and the Montana School Board Association, along with the Montana Rural Education Association, School Administrators of Montana, and Montana Quality Education Coalition, hereinafter School Trust Representatives, submit this amicus brief on behalf of their membership.

STATEMENT OF THE ISSUES

1. Did the District Court correctly determine that the streambeds of navigable rivers are part of the school trust?

2. Did the District Court correctly determine that PPL must pay for its use of the streambeds based upon the productive value of the land?

STATEMENT OF THE CASE

The District Court decided a wide variety of issues in this case; however, the School Trust Representatives will address only the determinations regarding the streambeds of navigable rivers being part of the school trust and the requirement that PPL pay fair market value for its use of the streambeds.

STATEMENT OF THE FACTS

The School Trust Representatives adopt the Statement of the Facts filed by the State of Montana.

SUMMARY OF JUDGMENT

This case represents just another stop in an ongoing effort to require compliance with Montana law in order to ensure that Montana's public school system is adequately funded. The State of Montana owns the streambeds which PPL is currently occupying and using for its income-producing operations. As such, PPL is required to pay for its use and occupancy of the streambeds. In addition, it is required to pay full market value. As title to streambeds is governed by state law, it is the State of Montana's decision which governs where revenues from those streambeds should be deposited. As the streambeds or revenue from them are not dedicated to a "special purpose," those lands belong in the school trust.

ARGUMENT

1. INTRODUCTION

The initial provision of Article X of the Montana Constitution, which governs education and public lands, guarantees equality of educational opportunities to each person f the state. Mont. Const., Art. X, (1). It also requires the Montana legislature to "provide a basic system of free quality public elementary and secondary schools." Mont. Const., Art. X (3).

Montana's public schools provide the most comprehensive public service in our state. In each community, our public schools help parents in preparing nothing less than the future of Montana. The stakes are large. Equipped with an effective elementary and secondary education, the possibilities for a new graduate of one of our high schools are

virtually endless and include a number of potential pathways to success. Correspondingly, without the benefit of a public education worthy of the Constitutional guarantees in Article X of the Montana Constitution, the future is limited and constrained by an increased likelihood of detours to failure.

To that end, the School Trust Representatives and others have engaged and continue to engage in an ongoing multi-faceted reform effort to increase funding for Montana's public schools.

A. Recent History of Reform in School Funding

1. School Funding Lawsuit

In 2022, Amicus Montana Quality Education Coalition (MQEC), which includes MEA-MFT, sued the State of Montana alleging that the funding system for Montana's public schools violated Article X, Section 1, of the Montana Constitution because it failed to provide adequate funding. (MQEC Comp., Appendix 1). First Judicial District Court Judge, Jeffrey M. Sherlock agreed. See April 14, 2004, Findings of Fact, Conclusions of Law and Order, Conclusion of Law No. 9, p. 51. (Appendix 2). ("[T]he current Montana school funding system violates Article X, Section 1 of the Montana Constitution in that it fails to provide adequate funding for Montana's public schools.") That decision was upheld by this Court, *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, 326 Mont. 304, 109 P.3d 257.

As a direct result, the Montana Legislature made numerous changes to Montana's school funding

formula including quality educator provisions, at-risk funding, Indian Education for All funding, and Indian achievement gap funding. *See* MQEC's February 45, 2008, Renewed Motion for Supplemental Relief and an Order to Show Cause, pp. 7-8. (Appendix 3). Most importantly, as required by the Montana Supreme Court in its ruling, the Montana legislature also provided a definition for "a basic system of free quality public education" as provided in the Montana Constitution. *See* § 29-9-309, MCA (2005). *See also* Plaintiffs' February 5, 2008, Renewed Motion for Supplemental Relief and an Order to Show Cause, p. 7. (Appendix 3).

However, MQEC maintains that regardless of the numerous changes to the funding of Montana's schools, the same defective funding formula that was present in 2004 and 2055 has not changed significantly and that Montana's public schools are still dramatically underfunded. *See* Plaintiffs' February 5, 2008, Renewed Motion for Supplemental Relief and an Order to Show Cause, pp. 8-12 (Appendix 3). Due to the above-cited statutory changes, Judge Sherlock declined to grant any supplementary relief to MQEC. *See* December 9, 2008 Order. (Appendix 4). Judge Sherlock's decision requires MQEC to analyze school funding under the revised definition and statutory structure. MQEC and the other School Trust Representatives will continue this analysis upon the conclusion of the 2009 legislative session.

2. Ensuring Full Value for Trust Lands

At statehood in 1889, Congress granted Montana over five million acres of land as a trust to support public education. Enabling Act of February 22, 1889,

ch. 180, 25 Stat. 676 (1889). Under the founders' vision of a strong financial foundation for public schools, the Montana Constitution expanded that grant beyond "[p]roceeds from the school lands" to escheated estates, unclaimed corporate shares, and all gifts for educational purposes, as well as all "[l]ands given or granted by any person or corporation" and "[a]ll other grants of land" by the United States for educational or general purposes. Mont. Const., Art. X, Section 2. Although Montana's founders understood the serious nature of that trust, like other states, politics and administrative graft soon began diminishing the value of trust lands. *See Montanans For The Responsible Use of the School Trust v. State Board of Land Commissioners*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800, (hereinafter *MonTRUST I*).[1]

---

[1] Examples of statutes permanently enjoined after the *MonTRUST I* case;

1. § 77-1-130, MCA (allows DNRC to grant -right-of-ways and road access based on 1972 land values.)
2. § 77-1-208, MCA (no competitive bidding for renewal cabin lease sites)
3. § 77-5-211, MCA (allows state to issue firewood permits without charging for commercially valuable wood.)
4. § 77-6-304, MCA (allowing former leaseholders sixty days to remove improvements without charge.)
5. § 7-35-4104, MAC (enacted 1895, granting free cemetery sites on school trust lands.)
6. § 20-6-621(4), MCA (enacted 1971, allowing individual school districts to lease school sites for $1 per year.)
7. § 77-2-106, MCA (enacted 1927, speculative value-enhancement from putting new roads across trust lands to be offset against the price of easements.)
8. § 77-2-303(1), MCA (enacted 1927, forbidding any sales of timberland.)

§ 77-3-132(1), MCA (enacted 1937, granting automatic 40 acre mineral leases to prospectors "on the most favorable of terms"

Over the last decade that situation has started to improve.

Seeking to enhance reform, the watchdog group Montanans for The Responsible Use of the School Trust (hereinafter MonTRUST) was formed to ensure that the State of Montana was receiving full value for its school trust lands. To that end, in 1999, MonTRUST filed a complaint under the Enabling Act and Montana Constitution to enjoin implementation of numerous statues regulating School Trust Lands which MonTRUST claimed embodied a century of legislative pork barrel because the statutes failed to obtain full market value for trust lands as required by the Montana Constitution. *MonTRUST I*, 1999 MT 263, ¶ 12. This Court agreed with MonTRUST, concluding that several of the statutes violated the State's duty to obtain full market value for school trust lands pursuant to the Montana Constitution and the Enabling Act, and that the Land Board, through its school trust land lease prices and procedures associated with those statutes, had breached its trustee duties by benefitting third parties to the detriment of the school trust's beneficiaries. *MonTRUST I*, 1999 MT 263, ¶¶ 23, 32, 42, 51, 58.

Several years later, MonTRUST filed a second lawsuit alleging further constitutional violations and breaches of trust by the Land Board arising from the

---

without any competitive bidding.)

9. § 77-3-321, MCA (enacted 1927, grants any resident up to 30 tons of coat for only $5.)

10. § 77-5-204(1), MCA (enacted 1897, uses "best interests of the state" as timber sales criteria rather than "best interests of the trust beneficiaries."

State's alleged improper commingling of trust assets into the General Fund and the State's sale of a 30-year future stream of mineral royalties from school trust land in exchange for an immediate cash infusion of $46.4 million. *Montanans For The Responsible Use of the School Trust v. Darkenwald*, 2005 MT 190, ¶ 6, 328 Mont. 105, ¶ 6, 119 P.3d 27, ¶ 6 (hereinafter *MonTRUST II*). Though this Court concluded that the actions at issue in that case did not violate the school trust, this Court steadfastly maintained that the Land Board must obtain full market value for school trust lands and manage the trust to the benefit of the beneficiaries as opposed to third parties.

In direct response to the *MonTRUST II* case, the Montana Legislature made numerous changes to the school trust statutory scheme to provide for more accountability and greater transparency of school trust funds thereby continuing the reform effort stated by MonTRUST. *MonTRUST II*, 2005 MT 190, ¶ 7. Prior to 2001, the Legislature had required the Land Board to deposit annually the distributable income for each calendar year directly into the General Fund to be disbursed to public schools. *See* Mont. Code Ann. § 20-9-342 (1999). *See also, MonTRUST II*, 2005 MT 190, ¶ 9. Though the State maintained records of the amount of distributable income being deposited into the General Fund, the State did not earmark those deposits in any manner. *Id.*

During the 2001 Session, the Legislature amended the statutory scheme to create a sub-fund of the General Fund specifically designated to receive distributable school trust revenues. The 2002 special session Legislature amended the scheme even further by requiring that all distributable income from the

trust be deposited in a "guarantee account" in the state special revenue fund, statutorily appropriated for distribution to public schools, rather than a sub-fund of the General Fund.

Since its inception, the money for schools from the guarantee account represents between 8.6 percent and 13.6 percent of state funding for school districts. *See Guarantee Account Revenues As a Percent of State Spending and School Spending*, prepared by Legislative Fiscal Division on April 14, 2008, Appendix 5. The guarantee account has varied between 4.4 and 6.5 percent of total school spending. Appendix 5. The benefit of this case to the school trust is dramatic. The district court determined that the State is entitled to compensation from PPL for 2007 in the amount of $6,207,919. See June 13, 2008, Findings of Fact and Conclusions of Law, Conclusion of Law No. 10, p. 11, Appendix 6. In addition, PPL's original co-defendants settled and entered into lease agreements contingent on the outcome of this litigation. PacifiCorp agreed to an annual rental rate of approximately $50,000 per year and Avista agreed to an annual rental rate of approximately $4 million per year. See State of Montana brief, Statement of Facts, p. 6. Therefore, the school trust guarantee amount will see an increase of a minimum of $10 million dollars per year from the enforcement of trust duties under the Hydroelectric Resources Act. In addition, the nearly $4 million of damages for past wrongful occupation through 2007 will be capitalized as trust principal under the land banking program, providing additional benefits over generations. See Board of Lane Commissioners, Minutes of December 15, 2008 Meeting, Item 1208-9, http://dnrc.mt.gov/commissions/land_board/2008/December/minutes.pdf.

Ten million additional dollars per year would immediately and positively impact every Montana classroom as 83% of school district general fund monies in fiscal year 2008 went directly to paying school staff and 65% was dedicated to classroom instruction and direct support services for students. *See* School District General Fund Expenditures, Prepared by Paul Taylor, OPI School Finance, Appendix 7. *See also*, http://www.opi.mt.gov/pub/School%20Finance/SchoolAccountingManual/3-0600%20Expenditure%20%26%20Other%20Financing%20Uses.pdf, pp. 10-15 (description of the types of expenditures that are coded as instruction and support services for students).

For example, this additional $10 million could provide for an $800 increase in salary for 12,200 class room teaches in Montana. This equates to an approximately 2% increase in average salary and shrinks the existing 18% pay deficit. *See* Appendix 8. Alternatively, this additional $10 million could pay roughly two-thirds of the current annual premium increase for health care costs of all school employees. *See* Appendix 9.

The case at bar represents just another step in this ongoing reform effort to ensure that Montana's school children are receiving full value from their trust lands.

II. FEDERALLY GRANTED STREAMBEDS ARE PART OF THE SCHOOL TRUST

The State owns navigable streambeds under the Equal Footing Doctrine, which provides that "the Federal Government holds such lands in trust for future States, ***to be granted*** to such State when they

enter the Union and assume sovereignty on an 'equal footing' with the established States." *Montana v. United States*, 450 U.S. 544, 551 (citation omitted) (emphasis added). "After a State enters the Union, title to the land is governed by state law . . . subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Id.* It is, therefore, a question of state law whether the Montana Constitution intended for the navigable streambeds held in trust and granted under the Equal Footing Doctrine to fall within the school trust.

Montana's Constitution and laws clearly provide that the streambeds granted under the Equal Footing Doctrine fall within the school trust. The public school fund, established by the 1889 Constitution and continued by the 1972 Constitution, must receive "the proceeds . . .of all other grants of land or money made to the State from the general government for general educational purposes, or where no other special purpose is indicated in such grant." 1889 Mont. Const. art. XI, § 2, re-ratified at Mont. Const. Art. X, § 2. In pursuance of this trust obligation, the Legislature provided for a school fund derived from, among other sources, "the proceeds of all property granted to the state, when the purpose of the grant is not specified or is uncertain." Mont. Pol. Code § 1940 (1895), re-codified at § 20-9-601(4) MCA.

A. School Trust Land Is Not Limited To Enabling Act "School Lands"

PPL argues that equal footing lands "vest" at Statehood as opposed to being "granted" by the federal government and therefore cannot fall within the above

Montana Constitutional and statutory provisions. However, as noted by the State of Montana in its brief, this is a distinction without a difference. The terms are synonymous. In addition, as title to streambeds "is governed by state law," *Montana*, 450 U.S. at 551, it is the State's, not Congress's, decision as to where the revenues from those streambeds should go. To that end, numerous other states have limited their school trust lands to only Enabling Act lands. *See* Miss. Const. Art. VIII, § 211 (Legislature "shall provide that the sixteenth section lands reserved for the support of property heretofore set apart and appropriated for the support of public schools . . . one half of the public domain of the State"); Utah Const. Art. XX, § 2 ("Lands granted to the State under sections 6, 8 and 12 of the Utah Enabling Act, and other lands which may be added to those lands pursuant to those sections"); *See also State ex rel. Plaquemnes Parish Sch. Bd v. Plaquemines Parish Gov't*, 690 So. 2d 232, 233 (La. Ct. App. 1997), ("Pursuant to federal law . . .[t]he 16th section of each township was reserved for the benefit of schools.")

Had the framers of Montana's Constitutions wanted the school trust, like these other states, to include only lands expressly granted by the Enabling Act, they would have said so. Instead, Montana's Constitution plainly expresses an intention to supplement the Enabling Act lands with "other grants of land."

B. The Public Trust Doctrine Does Not Exempt PPL From Paying Rent

Another reason navigable streambeds cannot be school trust lands, according to PPL, is that they are

subject to the Public Trust Doctrine. Under the doctrine, the Public Trust "is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein freed from the obstruction of interference of private parties." *Montana Coalition For Stream Access, Inc. v. Curran*, 220 Mont. 38, 47, 682 P.2d 163, 168 (1984), *quoting Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892).

But as *Curran* makes clear in its analysis of both doctrines, state title under Equal Footing and public use under Public Trust are not contradictory, but complimentary. *Curran*, 210 Mont. at 48, 682 P.2d at 168. The State can exercise its title rights to lease navigable streambeds in fulfillment of its sovereign trust duties generally (and its school trust duties in particular), so long as it does not interfere with the public's rights to use the waters so as to *"abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties. ..."* *Curran*, 210 Mont. at 47, 682 P.2d at 168, *quoting Illinois Central*, 146 U.S. at 453. *Curran* provides a general limitation on the means of generating revenue, not a prohibition against the collection or generation of revenue from trust lands. So long as the State does not "abdicate its trust" to private parties, it can dedicate revenue from its Equal Footing lands to any public purpose. Since that is not a "special purpose," those lands belong in the school trust.

C. PPL Lacks Standing To Challenge The Distribution Of Their Rental Payments To Montana Beneficiaries.

PPL concedes that the beds of navigable rivers are owned by the state (PPL Opening Brief at pp. 28-29) and further concedes that states hold title to navigable waterways in trust for the public benefit. PPL Opening Brief at p. 30, (citing *Curran*, 210 Mont. at 48, 682 P.2d at 168). However, PPL then argues a distinction between "public trust" land and "school trust" land, a distinction it claims has dramatic financial consequences for itself and others.

It is unclear what relief PPL hopes to attain from this argument. "The essence of a finding that property is held in trust, school, public, or otherwise, is that anyone who acquires interests in such property do[es] so 'subject to the trust.'" *Dept. of State Lands v. Pettibone*, 216 Mont 361, 375, 702 P.2d 948, 957-58 (1985). Consequently, a "court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance" away from the state. *Montana v. United States*, 450 U.S. 544, 552. And "[t]he State has no power, absent adequate consideration, to grant the lessees the permission" to use the trust lands for their projects. *Pettibone*, 216 Mont. at 375, 702 P.2d at 957. Given PPL's thorough concessions in its brief that navigable streambeds are state trust lands, however, it should not matter whether the proceeds from those lands go to schools or to the general fund. Either way, PPL sits on state trust land and the State has a fiduciary duty to make them pay for it.

The State, in common cause with the School Trust Representatives, has taken the position that proceeds from PPL's rent payments is properly paid into the public school fund created in Article X of the Montana Constitution. Yet whether the State's position is correct or incorrect has not bearing on PPL. As a foreign corporation, it argues that "[r]iverbeds must be held in trust for the benefit and use of all Montana's citizens, not simply the beneficiaries of the school trust." (PPL's Opening Br. at 24-30.) PPL is not a Montana citizen. (Comp. at ¶¶ 6-8.) It has not shown, nor even claimed, any injury that could befall it as a result of the State's intended disposition of trust land revenues. Without "a sufficient 'personal' stake" in the use of the rents they must pay, PPL lacks standing to raise this defense. *Northern Border Pipeline Co. v. State*, 237 Mont. 117, 129, 772 P.2d 829, 836 (1989); *see also National Cas. Co. v. American Bankers Ins. Co.*, 2001 MT 28, ¶ 25, 304 Mont 163, ¶ 25, 19 P.3d 223, ¶ 25 (insured who received fill payment "has no interest in and no standing to argue" for a particular distribution between two insurers).

If a Montana citizen with a stake in the distribution of trust land revenues received from PPL disagrees with the State's position, that person--and not an out-of-state corporation--is the proper party to challenge it. *See MonTRUST II* (considering challenge to treatment of trust land revenues).

III. PPL's DAMAGES ARGUMENTS IGNORE FUNDAMENTAL SCHOOL TRUST LAW PRINCIPLES

Amici School Trust Representatives also wish to address several aspects of PPL's arguments regarding

the District Court's determination of damages and future lease compensation. (PPL's Opening Brief, pp. 55-61). If accepted, these arguments would have the effect of benefiting PPL to the detriment of the school trust's beneficiaries -- a result clearly precluded by *MonTRUST I* and *MonTRUST II*. Specifically, PPL contends: (1) that § 27-1-318, MCA, governs the determination of damages for past wrongful occupation of the involved school trust parcels (PPL Br. at 57); and (2) that the State has not put anything "at risk" and thus should not be entitled to the well-established 50/50 split of the shared net benefits of the PPL facilities. PPL Br. at 60-61.

PPL's first argument is not even supported by the statute it cites. By its plain language § 27-1-318, MCA, only applies to "cases not otherwise provided for in this code." It is clear that the determination of rent for the use and occupancy of school trust land for the purpose of generating electricity *is* "otherwise provided for" in § 77-4-208, MCA, which states that:

> The rental to the state [for power sites] . . . shall not be less than the full market value of the estate or interest disposed of through the granting of the lease or license, such value to be carefully ascertained from all available sources.

More importantly, even if the "not otherwise provided" language did not appear in § 27-1-318, MCA, *MonTRUST I* makes clear that any statute which fails to secure for the school trust the full value of the estate or interest being granted is unconstitutional. *MonTRUST I*, ¶¶ 23, 32, 42, 51, 58. In this instance the Legislature has enacted the more specific and more pertinent (than § 27-1-318, MCA) Hydroelectric

Resources Act. The definition of power sites contemplates that state-owned dam and reservoir lands make "an essential contribution to the value of the power site" and should be covered under the Act when those lands represent "not less than 5% of the entire value of such power site." § 77-4-202, MCA.

Moreover, the prohibition on sale of state land power sites "capable of developing hydroelectric energy in commercial quantities" bars the grant of an easement or other interest that would leave the State without a share in the actual production from the power site. § 77-4-201, MCA; *see also* § 77-4-209, MCA (lease term limited to 50 years). Instead, a lease for not only "the development of power sites" but also "the distribution, use, and disposition of the electrical energy generated on the sites" ensures that the State will receive the full market value of its lands in their highest and best use of hydroelectric generation. § 77-4-201, MCA. Thus, the Board shall examine not only "the value of the power site," but also "the plans of development" and "all other matters relating to the proposed development as it deems necessary for the proper disposition of the business." § 77-4-204, MCA.

The Act's emphasis on the income generated on the land is consistent with virtually every other statute and regulation governing leases of income-producing state lands. The most analogous are renewable energy leases: geothermal leases require not less than 10% of gross revenue received from sale of energy (Mont. Admin. R. § 36.25.204); and wind energy leases require approximately 3% of gross annual revenues. Farmers and ranchers also pay income-based rents: agricultural land leases require at least 25% of the annual crop value (Mont. Admin. R. § 36.25.110(1)); and grazing

leases require rents valued at the animal-unit-month carrying capacity of the land based on beef prices. Mont. Admin. R. § 36.25.110(3). Commercial leases require a percentage of the land's appraised value not less than 2% below rate of return of Montana Board of Investments unified investment program, and allows payments of services or materials equal to the full market value of the rent. § 77-1-905(2), MCA. Even recreational cabinsite leases, a subject of *MonTRUST I*, require at least 5 percent of the appraised market value of the land in its existing cabinsite use. Mont. Admin. R. § 36.25.110(6).

In *State ex rel. Thompson v. Babcock*, 147 Mont. 46, 409 P.2d 808 (Mont. 1966), this Court explained that income-based leasing enables the State "to secure as large a return as possible, yet preserving the productive capacity of the land." 147 Mont. at 53. It is simple not permissible for the Board or the Legislature to fix a valuation based on a non-site specific factor. *See* ***MonTRUST I***, ¶ 23 (statute valuing right-of-way acreage based on 1972 levels "clearly violated the State's constitutional obligation to obtain full market value for school trust lands"). Therefore, the Board is not only permitted to consider the ongoing productive value of the land, but is *required* to consider it under the "full market value" constraint of state trust land law.

Beyond this, what is especially troubling about PPL's statutory argument is the fact that, if accepted, it would mean that a wrongful occupier of school trust land would stand to pay to the school trust less than one who willingly complied with the law. Put differently, under PPL's argument the full economic value of the school trust land would be captured not by

the trust's beneficiaries, but by PPL. It was just this type of inequity that led the Court in *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544 (9th Cir. 1994) to reject the district court's decision that the measure of damages for the past trespasses at issue there was "the rental value of the land for grazing." 28 F.3d at 1549. In reversing, the Court of Appeals explained:

> The damage calculation urged by the Utility would encourage others to use Indian reservation lands for power production without complying with the Power Act.

28 F.3d 1t 1551. PPL's statutory argument must be rejected.

Second, PPL is simply wrong in its assertion that the customary 50/50 split between landowner and developer under the shared net benefits test should be modified here because the State did not put anything "at risk" in these projects. PPL Br. at 60-61. That assertion ignores the basic economic principle of opportunity cost.

Were the State's streambeds not submerged by PPL's facilities, the State could have leased the streambeds to another federal licensee (like Avista or PacifiCorp) who could and would easily pay for the enormous hydroelectric generation value of the school trust lands under Clark Fork, Madison, and Missouri Rivers. And, given that the State is statutorily allowed to commit its lands to a hydropower project for up to 50 years (*see* § 77-4-209, MCA), it is conceivable that new economic uses could arise that were not even contemplated at the time the project was licensed, but

which would be precluded until the expiration of the lease and federal license. Wind generation is a classic case in point: a century ago the thought that wind turbines might be erected on agricultural parcels was not even a remote consideration. However, times and economics have changed and the productive value of those parcels has increased dramatically.

Finally, while PPL already has a federal license for its projects, the other "risk" the State takes in prospectively licensing to other applications under the Hydroelectric Resources Act in general is in foregoing a relationship with other potential applications who might turn out to be more efficient or productive in generating revenues from the power site. This is precisely why the Hydroelectric Resources Act requires the Land Board to consider the applicant's capability to "carry out the proposed development" (§ 77-4-206, MCA) as part of the lease-approval process. PPL's suggestion that the State carries no "risk" in this arena is without merit.

CONCLUSION

MonTRUST I brought about many positive changes in the way the school trust is seen and managed. The case now before the Court provides an important opportunity to continue that work and to emphasize the sanctity and importance of the school trust.

DATED this 20th day of April, 2009

LUXAN AND MURFITT, PLLP

/s/ Pamela D. Bucy
Pamela D. Bucy
Attorneys for Amicus Curiae

* * *

[*Certificate of Compliance and Certificate of Service omitted in printing of this appendix*]

* * *

APPENDIX

TABLE OF CONTENTS

1. MQEC Comp.

2. April 14, 2004, Findings of Fact, Conclusions of Law and Order.

3. MQEC's February 5, 2008, Renewed Motion for Supplemental Relief and an Order to Show Cause.

4. December 9, 2008 Order.

5. Guarantee Account Revenues As a Percent of State Spending And School Spending prepared by Legislative Fiscal Division On April 14, 2008.

6. June 13, 2008, Findings of Fact and Conclusions of Law.

7. School District General Fund Expenditures prepared by Paul Taylor, OPI School Finance.

8. Average Salaries Paid to Us & MT Teachers.

9. Historical Trend of School District Expenditures for Health Insurance.

* * *

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 3 1 2011
OFFICE OF THE CLERK

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF FOR PETITIONER

ASHLEY C. PARRISH
PAUL A. MEZZINA
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St., Ste. 1500
Billings, MT 59101
(406) 252-2166

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M St. NW, Ste. 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

Counsel for Petitioner

August 31, 2011

Library of Congress
Law Library

QUESTION PRESENTED

The Montana Supreme Court held on a summary judgment record that the State of Montana owns the riverbeds under more than 500 miles of rivers, including the riverbeds under multiple hydropower facilities on the upper Missouri, Madison, and Clark Fork rivers. This came as quite a shock, because for more than a century the riverbeds beneath those facilities have been treated as owned by private parties or the federal government. In reaching this result, the lower court concluded that the rivers were navigable when Montana joined the Union in 1889 and, therefore, that Montana held title to the riverbeds. The court upheld summary judgment for the State, notwithstanding a prior federal court decree, as well as 500 pages of expert testimony and exhibits, establishing that the relevant sections of the rivers were not navigable at statehood. The consequences are draconian: The court below held that the State is entitled to tens of millions in retroactive back rent and millions more in future payments from the owners of the hydropower facilities. The question presented is:

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

RULE 29.6 STATEMENT

The sole member of petitioner PPL Montana, LLC is PPL Montana Holdings, LLC, a privately held Delaware limited liability company. The sole member of PPL Montana Holdings, LLC is PPL Generation, LLC; the sole member of PPL Generation, LLC is PPL Energy Supply, LLC; and the sole member of PPL Energy Supply, LLC is PPL Energy Funding Corporation.

PPL Energy Funding Corporation is a wholly owned subsidiary of PPL Corporation, a publicly traded Pennsylvania corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. PPL's Hydropower Projects 3

B. The Trial Court Proceedings 4

1. The State's Evidence 6

2. PPL's Evidence 13

3. The Trial Court's Ruling 20

C. The Montana Supreme Court 21

SUMMARY OF ARGUMENT 25

ARGUMENT 27

I. Navigability For Title Purposes Is A Constitutionally Grounded Test That Requires Uniform And Consistent Application 27

II. This Court Should Confirm The Controlling Federal Test For Determining Navigability For Title Purposes 33

A. Navigability for Title Purposes Is Assessed with Respect to the Particular River Stretches at Issue 34

1. The Segment-by-Segment Approach Is Dictated by Practical Considerations 34

2. This Court's Cases Have Consistently Applied the Segment-by-Segment Approach. 36

3. The Decision Below Exemplifies the Dangers of Substituting a "Whole River" Approach for this Court's Segment-by-Segment Approach 40

B. Navigability for Title Purposes Is Determined Based on Evidence of Commercial Navigation at Statehood. 43

1. The Proper Test Focuses on Reliable Historical Evidence and Considers Susceptibility to Use Only in Narrow Circumstances 44

2. Modern-Day Evidence Is Inherently Suspect and Rarely Relevant 46

3. Recreational Use Cannot Establish that a River Supplied a Highway for Commerce 49

4. Isolated and Unsuccessful Log Floats Cannot Establish that a River Supported Trade and Travel. 53

C. The Burden of Proof Rests on the Party Seeking to Establish Navigability; Navigability for Title Purposes Is Not "Very Liberally Construed." 54

III. Under A Correct Application Of This Court's Precedents, The State's Evidence Was Manifestly Insufficient To Sustain Its Title Claims 58

CONCLUSION 61

APPENDIX

U.S. Const., art. VI, cl. 2 ..... 1a

U.S. Const., art. IV, § 3, cl. 2 ..... 2a

43 U.S.C. § 931 ..... 3a

43 U.S.C. § 1311(a) 4a

TABLE OF AUTHORITIES*

Cases

Alabama v. Texas,
347 U.S. 272 (1954) 30

Alaska v. Ahtna, Inc.,
891 F.2d 1401 (9th Cir. 1989) 40, 48, 52, 53

Arizizona Free Enter. Club's Freedom Club PAC v. Bennett,
131 S. Ct. 2806 (2011) 55

Arizona Ctr. for Law in the Pub. Interest v. Hassell,
837 P.2d 158 (Ariz. Ct. App. 1991) 55

Boerner v. McCallister,
89 S.E.2d 23 (Va. 1955) 55

Boutwell v. Champlain Realty Co.,
94 A. 108 (Vt. 1915) 55

Brewer-Elliot Oil & Gas Co. v. United States,
260 U.S. 77 (1922) .....passim

Burner v. Nutter,
87 S.E. 359 (W. Va. 1915) 55

Colorado v. New Mexico,
467 U.S. 310 (1984) 57

Elkins v. United States,
364 U.S. 206 (1960) 55

---

* "Pet.App." refers to the petition's appendix. "S.App." refers to the reply brief's appendix. "2d.S.App." refers to the appendix to the supplemental brief filed at the certiorari stage. JA refers to the joint appendix.

George v. Beavark, Inc.,
402 F.2d 977 (8th Cir. 1968)..... 52

Hamling v. United States,
418 U.S. 87 (1974)..... 55

Harrison v. Fite,
148 F. 781 (8th Cir. 1906)..... 50, 55

In re Montana Power Co.,
7 F.P.C. 163 (1948) 9

Kaiser Aetna v. United States,
444 U.S. 164 (1979)..... 31, 33, 44

Leo Sheep Co. v. United States,
440 U.S. 668 (1979)..... 33, 36, 56

Martin v. Waddell,
41 U.S. 367 (1842)..... 28

Montana Power Co. v. FPC,
185 F.2d 491 (D.C. Cir. 1950)..... 9, 18

Mundy v. United States,
22 Cl. Ct. 33 (1990) 40

N. Am. Dredging Co. of Nev. v. Mintzer,
245 F. 297 (9th Cir. 1917)..... 50

North Dakota ex rel. Bd. of Univ. & Sch. Lands v. United States,
972 F.2d 235 (8th Cir. 1992)..... 48, 54, 55

Nw. Steelheaders Ass'n v. Simantel,
112 P.3d 383 (Or. Ct. App. 2005) 40

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,
313 U.S. 508 (1941)..... 32

Oklahoma v. Texas,
258 U.S. 574 (1922) ..... passim

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,
429 U.S. 363 (1977) 28

Oregon v. Riverfront Prot. Ass'n,
672 F.2d 792 (9th Cir. 1982) 40

Pollard v. Hagan,
44 U.S. 212 (1845) 28

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 57

State v. Aucoin,
20 So. 2d 136 (La. 1944) 55

Steele v. Donlan,
In Equity No. 950 (D. Mont. July 14, 1910) 11

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,
130 S. Ct. 2592 (2010) 31

Taylor Fishing Club v. Hammett,
88 S.W.2d 127 (Tex. Civ. App. 1935) 50

The Daniel Ball,
77 U.S. 557 (1870) 27, 31, 49

The Montana Power Co.,
8 F.P.C. 751 (1949) 13

The Montello,
87 U.S. 430 (1874) 42

United States v. Appalachian Elec. Power Co.,
311 U.S. 377 (1940) 32, 44

United States v. Davis,
339 F.3d 1223 (10th Cir. 2003) 55

United States v. Holt State Bank,
270 U.S. 49 (1926) 28, 29, 30

United States v. Oregon,
295 U.S. 1 (1935) ..... passim

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 37, 49, 54

United States v. Texas,
339 U.S. 707 (1950) 28, 29

United States v. Utah,
283 U.S. 64 (1931) ..... passim

United States v. Utah,
283 U.S. 801 (1931) 38

Utah v. United States,
304 F.2d 23 (10th Cir. 1962) 39

Utah v. United States,
403 U.S. 9 (1971) 44, 51

Webb's Fabulous Pharms., Inc. v. Beckwith,
449 U.S. 155 (1980) 31

Constitutional Provisions

U.S. Const., art. I, § 8 31

U.S. Const., art. III, § 2 31

U.S. Const., art. IV, § 3, cl. 2 30

Statutes

16 U.S.C. § 791 9

16 U.S.C. § 796(8) 9, 13, 32

16 U.S.C. § 803(e) 4

28 U.S.C. § 1254(1) 1

33 U.S.C. § 407 32

43 U.S.C. § 931 30

Other Authorities

78 AM. JUR. 2D *Waters* (2002) 55

MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2008) 50, 53

OPINIONS BELOW

The opinion of the Montana Supreme Court is reported at 229 P.3d 421 and reproduced at Pet.App.1.

The Montana district court's June 13, 2008 final judgment is reproduced at Pet.App.118. The district court's August 28, 2007 partial summary judgment on navigability is reproduced at Pet.App.130.

JURISDICTION

The Montana Supreme Court rendered its decision on March 30, 2010. On June 8, 2010, Justice Kennedy extended the time for filing a petition to and including August 12, 2010. The petition was timely filed, and granted limited to Question 1 on June 20, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause and the Property Clause of the United States Constitution and the relevant statutory provisions are reprinted in the appendix to this brief. App. 1a–4a.

STATEMENT OF THE CASE

This case concerns the State's belated effort to assert ownership—more than 100 years after statehood—of the riverbeds under more than 500 miles of rivers, including approximately 5,900 acres of riverbeds under dams and reservoirs that are part of two federally licensed hydropower projects on the upper Missouri, Madison, and Clark Fork rivers in Montana. For over a century, the riverbeds were

understood to be owned by either private parties or the federal government. On that basis, appropriate easements were granted, deeds transferred, and extensive payments made for use of the riverbeds. These arrangements occurred in the early years of Montana's statehood. The first of the relevant dams was constructed in 1891, just two years after Montana's admission to the Union, and all but one were constructed between 1891 and 1930.

In the proceedings below, the Montana courts held, contrary to long-settled understandings, that the State of Montana has owned the riverbeds all along and that, as a consequence, PPL Montana, LLC ("PPL") owes the State tens of millions of dollars in retroactive rent payments and millions more in expected future payments. The lower courts effected this massive land transfer and imposed the resulting multi-million-dollar liability based on a determination—at the summary judgment stage of proceedings no less—that the upper Missouri, Madison, and Clark Fork rivers were navigable for title purposes in 1889 when Montana joined the Union. The courts reached that conclusion notwithstanding more than 500 pages of exhibits and expert witness affidavits provided by PPL disputing the State's claim to title and demonstrating that the relevant river stretches where PPL's hydropower projects are located were non-navigable at statehood. The court deemed all that evidence to raise no material dispute of fact and retroactively awarded Montana title to some 500 miles of riverbeds.

A. PPL's Hydropower Projects

PPL owns and operates two hydropower projects on the upper Missouri, Madison, and Clark Fork rivers: the Missouri-Madison project and the Thompson Falls project. *See* http://www.pplmontana.com/PPL-Montana-LLC-v-Montana (maps and pictures of rivers and dams).

The Missouri-Madison project consists of nine dams on the upper Missouri and Madison rivers. Those dams, with one exception, were constructed in the early years of Montana's statehood, on the sections of the river with the fastest flowing rapids and most precipitous vertical drops. Five dams—Black Eagle (1891), Rainbow (1910), Ryan (1916), Morony (1930), and Cochrane (1958)—are on the Missouri River near the city of Great Falls, where over a 17-mile stretch with five historic waterfalls the river drops more than 600 feet. Two dams—Hauser (1911) and Holter (1918)—are situated on the Stubbs Ferry stretch of the Missouri River, which was a treacherous, boulder-strewn section before the dams were built. And two dams—Madison (1906) and Hebgen (1915)—are on the Madison River in steep, rocky canyons with falls of 20 and 16 feet per mile. The Hebgen dam, near the northwestern border of Yellowstone National Park, stores and releases water to regulate flow to the other downstream dams. That dam was regulating water flow by 1912 and was fully operational by 1915. The Missouri-Madison project has been federally licensed twice: in 1956 and in 2000.

The Thompson Falls project, which was completed by 1915, was constructed on a naturally

occurring waterfall with a 22-foot drop on the Clark Fork River at Thompson Falls, Montana. It consists of a seven-unit hydroelectric plant with a total generating capacity of 94 megawatts. That project has also been federally licensed twice: in 1949 and in 1979.

Although both projects date back nearly a century, until this litigation, "the State had never previously sought compensation for use of the" underlying riverbeds. Pet.App.4. Those lands were instead understood to be either private lands owned by PPL's predecessors-in-title or others who had granted flood easements, or federal lands for which the hydropower producer paid substantial annual use, occupancy, and enjoyment charges. 16 U.S.C. § 803(e). Although the State actively participated in the federal licensing and re-licensing proceedings for both projects, it never claimed title to any of the riverbeds in those proceedings.

In 1999, PPL purchased the two hydropower projects from The Montana Power Company ("MPC") and, with the federal government's approval, continued to operate them. As part of that transaction, PPL received numerous deeds conveying fee title, easements, and other interests to lands underlying the projects, including deeds and patents from the State granting MPC (or its predecessors) fee title to certain lands and rights-of-way to flood lands owned by the State.

B. The Trial Court Proceedings

In 2003, two Montana citizens sued PPL and two other hydroelectric companies, Avista Corporation and PacifiCorp, in the United States

District Court for the District of Montana. The citizen suit relied on the novel theory that the riverbeds under hydroelectric facilities in Montana had always been state-owned lands that were part of Montana's school trust, and that the companies owed hundreds of millions in unpaid rent to the State. In 2004, the State intervened as plaintiff. In 2005, the district court dismissed the case for lack of diversity jurisdiction.

PPL, Avista, and PacifiCorp then filed this case in the Montana First Judicial District Court seeking a declaration that federal law precludes or preempts any claim for compensation. In response, the State filed a counterclaim, contending it was entitled to compensation for use of the lands.

The trial court rejected arguments by PPL and the other companies that equitable doctrines like laches and equitable estoppel, which would prevent a private party from belatedly asserting title in comparable circumstances, constrained the State. Pet.App.157–60. Although the trial court conceded the premise of these equitable arguments—that the State had never before sought compensation for use of the riverbeds, even though both the federal government and private parties had openly asserted title to those lands for decades—the trial court deemed those equitable defenses inapplicable against the sovereign. Pet.App.157–60. Faced with hundreds of millions in potential rent for use of lands reaching back to the early 1900s, Avista and PacifiCorp settled; as state-regulated utilities (unlike PPL), they could pass their additional costs through to ratepayers.

The State then moved for partial summary judgment against PPL. It contended that Montana held title to the riverbeds because the upper Missouri, Madison, and Clark Fork rivers were purportedly navigable in 1889 when Montana entered the Union.

1. The State's Evidence

There is no historically reliable evidence that any of the relevant river stretches were navigable in 1889, and considerable historical evidence to the contrary, not to mention a century's worth of evidence that title did not lie with the State. Nonetheless, the State attempted to prove navigability at statehood by submitting two non-expert affidavits of state employees that relied entirely on hearsay evidence. The State contended that these affidavits entitled it to summary judgment because no material facts were in dispute under its view of the governing legal test. The first affidavit attached copies of various newspaper articles, books, and journal entries from the Montana Historical Society's collection. The State Archivist vouched for the authenticity of the documents, but not for their accuracy or reliability. The second affidavit, provided by the Mineral Management Bureau Chief for the Montana Department of Natural Resources, summarized the results of a discredited 20-year-old study commissioned by the State. That 1986 study relied primarily on river studies prepared in 1974, which the State (mistakenly) attributed to the U.S. Army Corps of Engineers.

The State's evidence was facially unreliable and lacking in probative value in multiple respects. First, the 1974 studies had plainly *not* been *prepared by* the Army Corps, but were instead only *presented to* the Corps by individuals whose background and affiliations (and, in one instance, identities) were not given. JA 226, 246, 294. Moreover, those studies addressed the very different question of navigability for purposes of establishing the Corps' regulatory authority, not for determining title, and therefore were not limited to evidence of commercial use of the unimproved rivers at statehood. Second, the 1986 study explained that its "approach to documenting navigable waterways for title purposes ha[d] been constrained by lack of funding" and that, "[d]ue to [those] limitations, several exclusions were made from the research." JA 205–06. Finally, although the studies claimed that the three rivers were navigable in their entirety, the evidence set forth in each study confirms the significant—even insurmountable—difficulties experienced by the few adventurers who attempted to traverse the relevant stretches at or near statehood.

Upper Missouri River. Although the State argued that the whole Missouri River was navigable, its evidence revealed that navigation was *not* attempted on the "Great Falls Reach," where PPL's Missouri-Madison project is principally located. The Great Falls Reach is a dangerous 17-mile stretch in which the river drops more than 600 feet over a series of impassable rapids and waterfalls, culminating in the 87-foot Great Falls. It lies almost 50 miles above Fort Benton, the historical head of navigation on the upper Missouri River. JA 317.

The State produced no evidence even suggesting the Great Falls Reach had ever been navigated, much less used as a highway of commerce. For example, the State relied on the journals of Captains Meriwether Lewis and William Clark documenting their travels on and along the Missouri River. JA 305–06. But those journals confirm that their expedition did not attempt to traverse the Great Falls Reach; the expedition instead undertook a grueling, 33-day, overland journey that was barely conducive to exploration, but certainly not to water-borne commerce. JA 397–435. Along the way, Clark documented fifteen different rapids and nine waterfalls. JA 437. The State also contended that shallow-draft, flat-bottomed boats, known as "mackinaws," were paddled or poled on parts of the Missouri above Fort Benton in 1867. The State offered no credible support for that contention, but in any event acknowledged that mackinaws could not have navigated the Great Falls Reach. JA 313.

As to the Missouri River above the Great Falls, the State acknowledged that a federally commissioned 1885 study concluded that attempts to render that stretch navigable had proved futile. JA 317. The State's studies also documented the substantial difficulties experienced by the few who had attempted commercial navigation, including the travails of the only two steamboats to attempt the trip between Canyon Ferry and Great Falls. The first "barely ascended" the treacherous Half-Breed Rapids (near the present-day Holter dam), leading its operator to "conclude[] that regular service between Three Forks and Great Falls would be impossible." JA 322. "[A] difficult trip down" the

same stretch convinced the operator of the second boat "that he should withdraw from the steamboat business." JA 322. He made a wise decision: Both steamboats "were lost" on the river. JA 323.

Finally, the State emphasized a 1948 regulatory determination that the upper Missouri River is "navigable" under section 3(8) of the Federal Power Act, 16 U.S.C. § 791 *et seq.* Pet.App.137 (citing *In re Montana Power Co.*, 7 F.P.C. 163 (1948); *Montana Power Co. v. FPC*, 185 F.2d 491 (D.C. Cir. 1950)). But the test for the Federal Power Commission's regulatory jurisdiction is very different from the test applied to determine title. Section 3(8) considers navigability in a river's "natural *or improved* condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids." 16 U.S.C. § 796(8) (emphasis added). Moreover, "all such interrupting falls, shallows, or rapids" are subject to regulation under the Act, even if they are not navigable themselves. *Id.* Accordingly, the Commission did not deem the Great Falls Reach navigable, but instead deemed the reach "specifically encompassed by that definition." *In re Montana Power*, 7 F.P.C at 174; *see also Montana Power*, 185 F.2d at 494–95.

Madison River. The Madison River has never been navigable for commercial purposes. Not surprisingly, the State's studies acknowledged with considerable understatement that "recorded entrances of commercial navigation [on the Madison River] are few." JA 218. The State nonetheless claimed that the river historically served as a useful highway of commerce because it purportedly supported log floats.

The State's evidence in fact revealed that exactly one log float was attempted on the Madison River. It was an abject failure. In the summer of 1913—nearly a quarter-century *after* statehood and a year *after* the Hebgen Dam began regulating water flow on the river—a timber company attempted a single log float down the middle portion of the river (where neither of PPL's dams is located). JA 258. It took two months to drive the logs a mere 55 miles down the river, and many never reached their final destination. JA 258. Indeed, "for years after this summer of 1913, numerous logs were found along side the banks of the Madison River." JA 258. The company never attempted a second log drive, and it "was forced into indebtness" within two years. JA 259–60. No log floats have been attempted since, and the consensus is that conditions on the Madison "make the cost of river-driving timber prohibitive." JA 263.

The State's other principal historical evidence regarding the Madison was the Lewis and Clark journals, which, according to the State, document that Clark considered the Madison navigable. The relevant journal excerpt reveals, however, that Clark neither characterized the river as navigable nor attempted to navigate it. JA 146. Upon observing the mouths of the Madison, Jefferson, and Gallatin rivers at Three Forks, Clark noted only that all three appeared somewhat similar in size. JA 146. Clark then concluded that the Jefferson was likely the best river to ascend because the other two appeared "very rapid & Contain Some timber in their bottoms which is verry extincive." JA 146. Clark never saw more

than the mouth of the Madison, for the expedition followed his advice and ascended the Jefferson.

Finally, the State contended that in modern times parts of the Madison River have supported a "lively recreation industry." JA 262. But it did not even attempt to show that the river did or could support that non-commercial use in its unimproved condition at statehood. Instead, the 1974 report references modern-day recreational use on a 50-mile stretch of the river far from where PPL's dams are located and where the river's flow has been heavily regulated since construction of the Hebgen dam decades after statehood. JA 261.

Clark Fork River. The State's burden as to the Clark Fork River should have been particularly heavy, for, as the State acknowledged, a federal district court determined in 1910 that the relevant stretch of the river was non-navigable and granted title to the riverbeds under the Thompson Falls project to PPL's predecessor-in-title. JA 217 (citing *Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910)). The 1910 federal court decree held that "Clark's Fork of the Columbia River at all points in Sanders County, Montana, always was and is a non-navigable, torrential, mountain stream, full of rapids and falls." S.App.3. The State nonetheless asserted not just that a federal court a century closer to statehood was wrong, but that there was not even a material dispute of fact as to the Clark Fork's navigability.

The State based its claim primarily on what it described as "extensive steamboat traffic" on the river in the 1860s. Br. Supp. State's R. 56(c) Mot.

Summ. J. 9 (Doc. 84). But the only traffic the State's studies discuss in any detail is a single steamboat line reported to have run from Lake Pend Oreille to somewhere *below* the Thompson Falls area. JA 236–37. Even assuming the reports are accurate, the boats of course could not pass the falls area itself, which later became the site of the Thompson Falls project. And to get even that far, passengers were reported to have unloaded and reloaded onto additional steamboats along the way to bypass hazardous stretches of rapids. JA 236–67. Accordingly, the company could not actually provide a continuous line of service, but instead operated three separate steamboats, each of which traversed only a short segment of a 60-mile stretch of the Clark Fork that ended somewhere before Thompson Falls. The studies do not reveal how "extensive" travel on that three-boat line was, but they do note that the line ceased operations in 1870, five years after its inception. JA 237. The only other steamboat the State's studies reference was reported to have crashed and been stolen some 100 miles from the site of the Thompson Falls project. JA 135.

Beyond that, the State claimed the Clark Fork supported miner traffic and log drives. The 1986 and 1974 studies, however, principally discuss sporadic transportation on separate stretches of the river, either well below or more than 100 miles above the Thompson Falls area, including small vessels whose occupants drowned after they crashed or capsized. JA 132–33, 214–15, 237–41. Although both studies refer to log drives in the late nineteenth and early twentieth centuries, the State documented only a single lumber raft that attempted to navigate

the river anywhere near the Thompson Falls area. Its two passengers lost control of the raft in perilous rapids, and only one escaped with his life when the raft crashed over the falls. JA 139. Beyond that, neither study revealed where or for how long on any stretch of the river any log floats occurred; the 1986 study noted that funding limitations prevented any attempt to uncover such critical details. JA 205.

Finally, the State noted that PPL's predecessor-in-title did not contest that parts of the Clark Fork were navigable during the 1949 federal licensing proceeding for the Thompson Falls project. *The Montana Power Co.*, 8 F.P.C. 751 (1949). That proceeding, however, determined only that the river was navigable "within the meaning of section 3(8) of the Federal Power Act." *Id.* at 752. As with the Federal Power Commission's determination concerning the Missouri River, any effort to equate section 3(8)'s test for regulatory jurisdiction with the navigability-for-title test is a profound mistake. A concession of regulatory jurisdiction under section 3(8) in 1949 is hardly a concession of navigability for title purposes in 1889. Indeed, the State participated in that same 1949 regulatory proceeding and did not assert title to the riverbeds.

2. PPL's Evidence

The facial shortcomings of Montana's evidence should have been enough to preclude summary judgment. Before taking the extraordinary step of upending more than a century of settled expectations and retroactively vesting title in the State, the state court should have required Montana to come forward with much more evidence of

navigability. Nonetheless, PPL submitted more than 500 pages of exhibits and affidavits from two renowned experts: Dr. David M. Emmons, a Professor of History Emeritus at the University of Montana, and Dr. Stanley A. Schumm, a specialist in fluvial geomorphology, which is the study of the physical characteristics of rivers and how rivers change over time. JA 367, 570. Both experts concluded that the relevant stretches of the three rivers were non-navigable in 1889. Before the trial court entered final judgment, PPL also submitted additional evidence supporting those conclusions in the form of an offer of proof, which the court accepted. JA 656, 729, 922.

Dr. Emmons identified glaring flaws in the State's evidence. As to the 1986 study, he reiterated that "[t]he Study itself highlights its limitations" by cautioning that it was "constrained by lack of funding." JA 371. Dr. Emmons noted that the only other firm invited to bid on preparing the study declined to do so because it did not believe it could provide "a solidly researched and defensible product ... given the stated project ceiling." JA 371–72, 394. Dr. Emmons also opined that the study "is overly dependent on two of the least trustworthy historical sources known to Western historians—frontier-era newspapers and personal memoirs or reminiscences." JA 372. Frontier newspapers, he explained, were notorious for "act[ing] more as unabashed promoters of economic development than unbiased news reporters." JA 372; *see also* Amicus Br. of Professors Supporting Certiorari 10 (describing fabricated accounts of 28-pound radishes

and steamboat traffic between Denver and the Gulf of Mexico).

As to the three 1974 reports, Dr. Emmons emphasized that those reports had only been *presented to* the Army Corps, by individuals whose background and affiliations were not provided, and "thus do not carry any imprimatur of credibility that might be associated with an actual Corps Report." JA 373. He further noted that the reports were written with the goal of proving the rivers navigable for *regulatory* purposes and "rely on the same types of untrustworthy historical sources as" the 1986 study. JA 373. For example, Dr. Emmons noted that the Missouri River study placed undue emphasis on accounts from Hubert Howe Bancroft, a source described by one eminent historian as "often ludicrous and sometimes dishonest." JA 374. Dr. Emmons attested that he "know[s] of no professional historian who would use Bancroft as a credible historical source." JA 374. Yet Bancroft is the sole source the reports provide to support the notion that mackinaw boats traveled on the upper Missouri. JA 313.

In addition to undermining the credibility of the State's sketchy evidence, PPL's experts identified a "mountain" of historical evidence documenting that the relevant stretches of all three rivers were non-navigable in 1889. Pet.App.100.

Upper Missouri River. Dr. Emmons attested that, "to [his] knowledge as a professional historian, there has *never* been any navigation on the Missouri River in the Great Falls Reach because the physical characteristics of the falls prevent it." JA 375. He

reiterated that the Lewis and Clark expedition "did *not* navigate the Great Falls Reach of the Missouri because it was *impossible* for them to do so." JA 375. Indeed, upon observing the 17-mile reach, Lewis concluded that getting around it likely would be "the most perilous and difficult part of" the expedition. JA 423–24. Their journals reveal that they "engaged in an arduous month-long portage" and met with significant difficulties when they returned to the river's upper stretch. JA 375. Dr. Emmons explained that one of the expedition's most lasting influences upon westward expansion was its discovery that the Missouri River was *not* navigable above the Great Falls, leading Congress to spend the better part of the next century trying to locate "the easiest way to get around both them and the sections of the river above them." JA 752.

PPL also pointed to two findings that the Army Corps *actually* made nearly contemporaneously with Montana's entry into the Union, each of which concluded that the Great Falls Reach was non-navigable. First, in 1896, PPL's predecessor-in-title asked the Army Corps whether it needed a permit to maintain the dam constructed just above the Black Eagle Falls. The Corps responded that a permit was not necessary, as the dam was "situated in a portion of this stream that is not now navigable and which in all probability never will be." JA 472. Although the Corps acknowledged that "the greater portion of [the Missouri] is a 'navigable stream,'" it concluded that the Great Falls Reach could "never be made navigable at a cost that the demands of commerce will ever justify." JA 472. Second, an 1898 Corps report concluded that the portion of the river from

Fort Benton through the Great Falls Reach was "an unnavigable section occupied by cataracts and dangerous rapids," on which no improvement work had ever been contemplated. JA 475.

PPL's evidence also proved that stretches of the Missouri River above and immediately below the Great Falls Reach were not navigable as useful highways of commerce. First, the same 1898 Army Corps report detailed a long history of failed attempts to render the Stubbs Ferry stretch—a reach with "[n]umerous rapids and rock obstructions"—navigable, leading to abandonment of all such efforts by 1899. JA 299, 495. In 1915, the Corps concluded that "[a]s far as navigation is concerned the headwaters of the Missouri are completely and permanently separated from the river below." JA 919. Dr. Schumm's review of historical maps confirmed the Corps' conclusion: They revealed "about 30 impediments to navigation in the form of waterfalls, rapids, and riffles ... from Fort Benton to Canyon Ferry," which occurred, "on average, every 6 miles." JA 688. That and other evidence led Dr. Schumm to conclude that navigation "would be impractical." JA 688. A 1916 engineering report prepared for MPC before it constructed the Holter dam similarly concluded that "the navigability of the Missouri River from Hauser Lake to Cascade is not practicable and almost impossible." JA 857.

Madison River. PPL identified a 1931 report actually prepared *by* the Army Corps to inform Congress whether the Madison River was navigable. After conducting a thorough search of federal, state, and county records; holding local meetings; and

carrying out field studies, the Corps informed Congress that "[a]s far as is known there has never been any navigation on th[is] stream[], and commercial navigation on the[] [stream] is entirely out of the question." JA 535. That conclusion was corroborated by numerous nineteenth century land surveyor reports. *See* JA 677 ("Madison River passing through the Township is not navigable; it is a bold rapid mountain stream"); JA 678 ("Madison River, which is a wide rocky shallow stream with swift current, not navigable"); JA 678 ("Madison River is a rapid shallow mountain stream, not being navigable"). The Federal Power Commission later took the same position; even under its permissive definition of regulatory jurisdiction, it conceded in the 1949 licensing proceeding that the Madison River was non-navigable. *See Montana Power*, 185 F.3d at 496 (finding jurisdiction because Madison River facilities are located on federal property).

PPL also submitted evidence establishing the irrelevance of the State's evidence of modern-day recreational usage. Based on an extensive review of historical maps and water flow records, Dr. Schumm opined that "the current physical conditions of the Madison River, with respect to navigability, are not the same as the conditions of the river in 1889." JA 574.

Dr. Schumm explained that the Madison and Hebgen dams, constructed around 1906 and 1912, respectively, "have made the river more susceptible now to commercial navigation than it would have been without them," because they "mak[e] the flow lower during periods of high flow and higher during periods of low flow." JA 574. The 1931 Army Corps

report made the same observation. JA 535 (the dams "result[] in a regulated flow during low-water periods that is generally greater than the natural low water discharge"). PPL's expert also pointed out that the single 1913 log drive on the Madison River did not occur until after the dams were constructed, making it questionable whether it even absent those improvements would have been attempted. JA 804.

Dr. Schumm also explained "that relevant portions of the river appear to have been either anastomosing or braided at the time of statehood," meaning that the stretches were split into "multiple distinct channels." JA 574, 578. One map documents so many anastomosing channels now submerged by the present-day Madison reservoir (Ennis Lake) as to have made pre-dam navigation impossible. JA 628. Accordingly, Dr. Schumm concluded that "[t]he Madison River is not the same river now that it was in 1889" and "was not susceptible to navigation at that time." JA 581.

Clark Fork River. In contrast to the State's reliance on the 1949 determination of *regulatory* navigability, PPL relied on the more contemporaneous 1910 federal district court decree that analyzed navigability of the Clark Fork River for *title* purposes and declared the relevant stretch of the river non-navigable. *See* 2d.S.App.3. PPL also produced a study of the Clark Fork prepared *by* the Army Corps in 1891, only two years after statehood. That report described the river as "a mountain torrential stream, full of rocks, rapids, and falls"; pronounced the Thompson Falls "a complete obstruction to navigation"; and declared the river "utterly unnavigable, and incapable of being made

navigable except at enormous cost." JA 564–66. The report noted that, at the time of Montana's statehood, the mayor and other prominent citizens of Missoula—a city situated on and apt to profit from improvements to the river—dismissed the notion of rendering the river navigable as "an absurdity." JA 565.

PPL also relied on other historical governmental reports, each documenting that the Clark Fork is navigable, at most, only on the first four miles above Lake Pend Oreille. *See* JA 655 ("Clark Fork is a meandered non navigable stream"); JA 357 (Clark Fork "above the lake is exceedingly rough, and ... it is utterly impossible to make it a navigable river"). That four-mile stretch is over the Idaho border and more than 60 miles downstream from the Thompson Falls project. In 1940, responding to an inquiry as to whether the river was navigable between the lake and Missoula, an Army Corps major confirmed that the Corps considered the Clark Fork navigable only "from its mouth in Pend O'Reille [sic] Lake to the Northern Pacific Railroad Bridge, a distance of only about four miles." JA 568–69.

3. The Trial Court's Ruling

Notwithstanding the weakness of the State's evidence, and despite PPL's considerable evidence that the relevant stretches of all three rivers were non-navigable in 1889, the trial court granted summary judgment to the State. Pet.App.143.

As to the Missouri and Clark Fork rivers, the trial court refused to examine the rivers on a section-by-section basis and instead, without discussing any of PPL's evidence, concluded that PPL could "not

defeat a finding of navigability" as to each river as a whole. Pet.App.138, 142. As to the Madison River, the court acknowledged that "[t]here apparently is little historical documentation regarding the [river's] navigability" but nonetheless found it navigable based on the single, unsuccessful 1913 log float and modern-day recreational usage. Pet.App.143.

After an 8-day bench trial on the remaining issues in the case, the trial court entered final judgment in the State's favor. The trial court awarded the State $34.7 million in retroactive back rent for PPL's use of the riverbeds from 2000 through 2006; an additional $6.2 million for its use of the riverbeds in 2007; and whatever future amounts the State Land Board determined in 2008 and going forward. Pet.App.81. With statutory interest at a rate of 10% per annum, the amount has grown to approximately $53 million.

C. The Montana Supreme Court

The Montana Supreme Court affirmed the trial court's grant of summary judgment to the State. It observed that the trial court "perceived the navigability for title test as somewhat 'fluid,'" and concluded that two points in particular were "crucial" to the trial court's decision. Pet.App.53. First, it noted that the trial court concluded that "portages do not defeat navigability," and that the relevant inquiry was whether the river as a whole "was used, or susceptible of being used," for navigation. Pet.App.53. It concluded that the trial court could not have ignored "the presence of rapids, falls, and obstructions on the Clark Fork and Missouri Rivers" without considering the

navigability only of the rivers as a whole, rather than of the segments at issue. Pet.App.53. Second, acknowledging that "the early usage of the Madison River was admittedly not well-documented," the Montana Supreme Court emphasized the importance of the trial court's view that "present-day usage [is] probative as to navigability of a river at the time of statehood." Pet.App.53–54.

The Montana Supreme Court concluded "unequivocally" that the trial court's "understanding of the navigability for title test was correct." Pet.App.54. Deriving a rule of construction from this Court's cases that "the concept of navigability for title purposes" must be "very liberally construed" in the State's favor, the Montana court rejected the notion that obstructions or portages can "defeat a finding of navigability." Pet.App.54. Although it acknowledged that this Court employed a section-by-section analysis in *United States v. Utah*, 283 U.S. 64 (1931), to determine whether a 4.35-mile river stretch was navigable for title purposes, it concluded that "the 'section-by-section' approach does not apply to 'short interruption[s] of navigability in a stream otherwise navigable.'" Pet.App.60 (quoting *Utah*, 283 U.S. at 77). It then summarily declared each of the relevant river stretches, including the 17-mile Great Falls Reach and the "interruptions to unimpeded navigation in the vicinity of PPL's Thompson Falls project," to be "relatively short interruptions" that are "insufficient as a matter of law" to prevent a finding of navigability for the river as a whole. Pet.App.61.

The Montana Supreme Court also characterized this Court's precedent as "embrac[ing] the notion

that emerging and newly-discovered forms of commerce can be retroactively applied to considerations of navigability." Pet.App.55. It emphasized that the relevant test looked not just to actual use at statehood, but to whether the river was "susceptible" to use for commerce. Pet.App.54. It therefore agreed with the trial court that "present-day usage of a river may be probative of its status as a navigable river at the time of statehood." Pet.App.55–56. As to the Madison, the failed 1913 log float and the modern-day recreational use were deemed sufficient evidence "that this river was susceptible of providing a channel for commerce at the time of statehood." Pet.App.56. Indeed, the Montana Supreme Court considered this sparse evidence effectively irrefutable. It dismissed Dr. Schumm's expert testimony that the Madison's characteristics had changed since statehood, in large part because of improvements by PPL's predecessors. In the Montana Supreme Court's view, that evidence did not "raise a genuine issue of material fact regarding [the Madison's] susceptibility for commerce" because "[t]he present-day recreational use is sufficient for purposes of 'commerce.'" Pet.App.58.

The Montana Supreme Court dismissed the remainder of PPL's more contemporaneous evidence as "conclusory statements ... made by a federal district court in 1910, and the Corps of Engineers in the 1930s." Pet.App.57. Although both the federal court and the Army Corps thoroughly documented the evidence that led them to find the relevant river stretches non-navigable, the Montana Supreme

Court declared their conclusions "without any specific factual support." Pet.App.57.

Justice Rice authored a dissent joined by Judge Salvagni (sitting for Justice Morris who was recused). Pet.App.93–117. The dissent asserted that the majority veered "off track" in two respects: by "assum[ing] an *entire river* is navigable merely because certain reaches of the river are navigable," and "by disregarding genuine material factual conflicts" created by PPL's "mountain" of evidence. Pet.App.93, 96, 100.

The dissent concluded that *Utah* mandates a section-by-section analysis, in which courts must "look to relevant portions of a river and, based upon the facts, determine whether particular reaches at issue are navigable or non-navigable." Pet.App.96. The dissent found it "[d]isturbing" that the majority circumvented *Utah* by "declaring, as a matter of law, that the reaches claimed by PPL to be non-navigable are simply too 'short' to matter." Pet.App.99. The dissent also criticized the majority for ignoring that, "unlike navigability as analyzed under the Commerce Clause, navigability for title is determined by a specific time period," namely, the State's admission to the Union. Pet.App.95.

The dissent also pointed out that "PPL submitted a 'mountain'—over 500 pages—of affidavits and exhibits demonstrating that the portions of the Missouri, Madison, and Clark Fork Rivers at issue were non-navigable at the time of statehood." Pet.App.100. The dissent concluded that "[t]his evidence, if accepted after a trial, would lead inevitably to the conclusion that the State did

not hold title to the streambeds at issue." Pet.App.100. "[T]he validity and credibility of the State's evidence," the dissent explained, "should have been[] determined at trial." Pet.App.101. Instead, "the District Court, and now this Court, has taken upon itself the role of factfinder, weighing PPL's evidence and concluding that it lacks credibility, rendering it mere 'conclusory statements.'" Pet.App.112. Finding PPL's considerable evidence "relevant and material," the dissent "wonder[ed] just what evidence the Court would have considered sufficient for PPL to defeat summary judgment." Pet.App.117.

SUMMARY OF ARGUMENT

There is always a strong temptation for state courts to combine revisionist history and modern evidence with doctrines that strongly favor the State to "enlarge what actually passed to the state, at the time of her admission" to the Union. *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 88–89 (1922). That is precisely what happened here: Disregarding both long-settled understandings and the overwhelming weight of historical evidence, the Montana courts allowed the State to exploit supposed ambiguities in the doctrine of title navigability to effectuate a massive land grab. If Montana's action is allowed to stand, other States will surely follow suit with their own judicial takings, with the demand for "just compensation" coming *from*, not against, the State.

This Court can provide a meaningful check on that powerful temptation for abuse by reiterating the uniform federal standard and fixed set of rules

that govern navigability for title purposes. Although more than a century's worth of precedent has already established the key components of title navigability analysis, the decision below confirms the need to reaffirm them with clarity.

First, title navigability should be assessed with respect to the particular river stretches at issue; a single river may contain both navigable and non-navigable segments. Courts may not shift focus to the navigability of the river "as a whole" and deem significant stretches simply too short to matter.

Second, title navigability must be determined at statehood, based on the unimproved condition of the river. A river's "susceptibility" to commercial use should be considered only in the rare instance when the absence of historical commercial use is explained by limited or non-existent settlement in the region, and even then only if river conditions are the same today as at statehood. Moreover, a river must have been capable of serving as a highway for useful trade and travel. Activities on the river that fall short of that standard, such as recreational fishing and unsuccessful log floats, cannot establish navigability.

Third, the burden of proof rests on the party asserting navigability and, contrary to the decision below, the test should not be construed "very liberally" in favor of the State. That burden is particularly vital where, as here, the State, free of equitable limitations like laches, asks its own courts to award it title to riverbed lands long thought to belong to others.

Proper application of these settled rules to the facts of this case confirms not only that the State did

not carry its burden of proving beyond material factual dispute that the relevant river stretches are navigable, but also that at least some of the State's assertions of title cannot succeed. There is no question that the 17-mile Great Falls Reach is and always has been a non-navigable stretch of the Missouri River. Similarly, the combination of a single, failed log drive—attempted *after* one of the dams at issue began regulating water flow—and modern-day recreational use does not come close to upsetting the long-settled understanding that the Madison River is and always has been non-navigable. Finally, the State's evidence of navigation on *other* portions of the Clark Fork is manifestly insufficient to overcome contemporaneous findings that the relevant portion of the river is non-navigable, most prominently a 1910 federal district court awarding title of the riverbeds in question to PPL's predecessor.

ARGUMENT

I. Navigability For Title Purposes Is A Constitutionally Grounded Test That Requires Uniform And Consistent Application.

Under long-settled law, waters are "navigable in fact" if they are "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1870). To establish title to a river within its borders, a State must demonstrate that the river was navigable in fact at the time it entered the

Union. *Pollard v. Hagan*, 44 U.S. 212, 228–29 (1845).

Whether a river is navigable for title purposes "is necessarily a question of federal law." *United States v. Holt State Bank*, 270 U.S. 49, 55–56 (1926); *see also United States v. Oregon*, 295 U.S. 1, 14 (1935). That is because "the State's title to lands underlying navigable waters within its boundaries is ... conferred ... by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

"[W]hen the revolution took place," the original 13 States "became themselves sovereign; and in that character hold the absolute right to their navigable waters, and the soils under them for their own common use." *Martin v. Waddell*, 41 U.S. 367, 410 (1842). Under the "equal footing" doctrine, the same is true for States that subsequently entered the Union: Because "the original States ... reserved [their navigable waters] to themselves," "to deny the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States." *United States v. Texas*, 339 U.S. 707, 716 (1950); *see also Pollard*, 44 U.S. at 229. Accordingly, when a State claims title to waters by virtue of their navigability, it is asserting navigability "as the basis of a right arising under the Constitution." *Holt*, 270 U.S. at 55–56.

The constitutional parity compelled by the equal footing doctrine is a two-way street. Just as the doctrine ensures that no State enters the Union with *lesser* sovereign rights than its predecessors, it

equally ensures that no State has *greater* sovereign rights. *Texas*, 339 U.S. at 717. Accordingly, "[i]t is not for a state by courts or legislature ... to adopt a retroactive rule for determining navigability which would ... enlarge what actually passed to the state, at the time of her admission." *Brewer-Elliot*, 260 U.S. at 88. To do so would arrogate greater sovereign rights than those of other States, and "give the Constitution a diversified operation where uniformity was intended." *Holt*, 270 U.S. at 56.

The temptation for States to take lands by contriving unfounded navigability claims, however, is profound. This Court recognized nearly a century ago States' troubling tendency to seek "to retain title to the beds of streams by recognizing them as navigable when they are not actually so." *Brewer-Elliott*, 260 U.S. at 89. The temptation is particularly strong in times of fiscal constraint, especially when outside groups who stand to benefit from the State's retroactive assertion of title egg the State on. *See, e.g.*, JA 959. Whereas an exercise of eminent domain requires a State to pay just compensation, a retroactive claim to title allows a State not only to expand its holdings but to charge back rent, as this case dramatically illustrates.

What is more, States can employ this "convenient method of preserving ... control" over riverbeds within their boundaries, *id.*, secure in the knowledge that their claims will, in many instances, be settled by their own rules in their own courts. Doctrines like laches and equitable estoppel that would prevent private parties from usurping titles unquestioned for a century can be waved aside as inconsistent with a State's conception of sovereign

immunity. *See* Pet.App.157–60. These structural incentives for self-dealing demand not only a watchful eye toward retroactive expansions of the concept of navigability, but also a particular skepticism toward navigability determinations made by a State's own courts in the State's favor. *See Holt*, 270 U.S. at 55–56 (declining to follow state court's determination that river was navigable for title purposes); *Oklahoma v. Texas*, 258 U.S. 574, 591 (1922) (same).

The need to guard against relaxing the title navigability standard is also compelled by substantial Fifth Amendment concerns. Riverbed lands under waters that are non-navigable at statehood remain the property of the United States, subject to Congress's plenary power to dispose of as it sees fit. U.S. Const., art. IV, § 3, cl. 2; *see also Alabama v. Texas*, 347 U.S. 272, 273 (1954) (per curiam). Congress can, and often does, convey title in non-navigable waters and their riverbeds to private landowners. That is nowhere more true than in the vast western lands that the United States acquired through treaties, such as the Louisiana Purchase and the Oregon Treaty. To encourage settlement in the resulting territories, the United States routinely granted land to private parties. When the United States patented out riparian lands alongside non-navigable rivers, the patent generally included title to the riverbed by virtue of the common law or applicable statutes. *See* 43 U.S.C. § 931 (first codified as R.S. § 2476). Patentees accordingly received the often-valuable mineral rights underlying riverbeds, as well as the right to construct dams where feasible.

To allow a State unilaterally and retroactively to deem such lands state property "would destroy a title already accrued under federal law." *Brewer-Elliot*, 260 U.S. at 88. Neither a State nor its courts may "by *ipse dixit* ... transform private property into public property without compensation." *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (plurality opinion) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.").

The constitutional concerns attendant to the navigability-for-title test require particular attention to this Court's admonishment that "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 170–71 (1979). The navigability test set forth in *The Daniel Ball* has been adapted as relevant to other distinct inquiries, such as whether waters fall within Congress's regulatory authority under the Commerce Clause, U.S. Const., art. I, § 8, or within the federal admiralty jurisdiction, U.S. Const., art. III, § 2. Like the navigability-for-title test, each of those inquiries brings with it certain underlying principles that affect how navigability is determined. But those underlying principles are quite different and properly produce distinct legal tests to govern distinct contexts.

While the Property Clause underscores that the navigability-for-title test must have a stable focus on navigability at statehood, the Commerce Clause

readily admits of a dynamic focus that allows regulatory jurisdiction to expand when improvements create newly navigable rivers. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409 (1940) (the "plenary federal power over commerce must be able to develop with the needs of that commerce which is the reason for its existence"). Moreover, in the regulatory context, navigability is only part of the analysis, as Congress has by statute extended authority and jurisdiction beyond waters that are navigable in fact. *See, e.g.*, 33 U.S.C. § 407 (extending Army Corps regulatory jurisdiction to tributaries and banks of navigable waters).

The provision of the Federal Power Act that gave rise to "navigability" determinations or concessions on which the Montana Supreme Court mistakenly relied is a case in point. Section 3(8) expressly allows consideration of rivers in their "improved" condition and subjects non-navigable falls and rapids to federal regulation in addition to its regulatory jurisdiction over navigable waters. 16 U.S.C. § 796(8); *see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) (holding portion of Red River already found non-navigable for title purposes subject to regulatory jurisdiction).

In stark contrast to the fluid and flexible approach to determining regulatory navigability, this Court has recognized "the special need for certainty and predictability where land titles are concerned." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687–88 (1979). That special need demands rejection of any title test that would render the same river non-navigable one day but navigable the next.

Indeed, to conflate the dynamic regulatory navigability test with the static title navigability test (as the courts below did) would produce perverse incentives: No rational landowner would risk making reasonable improvements to his property if he might strip himself of title in the process. *Cf. Kaiser Aetna*, 444 U.S. at 176. The constitutional concerns that have undergirded the Court's title navigability jurisprudence only underscore the need for "certainty and predictability" and require the navigability-for-title test to remain—at all times and in all courts—a fixed legal standard applied to a set of historical facts fixed at statehood.

II. This Court Should Confirm The Controlling Federal Test For Determining Navigability For Title Purposes.

This Court can provide a meaningful check on States and state courts by reaffirming certain core principles of the navigability-for-title test. As described below, these principles include: (1) title navigability depends on the navigability not of the river as a whole but of the particular river segment at issue; (2) title navigability should be based on reliable historical evidence of actual commercial use at statehood, not modern-day recreational usage and improved conditions examined through the guise of "susceptibility to use"; and (3) the burden of proof rests on the party asserting navigability, and the relevant rule of construction is not one of "very liberal" construction in the State's favor.

A. Navigability for Title Purposes Is Assessed with Respect to the Particular River Stretches at Issue.

This Court's cases establish as a matter of controlling federal law that title depends on the navigability in fact of the particular river segments at issue. A river can contain both navigable and non-navigable segments, and a State may not claim title to the non-navigable stretches merely because other parts of the river may be navigable.

1. The Segment-by-Segment Approach Is Dictated by Practical Considerations.

This Court has traditionally considered the navigability of rivers on a segment-by-segment basis. *See Utah*, 283 U.S. at 77. That approach is dictated by the practical realities of our Nation's rivers. Between its headwaters and its mouth, a river may flow for hundreds of miles through different States with diverse and widely varying terrain. A river's characteristics as it flows are shaped by a variety of regional factors, such as precipitation and gradient levels. A river may also be joined by tributaries that alter its volume, flow rate, and other characteristics. As a result, most long rivers, and many shorter ones, are (or were) navigable in some places and non-navigable in others.

For that reason, rivers have almost always been analyzed in terms of different segments with distinct characteristics. Indeed, both the federal government and Montana itself have previously employed a segment-by-segment approach to evaluate the rivers in this case. In 1986, Montana's Department of State Lands published a list of rivers it claimed were

navigable for title purposes. That list included only one stretch of the Madison River, "from the confluence of its west fork to Varney, Montana" (which is not where PPL's facilities are located). Pet.App.104–05. In response, the Bureau of Land Management disputed the accuracy of Montana's list, but allowed that "portions" of three other rivers were navigable for title purposes. 2d.S.App.2. Likewise, in 1891 the Army Corps determined the Clark Fork River to be non-navigable except for a short stretch "from its mouth ... to the Northern Pacific Railroad Bridge, a distance of only about four miles." JA 568–69. And in 1898, the Corps declared the stretch of the Missouri River from Fort Benton to Great Falls "an unnavigable section occupied by cataracts and dangerous rapids." JA 475.

The segment-by-segment approach is also dictated by the practical realities of our system of litigation and the importance of property rights. Courts are not well-designed to make broad, definitive pronouncements that a river either is or is not navigable along its entire expanse. Rather, courts adjudicate concrete disputes between adverse parties that generally concern discrete segments of a river. Forcing a dispute concerning a discrete segment to turn on whether the entire river is partially or predominantly navigable would have grave consequences. Every disagreement between private parties over title to specific riverbed lands would require the parties to dispute and the court to assess the navigability-in-fact of the entire river. Rather than focus on the dispute at hand, the parties and court would need to consider far-ranging issues impacting the rights and interests of numerous third

parties. Every decree in a case involving riverbed titles would have serious implications for the land rights of all others who claimed an interest in riverbeds down and upstream. The inconsistent outcomes that would inevitably arise would dramatically undermine "the special need for certainty and predictability where land titles are concerned." *Leo Sheep*, 440 U.S. at 687–88.

2. This Court's Cases Have Consistently Applied the Segment-by-Segment Approach.

Reflecting these practicalities, this Court's cases establish that a single river may contain both navigable and non-navigable segments. As the Court has repeatedly reiterated, "navigability *in fact* is the test of navigability in law," *Oklahoma*, 258 U.S. at 586 (emphasis added), and is to be determined based on evidence. *Utah*, 283 U.S. at 87. That fact-based test necessarily focuses on distinct segments, because many rivers do not have uniform characteristics along their lengths, and are thus navigable in some places and non-navigable in others. Indeed, the very concept of looking at the "whole river" is an artificial construct, as it is often not even certain where a particular river began or ended at statehood. *See id.* at 73 (noting the Grand River was "designated on all government maps and reports as separate from the Colorado river" until 1921, when Congress re-labeled it an upstream segment of the Colorado River).

The Court's decision in *Utah* exemplifies the segment-by-segment approach. There, the United States brought suit to quiet its title to "certain

portions of the beds of the Green, Colorado, and San Juan Rivers within the state of Utah." *Id.* at 71. Referring the case to a special master to make findings regarding the navigability of those portions, *id.* at 72, the Court stated that it was proper for the master to "limit[] his findings and conclusions as to navigability" to "the sections of the rivers which are described in the complaint." *Id.* at 77. As the Court explained, "[e]ven where the navigability of a river, speaking generally, is a matter of common knowledge ... it may yet be a question, to be determined upon evidence, how far navigability extends." *Id.*; *see also Oklahoma*, 258 U.S. at 584 (certain rivers were "known to be navigable in their lower reaches and not navigable in their upper reaches, but how far up the streams navigability extended was not known"); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (even when it is "general knowledge" that a river is navigable, "it is not so clear ... at what particular place between its mouth and its source navigability ceases").

In *Utah*, not only was the master's—and hence the Court's—analysis limited to the specific river sections at issue, but it also dealt separately with stretches within those sections that had distinct topographical characteristics. The master determined, for example, that (1) the disputed segments of the Green and Grand rivers, which joined to form the Colorado River, were navigable; (2) the Colorado was non-navigable for 40.5 miles south from the confluence of the Green and Grand rivers to the bottom of Cataract Canyon; and (3) the Colorado was navigable for 150 miles south from the

bottom of Cataract Canyon to the Utah-Arizona border. And when Utah raised exceptions to the master's finding of non-navigability as to "the first 4.35 miles of the stretch of the Colorado river," the Court considered that 4.35-mile stretch separately and ultimately sustained Utah's exception. 283 U.S. at 89–90. As a result, the Court recognized no fewer than three distinct segments within the relevant portion of the Colorado River—a non-navigable segment of 36 miles sandwiched between navigable segments of 4.35 miles and 150 miles. *See United States v. Utah*, 283 U.S. 801 (1931) (decree).

Utah distinguished between the stretches under consideration and the kind of *de minimis* "short interruption" or "negligible part" that would not merit independent analysis or change the nature of a stream or segment otherwise uniformly navigable or non-navigable. 283 U.S. at 77. The Court did not elaborate on when a stretch is "negligible," but the Court's detailed analysis made clear that it did not consider a 4.35-mile segment *de minimis*.

Other decisions from this Court have likewise followed a segment-by-segment approach to determining title navigability. For example, in *Oklahoma v. Texas*, Oklahoma claimed title to the bed of the Red River along the Texas-Oklahoma border. The Court recognized that Oklahoma's claim turned on the navigability not of the entire, 1,360-mile Red River, but rather of the much shorter segment at issue: "If *that section* of the river be navigable, its bed undoubtedly became the property of the state." 258 U.S. at 583 (emphases added). And the Court did not stop there; it further subdivided the disputed section into two distinct

segments: the western half, which the Court regarded as "obvious[ly]" non-navigable, and the eastern half, for which the evidence was less conclusive. *Id.* at 588, 591. Although the Court ultimately concluded that both segments were non-navigable, it treated them separately, not as though their navigability would stand or fall together.

Likewise, in *Brewer-Elliott*, the Court made clear that the title-navigability inquiry is specific to the river segment at issue, holding that Oklahoma had no claim of title to contested "portions of the bed of the Arkansas River, opposite the Osage Reservation in that state." 260 U.S. at 79. The Court first observed that the district court had "found that *at the place in question* the Arkansas River was, and always had been, a nonnavigable stream," and that the court of appeals had "concurred in the finding ... that the Arkansas *at this place* was, and always had been, nonnavigable." *Id.* at 79–80 (emphasis added). Although the Court acknowledged that other portions of the Arkansas River were navigable, it found no need to consider Oklahoma's claim of title "in view of the finding as a fact that the Arkansas is and was not navigable *at the place where the river bed lots, here in controversy, are.*" *Id.* at 85–86 (emphasis added).

Following this Court's consistent adherence to a segment-by-segment approach, numerous federal and state courts have likewise recognized that title navigability is based on the characteristics of the particular river segments at issue. *See Utah v. United States*, 304 F.2d 23, 26 (10th Cir. 1962) ("the part of the river in question was in fact and in law non-navigable"); *Alaska v. Ahtna, Inc.*, 891 F.2d

1401, 1402 (9th Cir. 1989) ("[t]he part of the River at issue ... is its lower 30 miles"); *Oregon v. Riverfront Prot. Ass'n*, 672 F.2d 792, 793 (9th Cir. 1982) (considering "whether the McKenzie River between river mile 37 and its confluence with the Willamette River was navigable"); *Mundy v. United States*, 22 Cl. Ct. 33, 36 (1990) (a "river can be navigable in some parts and non-navigable in others"); *Nw. Steelheaders Ass'n v. Simantel*, 112 P.3d 383, 388 (Or. Ct. App. 2005) (title inquiry depends on "whether a given river segment is navigable").

3. The Decision Below Exemplifies the Dangers of Substituting a "Whole River" Approach for this Court's Segment-by-Segment Approach.

Rather than follow the segment-by-segment approach mandated by this Court's precedent, the Montana Supreme Court rejected "a piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable"—and dismissed the bulk of PPL's evidence as irrelevant. Pet.App.58. Among other things, the court determined—on summary judgment, as a matter of law—that the 17-mile Great Falls Reach of the Missouri River, which no one contended was susceptible to commercial navigation, was a mere "short interruption" that could be disregarded because it was portaged by Lewis and Clark. The court reached that conclusion even though the Great Falls Reach is nearly four times as long as the stretch of the Colorado River that this Court considered separately in *Utah*, and even though the month-long Lewis and Clark

portage was wholly incompatible with commercial navigation.

The Montana Supreme Court's mistaken "whole river" approach was on full display when it came to the Clark Fork, for the State's minimal evidence of navigability did not even pertain to the stretch where the disputed riverbeds are located. Instead, the State presented limited evidence of sporadic and hazardous transportation on stretches of the river below or more than 100 miles above the Thompson Falls project. *See supra*, p. 12. Under a segment-by-segment approach, that evidence could not possibly have carried the State's burden of proving navigability at the "locus in quo." But the Montana Supreme Court's rejection of that approach allowed it to grant summary judgment to the State based on inapposite evidence concerning irrelevant portions of the Clark Fork, while acknowledging that "there are interruptions to unimpeded navigation on this river in the vicinity of PPL's Thompson Falls project." Pet.App.61. That "vicinity" should have been the focus, but was instead dismissed as legally irrelevant.

The Montana Supreme Court even dismissed a federal court decree addressing, *inter alia*, the relevant stretch only 21 years after statehood as merely a "conclusory statement[]." Pet.App.57. But the conclusion of a federal court reached when memories of statehood conditions were still fresh cannot be dismissed as "conclusory." That near-contemporaneous conclusion is far more probative than the State's thin evidence of sporadic activities elsewhere on the river.

The Montana Supreme Court reached its contrary conclusion by placing undue emphasis on this Court's decision in *The Montello*, 87 U.S. 430 (1874). That decision addressed *regulatory* navigability, not title navigability, for purposes of a federal statute regulating vessels upon "navigable waters." *Id.* at 442–43. Although the Court concluded that vessels could not escape federal regulation on a river they routinely navigated by pointing to brief portages and "carrying-places" along the way, the Court did not suggest that those non-navigable stretches should be considered themselves navigable for the quite different purpose of establishing title. Nor has the Court treated portageable interruptions as navigable in subsequent title cases. Quite the contrary, the special master in *Utah* held that the Cataract Canyon section of the Colorado River and the disputed portion of the San Juan River were non-navigable for title purposes even though portions of both rivers had been portaged on the river itself. 2d.S.App.10–17.

In any event, this Court's precedent at most might permit treating a portageable stretch of an otherwise navigable river as itself navigable for title purposes only if it qualified as a "short interruption" or "negligible part" within the meaning of *Utah*. The 17-mile Great Falls Reach, which could only be bypassed with an arduous, month-long journey, does not fit that description. Nor could such an approach explain the Montana Supreme Court's refusal to consider PPL's compelling evidence that much longer stretches of the upper Missouri and Clark Fork rivers were non-navigable. The court could only do

that by focusing on irrelevant stretches of the river and deeming those stretches sufficient to classify the entire river navigable as a matter of law. Nothing in any of this Court's cases remotely supports that river-as-a-whole approach.

B. Navigability for Title Purposes Is Determined Based on Evidence of Commercial Navigation at Statehood.

The navigability-for-title inquiry is fundamentally a factual one, determined based on the river's use and condition at statehood, without regard to subsequent improvements or changes. *Utah*, 283 U.S. at 87–89. The decision below flouted these principles by using this Court's reference in *Utah* to a river's "susceptibility to use" to deem evidence of modern-day, purely recreational usage dispositive of title navigability. That analysis is flawed at every turn.

The "susceptibility to use" language is not an invitation to consider rivers in their improved modern condition, but rather a recognition of narrow circumstances in which rivers in remote areas where commerce was not attempted at statehood might still be found navigable. That language should have no relevance in a case like this, where there were ample opportunities and incentives to navigate the rivers at statehood. Moreover, evidence of modern-day recreational use is doubly problematic. Not only is it irrelevant, outside the context of remote and undeveloped rivers and absent a predicate showing that the river's condition has not changed materially since statehood, but recreational use cannot substitute for the commercial use that the test

requires. The decision below illustrates the dangers of elevating such evidence above reliable historical evidence of a river's use and condition at statehood.

1. The Proper Test Focuses on Reliable Historical Evidence and Considers Susceptibility to Use Only in Narrow Circumstances.

This Court's decisions make clear that title navigability is based on whether the river segment in question was navigable when the State entered the Union. *Utah v. United States*, 403 U.S. 9, 10 (1971); *Oregon*, 295 U.S. at 6; *Utah*, 283 U.S. at 75. The focus on historical usage and conditions is one of the key distinctions between title navigability and regulatory navigability—whereas title navigability "is determined ... as of ... admission to statehood ... , navigability, for the purpose of the regulation of commerce, may later arise," based on post-statehood changes or improvements to a river. *Appalachian*, 311 U.S. at 408; *see also Kaiser Aetna*, 444 U.S. at 172. That dichotomy makes perfect sense: While regulatory jurisdiction can expand as new commerce is made possible, title must be fixed once and for all. Title cannot morph over time, with a property owner subject to dispossession based on changes in the river or, worse yet, the consequences of his own improvements.

The historical nature of the title inquiry ordinarily requires navigability to be proven by reliable historical evidence of actual, contemporaneous uses of the river, at or near the time of statehood. *See Oregon*, 295 U.S. at 16–24; *Utah*, 283 U.S. at 83; *Oklahoma*, 258 U.S. at 586.

Evidence of "susceptibility to use," by contrast, is rarely relevant to whether a river was navigable at statehood. If there were ample incentives for navigation and commerce before statehood, reliable evidence of commercial use should be readily available, and the absence of such evidence is highly probative of *non*-navigability. Only in the rare instance when a river and its surrounding lands were so inaccessible or unpopulated at statehood that "conditions of exploration and settlement explain the infrequency or limited nature of [actual] use" is evidence of a river's "susceptibility to use" as a highway of commerce, rather than its actual use, appropriate. *Utah*, 283 U.S. at 82.

That of course is not the case here. While parts of Montana were sparsely populated, the river segments at issue were not in some remote wild where commerce was never attempted before statehood, such that the focus must necessarily shift from actual use to the inherently more speculative inquiry into susceptibility to use. The absence of successful efforts to navigate the Great Falls Reach, for example, was not for lack of trying, or at least incentives to try. By the 1860s, Fort Benton was known as the "Chicago of the Plains" for its role as a busy trading post that served as the main supply point for Montana. JA 310–12. Although Fort Benton received extensive steamboat traffic from the East during April, May, and June, *id.*, most travel beyond that point was by horse or wagon; travel on the river above Fort Benton was "hazard[ous]" and required portaging around the Great Falls. JA 313; *see also* JA 317 (Fort Benton remained the "practical head of navigation"); JA 752 (noting "tens of

thousands of ox-, mule-, and horse-drawn wagons" heading west from Fort Benton, where further commercial river travel became impossible, to Helena). The 17-mile Great Falls Reach was bypassed by Lewis and Clark not out of convenience, but out of necessity—the stretch was impassable. Indeed, the State's own evidence confirms that commercial navigation *was* attempted on the relevant river stretches and was repeatedly proven impossible or wholly impractical.

The Montana Supreme Court nonetheless repeatedly invoked the susceptibility test, which it viewed as a "very liberal[]" and "expansive" standard, to speculate that river segments *could* have supported commercial use even though they in fact did not. Pet.App.54, 61. Nowhere was this tendency more pronounced than in its treatment of the Madison River. The Montana Supreme Court acknowledged that there is "little historical documentation" and only "sparse" evidence of navigation on the Madison at statehood. Pet.App.26. Undeterred, it relied almost exclusively on modern-day evidence of post-improvement uses to fuel speculation that the river was "susceptible to use" in 1889. Pet.App.56. That was plainly erroneous.

2. Modern-Day Evidence Is Inherently Suspect and Rarely Relevant.

Even in the rare case when resort to "susceptibility to use" is appropriate, courts should still view evidence of modern-day usage with a skeptical eye. Both natural forces and human ingenuity can dramatically alter a river's characteristics over time. Accordingly, modern-day

usage is relevant only when supported by reliable evidence that the river's condition and characteristics are materially unchanged since statehood.

Moreover, any value such evidence might have will almost always be outweighed by the dangers that attend its use. Allowing courts to consider usage that came into existence long after statehood undermines stability of title and invites continuing litigation even centuries after statehood. Moreover, reliance on modern-day usage creates a perverse incentive for riverbed owners not to improve their property in ways that facilitate navigation, lest they invite challenges to their titles based on the very uses they have made possible. By contrast, a clear rule that modern-day evidence is strongly disfavored promotes stable property rights and diminishes the potential for constant reevaluation of the navigability of rivers, streams, and lakes whose ownership has long been thought settled.

The Montana Supreme Court's heavy reliance on modern-day usage was erroneous twice over, particularly as to the Madison River. First, there was no need to resort to such "susceptibility" evidence at all, as reliable historical evidence of non-navigability, not a lack of incentive, explained the lack of commercial navigation. Second, the Montana Supreme Court compounded its error by refusing to consider PPL's expert evidence that the Madison had changed materially since statehood, and by instead deeming evidence of modern-day usage "sufficient" to establish "susceptibility for commerce at the time Montana became a state." Pet.App.58.

That conclusion flies in the face of this Court's insistence that the equal footing doctrine is concerned with navigability only at statehood. It also finds no support in the Montana Supreme Court's invocation of *Ahtna*, in which the Ninth Circuit considered modern-day usage only *after* the parties stipulated "that the physical characteristics of the River" were "the same as they were when Alaska became a State in 1959." *Ahtna*, 891 F.2d at 1402. Here, by contrast, PPL presented highly credible and unchallenged expert testimony that the characteristics of the Madison had changed and that the river was not susceptible to navigation at statehood. Those facts alone should have rendered modern-day usage irrelevant and certainly insufficient to support a grant of summary judgment. *See North Dakota ex rel. Bd. of Univ. & Sch. Lands v. United States*, 972 F.2d 235, 240 (8th Cir. 1992) ("modern day canoe use and modern day 'boatability' data [were] not reliable indicators of ... navigability at statehood" where evidence showed "that the River today is not the same ... as it was at statehood").

To add insult to injury, the modern-day uses on which the Montana courts relied were made possible by post-statehood construction *of PPL's own dams*, Pet.App.20–21, which significantly increased water flow and submerged anastomosing channels. The Montana Supreme Court's heavy reliance on present-day evidence of dubious probative value is in stark contrast to its dismissal of far more probative contemporaneous evidence, such as early Army Corps reports and the 1910 federal court decree, as "conclusory" and of no evidentiary weight. *See*

Pet.App.57–58 ("The fact that these statements were made in the early 1900's does not somehow cure them of their conclusory nature."). The court below thus got exactly backwards the order of priority that should be afforded to historical and present-day evidence.

3. Recreational Use Cannot Establish that a River Supplied a Highway for Commerce.

The proper navigability-for-title test recognizes that even historical evidence is relevant only if it reflects the kind of commerce that counts. *See Oklahoma*, 258 U.S. at 586–87 (unreliable and inaccurate historical anecdotes "must yield to the actual situation"). It is not "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable." *Rio Grande*, 174 U.S. at 698–99. A river must instead be capable of serving as a "highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Oklahoma*, 258 U.S. at 586; *see Daniel Ball*, 77 U.S. at 563. Modern-day recreational use thus not only suffers all the failings of modern-day evidence, but also improperly equates recreational and commercial use.

To support commercial use, a river must have been capable of serving for most of the year as a "*highway* for commerce" at statehood. *Oklahoma*, 258 U.S. at 586 (emphasis added). In other words, the river must have been conducive to "commercial utilization on a large scale," even if the demands of the time produced only smaller-scale utilization.

Utah, 283 U.S. at 83; *cf.* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 249 (11th ed. 2008) (commerce refers to "the exchange or buying and selling of commodities on a large scale involving transportation from place to place"). If the only commercial uses a river could support were "irregular" and "exceptional," *Oklahoma*, 258 U.S. at 591, or "sporadic and ineffective," *Oregon*, 295 U.S. at 23, or for only a few months out of the year, *id.*, then the river was not a "highway for commerce."

In keeping with these principles, courts have routinely found evidence of recreational use insufficient to establish title navigability. *See Harrison v. Fite*, 148 F. 781, 784, 787 (8th Cir. 1906) (lake "sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes" non-navigable); *N. Am. Dredging Co. of Nev. v. Mintzer*, 245 F. 297, 299–300 (9th Cir. 1917) (channel usable only by "duck boats or punts for hunting and fishing" non-navigable); *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 130 (Tex. Civ. App. 1935) ("lake that is chiefly valuable for fishing or pleasure boats of small size is not navigable"); *Aucoin*, 20 So. 2d at 160 (lake used only for "pirogues and canoes [for] hunting, fishing, and trapping" non-navigable). As this Court aptly put it, that a water body is "large enough to float a boat" does not mean it is a useful highway for commerce. *Oregon*, 295 U.S. at 23.

Contrary to the Montana Supreme Court's suggestion, nothing in *Utah* supports a "broad definition of commerce" that includes recreational use. Pet.App.55, 58. The passage from *Utah* on which the lower court relied said nothing about

recreational use. It instead merely explained that navigability is not necessarily defeated where "commercial utilization [of the river] on a large scale awaits future demands ... as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources." Pet.App.55 (quoting *Utah*, 283 U.S. at 83). That language in no fashion relaxes or broadens the definition of "commercial use." It instead reflects the Court's recognition that there are rare instances—not present here—in which the limited extent of *actual* commercial use at statehood does not necessarily reflect the river's capacity for commercial use at that time. *See* Part II.B.1, *supra*.

Utah v. United States also does not support resort to recreational use to establish navigability. The Court there went out of its way to avoid placing any weight on recreational use. *Compare* Report of Special Master J. Cullen Ganey at 22–23, 35–36, *Utah*, 403 U.S. 9 (No. 31, Orig.) (documenting extensive recreational use), *with Utah*, 403 U.S. at 11 (finding evidence of navigability "not extensive" and relying exclusively on small-scale *commercial* navigation). Beyond that, the case is only a straightforward application of the principle articulated in *United States v. Utah*: the Court found the Great Salt Lake one of those atypical bodies of water for which evidence of only small-scale commercial navigation was explained by something other than the lake's inability to sustain larger-scale use. *See* Report of Special Master J. Cullen Ganey at 48–49, *Utah*, 403 U.S. 9 (No. 31, Orig.) ("[w]hile commerce and trade ... has not flourished on the Lake, this is so not because ... the drawbacks and

obstacles are too formidable, but rather ... the need, strong enough to overcome them, has not arisen"). The State's own evidence precludes application of that principle here, where the significant demand for commercial navigation was frustrated at every turn by repeated determinations that the relevant river stretches were not navigable and could not be made so.

Nor can the logic of a single outlier case from the Ninth Circuit justify the Montana Supreme Court's untenable conflation of recreational and commercial use. Pet.App.58 (citing *Ahtna*, 891 F.2d at 1405 (finding "guided fishing and sightseeing trips" sufficient "commercial activity" to constitute "conclusive evidence" of title navigability)). On this point, *Ahtna* should be expressly rejected. Any body of water that can support recreational fishing and boating activities can also support "commercialization" of those same activities through the use of paid guides, rented watercraft, and the like. To consider such uses sufficient to render those waters "highways for commerce" would read the *commercial* component out of the navigability test, and cast a large shadow over titles to waterways throughout the country. *See George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) (noting "literally hundreds of overflow lands, drainage ditches, etc. where fishing is prevalent" that are "useful for no other purpose").

4. Isolated and Unsuccessful Log Floats Cannot Establish that a River Supported Trade and Travel.

In conjunction with the "highway of commerce" requirement, the navigability-for-title test also requires a showing that a river could support both "trade *and* travel." *Oklahoma*, 258 U.S. at 586 (emphasis added). The river must thus be capable of transporting both commercial goods and people. *Cf. Ahtna,* 891 F.2d at 1404 n.3. Moreover, that transportation must not demand extraordinary effort or ingenuity; rather, it must be possible utilizing the "customary modes of trade and travel on water" at statehood. *Oklahoma*, 258 U.S. at 586; *see also Oregon*, 295 U.S. at 23 (navigability requires "general and common usefulness for purposes of trade and commerce").

The "trade and travel" requirement casts serious doubt on whether even a series of successful log floats, without more, could render a river navigable for title purposes. The requirement makes clear that a single, unsuccessful attempt is insufficient and, in fact, demonstrates non-navigability. To support both "trade and travel," a river must be capable of carrying human travelers, not just logs or other inanimate objects. Indeed, that requirement is implicit in the term "navigable," for "navigation" generally involves some element of human-directed "steer[ing]," "manag[ing]," or "operat[ing]" of a vessel. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 827 (11th ed. 2008). Accordingly, the "mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river." *Rio*

Grande, 174 U.S. at 698; *see also Oregon*, 295 U.S. at 23 ("sporadic and ineffective" log floats do not establish navigability); *North Dakota*, 972 F.2d at 238–39 (same).

The Montana Supreme Court violated these principles when it deemed a single, unsuccessful log float—attempted *after* significant improvements to the river were made—sufficient to demonstrate that the Madison River was navigable at statehood. Even assuming *arguendo* that log floats might demonstrate navigability (*i.e.*, both trade *and* travel), only an established practice of commercially profitable log floats could even conceivably do so. *See Rio Grande*, 174 U.S. at 698. The State did not come close to making such a showing. Indeed, the State's evidence confirmed that the Madison was *not* capable of supporting commercially profitable log floats, as a log float was never again attempted after the first one ended in bankruptcy. JA 259–60. Even if the Montana Supreme Court were correct that "commerce" is "broadly construed," it would be ludicrous to construe commerce so broadly as to include a single, disastrous log float.

C. The Burden of Proof Rests on the Party Seeking to Establish Navigability; Navigability for Title Purposes Is not "Very Liberally Construed."

Because a finding that a body of water is navigable results in the imposition of public servitudes and affects the property rights of adjacent landowners, the burden of proof rests on the party seeking to establish title navigability. That is the rule stated by the special master in *Utah v. United*

States, and the Court expressed no disapproval thereof. *See* Report of Special Master J. Cullen Ganey at 50, *Utah*, 403 U.S. 9. And it is the rule that has been consistently applied by lower courts. *See North Dakota*, 972 F.2d at 238; *United States v. Davis*, 339 F.3d 1223, 1227 (10th Cir. 2003); *Harrison*, 148 F. at 785; *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158, 165 n.10 (Ariz. Ct. App. 1991); *Boerner v. McCallister*, 89 S.E.2d 23, 27 (Va. 1955); *State v. Aucoin*, 20 So. 2d 136, 159 (La. 1944); *Boutwell v. Champlain Realty Co.*, 94 A. 108, 112 (Vt. 1915); *Burner v. Nutter*, 87 S.E. 359, 361 (W. Va. 1915); *see also* 78 AM. JUR. 2D *Waters* § 133, at 480 (2002) ("the burden of proof rests upon the party asserting such navigability").

Placing the burden on the proponent of navigability is consistent both with a proper respect for property rights and with fundamental fairness given the inherent difficulty of proving a negative. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2823 (2011); *Hamling v. United States*, 418 U.S. 87, 116 (1974); *Elkins v. United States*, 364 U.S. 206, 218 (1960). Discrete historical events and similar evidence are typically readily available when a body of water was navigable at statehood—even more so because the obvious incentives for navigation and commerce mean that most rivers that could be navigated were, in fact, navigated. The absence of evidence of successful navigation in the presence of ample incentives for commercial exploitation strongly supports a finding of non-navigability. Placing the burden on the proponent of navigability corresponds to that reality and is far preferable to making the

other party prove a negative a century or more after the fact. *See* JA 784.

Moreover, because a State will often be the party asserting navigability, the traditional allocation of the burden of proof serves as an appropriate counterweight to the strong incentives to claim rivers "as navigable when they are not actually so," so as to "enlarge what actually passed to the state, at the time of her admission." *Brewer-Elliott*, 260 U.S. at 88–89. The burden also offsets the sizeable advantages a State enjoys when it challenges privately held titles in its own courts. If a private party sought to reclaim property rights a century after statehood and after participating in numerous regulatory proceedings premised on others' ownership, numerous state law doctrines like laches and equitable estoppel would reinforce settled expectations in stable property rights. But when a State belatedly asserts its property interests in its own courts, those same doctrines are often deemed inconsistent with the State's sovereign immunity. *See, e.g.*, Pet.App.13. Only federal law can vindicate property rights in that situation, and placing the burden of proof on the party seeking to establish navigability is an important safeguard.

Placing the burden on the State or other party asserting navigability is especially important where, as here, that assertion would upset long-settled ownership expectations. "This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned" and has been reluctant to "upset settled expectations." *Leo Sheep*, 440 U.S. at 687–88; *see also Republic of Austria v. Altmann*, 541 U.S. 677,

693 (2004). That reluctance is reflected, for example, in the requirement that a State seeking to divert previously appropriated water for future uses must prove by clear and convincing evidence that the diversion should be permitted, a standard that reflects society's interest in "the stability of property rights." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). By the same logic, the burden of proof appropriately rests on a State that, like Montana here, lays claim to riverbed lands that for decades, if not centuries, have been understood to be owned by the federal government or private parties.

For all the same reasons that the burden of proof has traditionally been placed on the proponent of navigability, the navigability-for-title test should be construed to disfavor belated claims of navigability. At a minimum, there is no place for a rule of construction that construes "the concept of navigability for title purposes ... very liberally" in favor of navigability. Pet.App.54. To do so would defeat the purposes for which courts have consistently placed the burden on the party asserting navigability. It would unsettle property rights, fuel the States' temptation to "enlarge what actually passed" at statehood, *Brewer-Elliott*, 260 U.S. at 88–89, and exacerbate the substantial advantages the State enjoys in its own courts.

Yet that is precisely what the Montana Supreme Court did here. Not only did it ignore the well-settled burden of proof; it affirmatively rejected it in favor of a rule that the navigability-for-title test must be "very liberally construed" *in the State's favor*. Pet.App.54. Remarkably, the lower court derived its erroneous "liberal construc[tion]" rule not

from some mistaken view that state law controls the question, but from *this* Court's opinion in *Utah*, which says nothing of the sort. *See* Pet.App.54. That erroneous reading of this Court's precedent is the only plausible explanation for the Montana Supreme Court's mystifying conclusion that summary judgment was appropriate, notwithstanding PPL's "mountain" of evidence demonstrating non-navigability, and "without the benefit of the extensive factfinding" that this Court's cases require. Pet.App.100 (Rice, J., dissenting). This Court should correct that error and make clear that the burden of proof rests with the proponent of navigability and that the appropriate rule of construction does not liberally favor belated assertions of title.

III. Under A Correct Application Of This Court's Precedents, The State's Evidence Was Manifestly Insufficient To Sustain Its Title Claims.

That the Montana Supreme Court construed this Court's precedent to support invalidation of long-held titles and consummation of the State's massive land grab illustrates the need for this Court to reaffirm the core principles of the federal navigability-for-title test. When those principles are properly applied, it is crystal clear that the grant of summary judgment in the State's favor cannot stand. Moreover, under a proper application of the test, certain of the State's assertions of title fail as a matter of law.

First, Montana's claim of title to the 17-mile Great Falls Reach of the Missouri River, where the

bulk of PPL's Missouri-Madison project is located, cannot succeed. The distinct characteristics of that stretch mean that it must be considered separately under this Court's longstanding segment-by-segment approach. No party seriously contends that the Great Falls Reach was navigable—commercially or otherwise—when Montana entered the Union or at any other time, and the State presented no evidence to that effect. And, contrary to the decision below, the Great Falls Reach cannot be classified as a negligible, "short interruption" given that it is nearly four times as long as the segment this Court treated separately in *Utah*. Nor can the Montana courts grant summary judgment in the face of PPL's considerable historical evidence that other, even longer, disputed segments of the Missouri are non-navigable as well.

Second, the State's evidence cannot possibly prove the Madison River navigable at statehood. The State relied on three pieces of evidence: a single, disastrous log float attempted in 1913; present-day recreational use made possible by post-statehood improvements; and the observations of Captain Clark. Under a proper application of this Court's "highway for commerce" test, the unsuccessful and never-repeated log float actually confirms *non*-navigability. And the evidence of present-day recreational use is irrelevant, especially in light of the unrefuted expert testimony that present-day conditions did not match conditions at statehood. That leaves only Clark's observations, which do not even tend to show the navigability of a river that he never saw beyond its mouth. Accordingly, the State's evidence is insufficient as a matter of law to

stablish that the Madison River was navigable at he time of statehood.

Third, as to the Clark Fork River, the State ffered insufficient evidence to overcome nearly ontemporaneous findings that the relevant stretch s non-navigable, including the 1910 federal court ecree awarding title to PPL's predecessor. The tate's evidence primarily pertained to limited log loats and passenger transportation on river tretches not at issue here. The admitted interruptions to unimpeded navigation on this river n the vicinity of PPL's Thompson Falls project," et.App.61, were disregarded along with this Court's egment-by-segment approach. When this Court's pproach is correctly applied, it is clear that the nterruptions "in the vicinity" are what matters, and hat the State's evidence of sporadic activities lsewhere on the river did not carry its summary udgment burden.

CONCLUSION

The Court should reverse the decision below, and remand with instructions for the Montana courts to apply the correct federal test for determining title navigability.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
(202) 234-0090

ASHLEY C. PARRISH
PAUL A. MEZZINA
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St, Ste. 1500
Billings, MT 59101
(406) 252-2166

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

Counsel for Petitioner

August 31, 2011

APPENDIX
OF RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF CONTENTS

U.S. Const., art. VI, cl. 2 ..... 1a
U.S. Const., art. IV, § 3, cl. 2 ..... 2a
43 U.S.C. § 931 ..... 3a
43 U.S.C. § 1311(a) 4a

U.S. Const., art. VI, cl. 2, the Supremacy Clause of the United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. IV, § 3, cl. 2, the Property Clause of the United States Constitution

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or Property belonging to the United States[.]

43 U.S.C. § 931

Navigable rivers as public highways

All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

43 U.S.C. § 1311(a)

Rights of States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof[.]

RESPONDENT'S BRIEF

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR RESPONDENT

STEVE BULLOCK
Attorney General
ANTHONY JOHNSTONE
Special Assistant Attorney General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders Street
Helena, MT 59620-1401
(406) 444-2026

GREGORY G. GARRE
Counsel of Record
LORI ALVINO MCGILL
KATYA S. GEORGIEVA
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Respondent

(Additional Counsel Listed On Inside Cover)

CANDACE F. WEST
Chief Legal Counsel
MONTANA DEPARTMENT OF
NATURAL RESOURCES
AND CONSERVATION
1625 Eleventh Avenue
Helena, MT 59620-1601
(406) 444-6702

QUESTION PRESENTED

This Court granted certiorari (131 S. Ct. 3019 (2011) (Mem.)) to decide the first question presented by the petition for a writ of certiorari (Pet. i-ii), which asks:

> Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. Montana's Entry Into The Union 4

B. The Rivers At Issue 8

C. This Litigation 15

SUMMARY OF ARGUMENT 20

ARGUMENT 24

I. THE QUESTION PRESENTED RAISES A CORE ISSUE OF FEDERALISM 24

II. THE STATE COURT APPLIED THE PROPER CONSTITUTIONAL TEST FOR NAVIGABILITY IN DECIDING THIS CASE 27

A. The Montana Supreme Court Applied This Court's Constitutional Test 28

B. The Montana Supreme Court Properly Considered The Stretches That Comprised The Relevant Channels Of Commerce 32

C. The Montana Supreme Court Properly Recognized That Portaging Does Not Automatically Defeat Navigability 38

TABLE OF CONTENTS—Continued

Page

D. The Montana Supreme Court Properly Considered The Madison's Susceptibility For Use As A Highway Of Commerce 43

III. THE STATE COURT CORRECTLY FOUND THAT SUMMARY JUDGMENT WAS PROPER ON THE HEARING RECORD 48

CONCLUSION 53

ADDENDUM

Map of the Missouri, Clark Fork, and Madison Rivers in Montana 1a

Map of Lewis and Clark Great Falls Portage 2a

The Montana Power Company v. Federal Power Company, No. 518, Brief for the Federal Power Commission in Opposition (Feb. 1951) (excerpts of pp. 6-9, 21-23) 3a

The Montana Power Company v. Federal Power Commission, No. 10200, Brief for the Federal Power Commission (D.C. Cir. 1950) (excerpts of pp. 15-20, 23-26) 9a

TABLE OF AUTHORITIES

Pages(s)

CASES

Alaska v. Ahtna, Inc.,
891 F.2d 1401 (9th Cir. 1989), *cert. denied*,
495 U.S. 919 (1990) 49

Alaska v. United States,
545 U.S. 75 (2005) 26, 49, 51

Alaska v. United States,
662 F. Supp. 455 (D. Alaska 1987), *aff'd*,
Alaska v. Ahtha, 891 F.2d 1401 (9th Cir.
1989) 39, 49

American Title Insurance Co. v. Lacelaw Corp.,
861 F.2d 224 (9th Cir. 1988) 16

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 23

Brewer-Elliott Oil & Gas Co. v. United States,
260 U.S. 77 (1922) 30

Camreta v. Greene,
131 S. Ct. 2020 (2011) 47

City of Centralia v. FERC,
851 F.2d 278 (9th Cir. 1988) 46

Consolidated Hydro, Inc. v. FERC,
968 F.2d 1258 (D.C. Cir. 1992) 39, 46

TABLE OF AUTHORITIES—Continued

Page(s)

Coyle v. Smith,
221 U.S. 559 (1911) 1

Economy Light & Power Co. v. United States,
256 F. 792 (7th Cir. 1919) 38, 42

Economy Light & Power Co. v. United States,
256 U.S. 113 (1921) 38

Hardin v. Jordan,
140 U.S. 371 (1891) 8

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997) 24

Idaho v. United States,
533 U.S. 262 (2001) 24

Illinois v. Army Corps of Engineers,
No. 79C 5406, 1981 U.S. Dist. LEXIS 14165
(N.D. Ill. Jan. 9, 1981) 49

Illinois Central Railroad Co. v. Illinois,
146 U.S. 387 (1892) 25

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 31

Kansas v. Colorado,
206 U.S. 46 (1907) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Klehr v. A.O. Smith Corp.,
521 U.S. 179 (1997) 48

Knott v. FERC,
386 F.3d 368 (1st Cir. 2004) 39

Leo Sheep Co. v. United States,
440 U.S. 668, 687 (1979) 6

Montana v. United States,
450 U.S. 544 (1981) 24

Montana Power Co. v. FPC,
185 F.2d 491 (D.C. Cir. 1950) 39, 51

Muckleshoot Indian Tribe v. FERC,
993 F.2d 1428 (9th Cir. 1993) 39

Mumford v. Wardwell,
73 U.S. (6 Wall.) 423 (1867) 24

Nebraska v. Wyoming,
325 U.S. 589 (1945) 36

New York v. New Jersey,
283 U.S. 336 (1931) 2

Niagara Falls Power Co. v. Duryea,
57 N.Y.S.2d 777 (Sup. Ct. 1945) 39

Oklahoma v. Texas,
258 U.S. 574 (1922) 26, 30, 35

TABLE OF AUTHORITIES—Continued

Page(s)

Packer v. Bird,
137 U.S. 661 (1891) 30

Pennsylvania Water & Power Co. v. FPC,
123 F.2d 155 (D.C. Cir. 1941) 39

Peuse v. Malkuch,
911 P.2d 1153 (Mont. 1996) 16

Pollard v. Hagan,
44 U.S. (3 How.) 212 (1845) 5

Shively v. Bowlby,
152 U.S. 1 (1894) 5

In re State Reservation at Niagara,
37 Hun. 537, 16 Abb. No. Cas. 395 (N.Y. Sup. Ct. 1885), *appeal dismissed*, 7 N.E. 916 (1886) 39

St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners,
168 U.S. 349 (1897) 38, 46

The Daniel Ball,
77 U.S. (10 Wall.) 557 (1871) ..... *passim*

The Montello,
87 U.S. (20 Wall.) 430 (1874) ..... *passim*

United States v. Alaska,
521 U.S. 1 (1997) 5, 24

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Appalachian Electric Power Co.,
311 U.S. 377 (1940) 40, 47

United States v. Holt State Bank,
270 U.S. 49 (1926) 31, 44

United States v. Oregon,
295 U.S. 1 (1935) 26, 31

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 8

United States v. Underwood,
344 F. Supp. 486 (M.D. Fla. 1972) 49

United States v. Utah,
283 U.S. 64 (1931) ..... *passim*

Utah Division of State Lands v. United States,
482 U.S. 193 (1987) 5, 24

Williams v. Union Fidelity Life Insurance Co.,
123 P.3d 213 (Mont. 2005) 50

Wisconsin v. FPC,
214 F.2d 334 (7th Cir. 1954) 46

Wisconsin Public Service Corp. v. FPC,
147 F.2d 743 (7th Cir. 1945) 46

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL AND STATE STATUTORY AND REGULATORY MATERIALS

16 U.S.C. § 796 40

Northwest Ordinance of 1787 (adopted by the First Congress in 1 Stat. at 52) (1789) 25, 53

U.S. General Land Office, *Instructions of the Commissioner of the General Land Office to the Surveyors General of the United States Relative to the Survey of the Public Lands and Private Land Claims* (May 3, 1881) 6

Mont. Code Ann. § 85-1-112 6

Mont. R. Civ. P. 56(c) 17

Mont. R. Evid. 401 45

OTHER AUTHORITIES

Alaska v. United States, No. 128, original, Special Master's Report at 17-22 (2004), *available at* http://docs.law.gwu.edu/facweb/gmaggs/128orig/summary_judgment_report.pdfSpecial Master's Report (2004), *available at* http://docs.law.gwu.edu/facweb/gmaggs/128orig/summary_judgment_report.pdf 49

TABLE OF AUTHORITIES—Continued

Page(s)

Hubert Howe Bancroft, *History of Washington, Idaho, and Montana* (1890) 11

59 Cong. Rec. 7730 (1920) 8

Michael Evans & R. Ian Jack, *Sources of English Legal and Constitutional History* (1984) 5

Richard Fletcher, *Drift Boats and River Dories* (Stackpole Books 2007) 15

John A. Humbach, *Public Rights in the Navigable Streams of New York*, 6 Pace Envtl. L. Rev. 461(1989) 39

Institutes of Justinian, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed., 1841) 5

The Journals of the Lewis & Clark Expedition (Gary E. Moulton ed., Univ. of Neb. Press 1987) 9

Norman MacLean, *A River Runs Through It and Other Stories* (1976) 14

William Mark McKinney & Burdett Alberto Rich, *Ruling Case Law*, Waters (1920) 39

TABLE OF AUTHORITIES—Continued

Page(s)

Montana Trust Land Management System (TMLA NET) Query, Sept. 27, 2011, http://dnrc.mt.gov/trust/default.asp 7

Original Journals of the Lewis and Clark Expedition (R. G. Thwaites ed., 1904) 14

Francis Parkman, *The Oregon Trail, Sketches of Prairie and Rocky-Mountain Life* (1883) 8

Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825 (1979) 24

I

INTRODUCTION

Under the constitutionally grounded equal footing doctrine, all States enter the Union with title to the lands underlying the navigable waters within their borders and "the right to control and regulate navigable streams" on that land. *Coyle v. Smith*, 221 U.S. 559, 573 (1911). This case concerns the State of Montana's title to lands underlying three rivers—the Missouri, Clark Fork, and Madison. Those rivers not only are home to some of the most prized trout fishing in the world, but have served as public highways of commerce since long before frontier times. The importance of the Missouri runs even deeper. The Missouri has long been regarded as one of America's great rivers and is the object of one of the nation's most important explorations—the Lewis and Clark Expedition. From territorial times to this day, the Great Falls of the Missouri have appeared on the official seal of Montana. In a real sense, the question in this case is whether the Great Falls belong to the people of Montana in public trust, or instead to the federal government or petitioner PPL Montana (PPL).

After carefully considering this Court's navigability precedents dating back nearly two centuries, the Montana state courts reached a judgment that would surprise few Montanans: The rivers at issue are navigable, and Montana therefore took title to the riverbeds at statehood, in public trust for Montanans. Indeed, PPL itself *admitted* at the outset of this litigation that the rivers at issue were navigable. *Infra* at 15. PPL now asks this Court to overturn that judgment. PPL's position is grounded on a novel interpretation of this Court's decisions and a selective account of history. If adopted, PPL's position would

upset centuries-old expectations and call into question the navigability of rivers not just in Montana but throughout the United States. That is particularly true for the American West, where rivers remain important highways of commerce, provide vital habitats for fish and wildlife, are generally open to the public for recreational pursuits such as fishing, and have a near-mystical quality in parts like Montana. *Cf. New York v. New Jersey*, 283 U.S. 336, 342 (1931) ("A river is more than an amenity; it is a treasure.") (Holmes, J.).

The "constitutional test" for navigability (Pet. i) articulated by the Montana Supreme Court is grounded on this Court's precedents going back to *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). PPL itself acknowledges that, under "long-settled law," the touchstone of navigability-for-title is whether the river was used, or was susceptible for use, as a highway of commerce at statehood. PPL Br. 27 (citing *The Daniel Ball*, 77 U.S. at 563). As to the Missouri and Clark Fork, PPL argues that this test cannot be met, because the Great Falls (Missouri) and Thompson Falls (Clark Fork) themselves were impassable by boat. But, as the Montana Supreme Court recognized (Pet. App. 54-55), this Court long ago held that natural interruptions do not defeat navigability where the obstacles were portaged so that the river continued to serve as a channel of commerce. Indeed, since at least the Northwest Ordinance of 1787, such "carrying places" have been recognized as facilitating—not defeating—the highways of commerce along America's navigable rivers. Here, it is undeniable that the falls in question were portaged so that the rivers served as continuous highways of commerce before statehood.

As to the Madison, PPL's primary argument is that the Montana Supreme Court erred in considering *post*-statehood use in determining whether the navigability test was met. All agree that, compared to the Missouri and Clark Fork, there is relatively little evidence of the pre-statehood use of the Madison. In that respect, the Madison presents a tougher historical case. But *The Daniel Ball* itself holds that navigability may be based on *susceptibility* for use as a highway of commerce. 77 U.S. at 563. And this Court's precedents support the commonsense conclusion that—while the navigability-for-title test looks to navigability at the time of statehood—post-statehood evidence of navigability is relevant, and thus admissible, insofar as it helps to establish susceptibility of navigation *at statehood*. That is the only basis for which the Montana Supreme Court relied upon evidence of post-statehood use. Pet. App. 56. And this Court's precedents also repudiate PPL's other argument concerning the Madison that log floats and commercial drift boat fishing on the river are not relevant in gauging navigability as of statehood.

PPL goes to extraordinary lengths to attack the Montana Supreme Court's decision. It calls into question the good faith and intentions of the Montana courts, PPL Br. 25, 30, 33, and decries the Montana Supreme Court's decision as a "judicial taking[]," *id.* at 25. But the only potential "taking" in this case is the one that PPL is attempting to accomplish by asking this Court to substantially narrow the centuries-old concept of navigability and thereby deprive Montana—and the people of Montana—of their long-held title to the riverbeds at issue. That effort should be rejected.

STATEMENT OF THE CASE

More than two centuries ago, Captain Meriwether Lewis stood on the banks of the Missouri in the territory that would become Montana. Taken by the sight before him, Lewis observed that he did not believe "that the world can furnish an example of a river running to the extent which the Missouri and Jefferson's rivers do through such a mountainous country and at the same time so navigable as they are." JA 162. Within a few years of Lewis and Clark, fur traders established trade routes along Montana's rivers, to both the East and West. Decades later, with the advent of the gold and copper rushes, Montana's population surged and the territory's fledgling economy began to take off. But transportation remained a challenge. The railroad did not reach Montana until the late 19th century, and at the time Montana joined the Union in 1889, the railroad was still in its infancy. *See id.* at 112-13, 215, 236. Cutting through Montana's vast expanse, Montana's network of navigable waterways fueled exploration and the territory's economic growth. That was particularly true for the Missouri—one of America's signature waterways—which, among other things, was used to transport gold mined from the Helena area back East. Ultimately, the history of the Missouri and other rivers at issue in this case well illustrates the indispensable role that navigable waters played in the exploration, economy, and everyday life of early America.

A. Montana's Entry Into The Union

The State of Montana—like all States—holds title to the lands beneath all navigable waters within its borders for the benefit of its citizens. The sovereign's responsibility to hold such lands in trust for its

citizenry can be traced as far back as Justinian in ancient Rome. *See Institutes of Justinian*, Lib. II, Tit. I, § 2 (T. Cooper transl. 2d ed. 1841) ("Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common."). Under English common law dating back to the time of the Magna Carta, the Crown held title to all lands underlying navigable waters "for the benefit of the whole people." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987) (citing *Shively v. Bowlby*, 152 U.S. 1, 11-14 (1894)); *see* Michael Evans & R. Ian Jack, *Sources of English Legal and Constitutional History* 53 (1984).

When the original thirteen Colonies formed the Union, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. *Shively*, 152 U.S. at 15-16. "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845). Because the "right to [the rivers] passes with a transfer of sovereignty, *id.* at 216, new States entered the Union "on an 'equal footing' with the original 13 Colonies and succeed[ed] to the United States' title to the beds of navigable waters within their boundaries," *United States v. Alaska*, 521 U.S. 1, 5 (1997). Montana entered the Union on the same footing in 1889 when it became the 41st State.

From the time of Montana's statehood, it has been generally recognized that the riverbeds at issue belong to the people of Montana in public trust, and not private riparian owners. At or around the time of statehood, the General Land Office (the predecessor agency to the Bureau of Land Management within the

Department of the Interior), "meandered" most of the riverbanks along the rivers at issue to ensure that any later conveyances to private parties ended at the high-water mark—and thus did not purport to convey title to the lands underlying navigable waters. *See* Trial Exh. S-48 at 13 (Jenkins Report). The maps created by the Surveyors General of the United States plainly show that the federal surveyors "returned as navigable" the rivers at issue and therefore excluded the riverbeds from private conveyances. *See, e.g.*, Exhs. S-40, S-41, S-42, S-42B (Thompson Falls); Exh. S-33 (Madison); *see also* Exh. S-44 (Missouri River Commission map). Although such meandering does not conclusively establish navigability, it is precisely the sort of thing on which "settled expectations" are formed "where land titles are concerned." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979).[1]

Likewise, consistent with the understanding that the State owns the riverbeds, the State has long managed the rivers and attendant riverbeds under actual and apparent authority of title. Thus, for example, Montana's Board of Land Commissioners, which manages school trust land across Montana, has

---

[1] Under instructions issued by the Commissioner of the General Land Office in 1881, navigable rivers were to be meandered by federal surveyors on *both* banks, thereby clearly delineating riparian property boundaries, while rivers considered non-navigable were to be meandered on only one bank. *See* U.S. Gen. Land Office, *Instructions of the Commissioner of the General Land Office to the Surveyors General of the United States Relative to the Survey of the Public Lands and Private Land Claims* 33-35 (May 3, 1881). Montana law has long recognized such meandering in determining title to riverbeds. *See* Mont. Code Ann. § 85-1-112.

issued (at least) 97 easements on the Missouri, Clark Fork, and Madison, an additional 85 mineral leases on the Missouri, and eight annual licenses and other leases on the Clark Fork and the Missouri to such private parties.[2] Likewise, in practice, private parties seeking to construct a power line, pipeline, riprap, kayak run, access bridge, or other commercial fixture along the rivers at issue in this case generally have sought permission from the State before doing so.

Not long after statehood, the Montana Supreme Court recognized the navigability of both the Missouri and Clark Fork, describing the latter as "'a matter of common knowledge.'" Opp. App. 31 (citation omitted), 35. To the State's knowledge, until this litigation, no private riparian owner has ever claimed title to the riverbeds at issue as against the State. And, as the Montana trial court found (consistent with the way in which the federal government meandered the rivers at issue long ago), the deeds held by PPL and other private owners show on their face that any private ownership interests end at the riverbank. Opp. App. 59; *see id.* at 37-38; Resp. Mt. S. Ct. Br. 28-29. Nor has the United States ever asserted ownership of the riverbeds at issue—an assertion that would be undermined by the way the federal government's own surveyors meandered the rivers at statehood.[3]

---

[2] Montana Trust Land Management System (TMLA NET) Query, Sept. 27, 2011 (record and ownership repository), http://dnrc.mt.gov/trust/default.asp; *see* Resp. Mont. S. Ct. Br. 13-15 (discussing State's management of trust lands).

[3] In a footnote that refers to *flood* lands, the United States (at 3 n.3) appears to suggest that PPL pays rent to the federal government for some portion of the riverbeds at issue. That is

(continued...)

B. The Rivers At Issue

The Missouri, Clark Fork, and Madison Rivers span hundreds of miles of the northwest, central, and southern parts of the State. *See* Add. 1a (map). While each has its own unique history and geography, the rivers—and especially the Missouri—are among the crown jewels of Montana's system of waterways.

Missouri River. The Missouri is the longest river in North America (spanning some 2400 miles) and before the railroads took root provided one of the most important thoroughfares to the West for settlers and pioneers. *See, e.g.*, Francis Parkman, *The Oregon Trail, Sketches of Prairie and Rocky-Mountain Life* (1883); JA 311. It has been cited frequently in court opinions, legislative debates, and historic works as the exemplar of a navigable river.[4] The Missouri has its headwaters at Three Forks, Montana—the junction of the Gallatin, Madison, and Jefferson Rivers—and flows northward through Helena, Great Falls, and Fort Benton, Montana, before turning east and entering

---

(continued)
incorrect. PPL advanced this argument for the first time in its Supplemental Brief in Support of Certiorari (at 2), citing only a letter that PPL itself submitted to FERC just ten days before that Supplemental Brief was filed (*id.* at App. 4-9). In any event, the State's claim for compensation meticulously excluded federally-owned flooded uplands (*see* Ex. S-48 at 22; Sept. 4, 2007 Order ¶¶ 20-29 (Dkt. # 253)), and was based solely on riverbeds to which the United States has never claimed title.

[4] *See, e.g., Hardin v. Jordan*, 140 U.S. 371, 382 (1891); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899); *Kansas v. Colorado*, 206 U.S. 46, 94 (1907); 59 Cong. Rec. 7730 (1920).

North Dakota. After passing through six more States, it eventually flows into the Mississippi River.

In 1803, aware of the Missouri's reputation as one of the continent's great waterways, President Jefferson commissioned an expedition whose "object" was "to explore the Missouri River, and such principal streams of it ... [that] may offer the most direct and practicable water-communication across the continent." JA 304-05. Lewis and Clark left St. Charles, Missouri, on May 14, 1804, heading up the Missouri for what would become one of America's greatest explorations. They arrived in what today is Montana approximately one year later, having ascended the river in pirogues and bateaux.

On June 13, 1805, Lewis set out ahead of the group to scout the upcoming route. By midday, he had come upon a series of five waterfalls, the largest of which—known as Great Falls—Lewis called "the grandest site I ever beheld." 4 *The Journals of the Lewis & Clark Expedition*, 284 (Gary E. Moulton ed., Univ. of Neb. Press 1987). Within a day, Lewis managed to chart out a roughly 17-mile portage around the falls—a distance that must be viewed in light of the 20 or more miles that Lewis and his team regularly traveled in a day during the course of the expedition. The portage began on June 22. JA 405. Although the land was unfamiliar, the load heavy (JA 407-08), and some members of the party—including Sacagawea—ill (JA 412), the expedition arrived at upper portage camp, just south of the present day city of Great Falls, on July 2—11 days later. App. 2a (map); JA 421. On July 15, the party put

their boats back into water to proceed up the Missouri to its very mouth at Three Forks. JA 433-34.[5]

The Great Falls consists of five different falls along almost eight river miles from the first cascade to the last, with various rapids and calmer waters mixed in between. The largest cascade—Great Falls—is the first in the series moving upriver from Fort Benton. Crooked Falls lies about 4.3 miles upriver from that. Beautiful Falls (or Rainbow Falls) lies about a half mile up river. Colter Falls, which is now fully submerged, lies about one mile upriver. And Black Eagle Falls, the last of the cascades, lies about two miles upriver. *See* JA 687; Add. 2a (map). The 17 miles that has been used in this case to refer to the Great Falls is generally demarked by the confluence with Belt (Portage) Creek, several miles below Great Falls, and Sun (Medicine) River, several miles above Black Eagle Falls. JA 296; Add. 2a. It is undisputed that the falls themselves were not passable by boat at statehood.

Although Lewis and Clark's portage of the Great Falls is certainly the most historic, it was by no means the last. In particular, during the 1860s, amidst the Montana gold rush, large numbers of miners regularly portaged the Great Falls as they traveled the Missouri between Fort Benton and Three Forks. JA 313. A line

---

[5] PPL describes (at 8, 40-41) the portage as taking 33 days. That covers the period from when Lewis first discovered the Great Falls to when the expedition put boats back into water above the falls. The expedition "set out to pass the portage" nine days after Lewis discovered the falls. JA 405. It took the expedition 11 days to travel the 17 miles from the lower to upper portage camps. And the expedition spent the remaining 13 days at upper portage camp preparing to continue the journey upriver. *See* JA 401-434.

of mackinaw boats regularly carried passengers from north of Helena to Fort Benton, making a short portage around the Great Falls, and arriving at Fort Benton in just three days total. From there, passengers embarked onto steamboats and headed East down the Missouri as far as St. Louis. *See* JA 312-13 (citing Hubert Howe Bancroft, *History of Washington, Idaho, and Montana* 732 n.9 (1890)); Add. 3a-6a, 9a-16a (excerpts of federal government briefs in *Montana Power Co. v. Federal Power Comm'n*).[6]

The 260-mile stretch of the Missouri between Three Forks and Fort Benton—encompassing the seven dams that PPL today owns along the Missouri—served as a vital highway of commerce at and before statehood. There is historical evidence that the stretch was used by fur traders and miners to transport their goods, as well as evidence of the use of steamboats above and below the falls, and of log rafting. *See, e.g.*, JA 112, 169, 175-77, 181, 189, 307-08. As the evidence shows—and the Solicitor General of the United States has previously explained in detail to this Court—the Great Falls by no means marked the end of, or impeded, this highway of commerce. Rather, a relatively short portage around the falls allowed commerce to continue along this stretch of the river as part of a continuous highway of commerce. That highway was well-known, and well-traveled, before the railroads arrived in Montana. *See* JA 313 & n.24; Add. 4a-5a, 13a-15a.

---

[6] Although the United States attempts the distinguish *Montana Power Company* on legal grounds (U.S. Br. 26), the Solicitor General's factual description of the "actual use" of the same stretch of the Missouri at issue here is in no way tied to any particular legal argument concerning navigability. Add. 3a-7a.

Clark Fork River. The Clark Fork rises in the Silver Bow Mountains near Butte, Montana. From there, it flows northwest through Missoula where it intersects with the Blackfoot, continues through Thompson Falls, and eventually crosses into Idaho, where it empties into Lake Pend Oreille. The Clark Fork provided a remarkably uniform channel at statehood with few interruptions. The only significant obstruction was the Thompson Falls—which today is the site of one of PPL's dams. The falls occupied less than half a mile and caused a drop in elevation of four to six feet. Including its surrounding rapids, the falls span approximately 2.8 miles. Despite that obstacle, the Clark Fork was regularly navigated by traders and explorers along this stretch, and was used for numerous log drives, before statehood.

Shortly after Lewis and Clark passed through Montana on their way back East, David Thompson—a fur trader and explorer—canoed down the Clark Fork from the Flathead river all the way to Lake Pend Oreille, "portaging at Thompson Falls and Rock Island Rapids." JA 66, 234. Others similarly navigated the Clark Fork from Missoula (above Thompson Falls) down to Lake Pend Oreille. JA 101. During the early fur-trading era, the Kootenai "often traded on the Clark Fork" (referring to the stretch between the lower Flathead and Lake Pend Oreille, encompassing Thompson Falls). JA 105. Many decades later, during the 1860s and 1870s, local newspapers reported boat service along the Clark Fork from points above Thompson Falls to Lake Pend Oreille. JA 118, 131.

This stretch of the Clark Fork also served as a significant channel for log drives. Multiple reports of log floats on the Clark Fork appear in the 1880s, in

tandem with the need to move building materials for construction of the railroads. JA 213. Log drives originated on Ninemile Creek and the Flathead River—both above Thompson Falls—and the logs were driven down the Clark Fork all the way to Idaho. JA 240-41. In 1882, the *Missoulian* announced that logs "can be floated right to the locality down the Missoula and Pen d'Oreille rivers." JA 143. There are numerous additional accounts of log floating and small boat use from Lake Pend Oreille to places above Thompson Falls around the time of statehood and shortly thereafter. *See* JA 126, 129, 223, 234, 356-57.

Steamboat navigation brought heavier traffic to the Clark Fork below Thompson Falls. In the 1860s, during the Montana gold rush, several companies operated steamboats that took miners and others from Lake Pend Oreille to points near Thompson Falls and back, providing for "a complete and reliable line of steamers for a distance of 125 miles, from Pen d'Oreille [sic] landing to Thompson's river." JA 119; *see* JA 113, 116, 119-21, 125, 138-39, 141.

Madison River. The Madison River rises in Yellowstone National Park in Wyoming and flows northward into Montana for 140 miles before joining the Gallatin and Jefferson Rivers at Three Forks to form the Missouri River. When William Clark reached the Three Forks on July 25, 1805, he observed that the Jefferson, Madison, and Gallatin Rivers were "nearly of a Size" (*i.e.*, shared the same characteristics). JA 252. This comparison is significant because Lewis had previously described the Jefferson as an exemplar of a navigable river in "a mountainous country." JA 162. While it has been reported that the Madison was used by trappers and explorers in the 1800s (JA 218, 251),

the evidence of pre-statehood commerce along the river was sparse compared to that of the Missouri and the Clark Fork. The lack of additional historic use no doubt stems in part from the fact that low-land Indian Tribes, such as the Blackfeet, lacked permanent settlements and were notoriously hostile to outsiders—as Lewis himself learned the hard way. JA 189.[7]

The Madison's natural condition between April and July was viewed as ideal for log-driving—this being "the first river in the country that had not a dollar of expenditure before the drive was started." JA 155. Shortly after Montana's entry into the Union, however, several dams were built along the Madison—including the Hebgen and Madison dams owned by PPL—making log floats more difficult by *lowering* water levels during what were previously high-flow months and erecting artificial obstructions. JA 258-59. Nevertheless, not long after statehood, the Madison River Lumber Company floated logs down most of the middle portion of the Madison, despite the relatively lower July waters. JA 155.

The Madison is best known today for its prized fishing—something close to "religion" in Montana. Norman MacLean, *A River Runs Through It and Other Stories* 1 (1976). The river is classified as a "blue ribbon" trout stream and attracts avid fishermen from all around the world. JA 261. Commercial fishing drift

---

[7] On July 27, 1806, the Blackfeet attacked Lewis and his party, stealing some of their guns and attempting to escape with their horses. Lewis and other members of the party took chase to recover the stolen property, eventually apprehended the culprits, and recovered their horses. *See* 5 *Original Journals of the Lewis and Clark Expedition* (R. G. Thwaites ed., 1904) 219-28.

boats regularly navigate the Madison near the Ennis and Hebgen dams. JA 261-62; Opp. App. 63. These drift boats are the historical successors to the shallow-draft pirogues and bateaux used by Lewis and Clark and traders in early commerce. *See generally* Richard Fletcher, *Drift Boats and River Dories* 53-63 (Stackpole Books 2007). The Madison is today among the most heavily used rivers in Montana—just behind the Missouri—in angler days. Opp. App. 63.

C. This Litigation

1. In 2003, parents of Montana school children filed suit in federal district court in Montana against PPL and other privately owned utilities on behalf of Montana's public school children, seeking compensation for defendants' use of state-owned riverbeds at various hydroelectric generation facilities. The suit alleged that the riverbeds occupied by the dams comprised state-owned trust lands for which Montana was obliged under the state constitution to seek compensation in the form of rent for their use. The State intervened in the action and filed its own complaint seeking compensation from defendants for use of the riverbeds. The district court dismissed the action for lack of diversity jurisdiction. Pet. App. 3-5.

2. Before the federal action was dismissed, PPL and other hydroelectric utilities filed a declaratory judgment action against the State in Montana state court, seeking a declaration that Montanans are *not* entitled to compensation for the use of the riverbeds at issue. The State counterclaimed, claiming that it owned the riverbeds at issue and seeking a declaration that it was due compensation for their use. Opp. App. 2-3 (¶¶1-2). PPL admitted that its dams were on "navigable river[s]." *E.g.*, Pet. App. 5-8, 17-20; Opp.

App. 17-20 (¶¶ 16, 17-24, 26-27). Instead of contesting navigability, PPL argued that the State's claims for compensation were preempted by the Federal Power Act and the federal navigational servitude because the plants at issue were federally licensed. But after the district court rejected those preemption arguments, PPL did an about-face on navigability.[8]

The State moved for partial summary judgment on navigability. (PPL did not cross-move.) Both sides submitted affidavits attaching various materials. The State's evidence is summarized at Opp. App. 26-57. PPL's affidavits are reprinted at Pet. App. 190-213. The main point of PPL's lead expert (Emmons) was that the Missouri and Clark Fork were not navigable because it was "impossible" to take a boat down the Great Falls or Thompson Falls *themselves*. *Id.* at 197; *see id.* at 197-201, 203. PPL's other expert (Schumm) focused on the Madison. *Id.* at 205-15. Applying the test for navigability established by *The Daniel Ball*, 77 U.S. at 563—which holds that rivers are "navigable in fact when they are used, or are susceptible of being

---

[8] PPL later tried to disavow its admissions and claimed that it had never admitted navigability for *title* purposes. But neither the State's counterclaims nor PPL's answer contained any limitation in describing the rivers as "navigable." Moreover, the State pleaded that "Montana acquired title to the beds and banks of navigable waters in Montana at issue herein." Opp. App. 2 (¶ 3). PPL made similar concessions in its pleadings and briefs in the preceding federal case. *Id.* at 26-31. Courts have long recognized that such admissions ordinarily are binding. *See, e.g., American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988); *see also Peuse v. Malkuch*, 911 P.2d 1153, 1157 (Mont. 1996). And the Montana district court appropriately found that these admissions were binding on PPL here. Pet. App. 139-43.

used, in their ordinary condition, as highways for commerce"—the district court granted summary judgment for the State. Pet. App. 135, 143.

The court rejected PPL's position—which was the crux of its argument concerning the Missouri—that "the Great Falls clearly prevent navigability" because the *falls themselves* are not susceptible to boat traffic. *Id.* at 138. As the court explained, this Court has long found that natural obstacles "requiring portage" do not defeat navigability when, as the evidence showed here, "'the natural navigation of the river is such that it affords a channel for useful commerce.'" *Id.* (quoting *The Montello*, 87 U.S. (20 Wall.) 430, 443 (1874)). The court explained that the same analysis compelled a finding that the Clark Fork was navigable, despite Thompson Falls, given the evidence that the river was used as a "channel of commerce." *Id.* at 142. The court also held that PPL was bound by its admissions that these rivers were navigable. *Id.* at 139, 142.

As for the Madison, the court recognized that, although there is comparatively "little historical documentation" of its use, the available evidence—which includes reports of use "'by explorers, trappers, miners, farmers, and loggers'" as well as a log float in 1913—established navigability. *Id.* at 143. The court also observed that "[t]oday, the Madison River experiences considerable recreational use," and found that, "[a]s with the Missouri and Clark Fork," PPL was "bound by its admissions" on navigability. *Id.*[9]

---

[9] The Montana summary-judgment rule requires that a party present any "opposing affidavits" before the "day of hearing." Mont. R. Civ. P. 56(c). Two months *after* the district court's ruling

(continued...)

The district court subsequently held a trial on the outstanding issues in the case and ultimately entered judgment requiring PPL to compensate the people of the State of Montana for its use of their riverbeds.

3. The Montana Supreme Court affirmed the district court's navigability ruling. The Court explained that its "independent review of the case law in this area" confirmed that the district court's "understanding of the navigability for title test was correct," including as to the two "crucial aspects" of the district court's ruling: the significance of portages (bearing on the navigability of the Missouri and Clark Fork) and use of post-statehood evidence (bearing on the navigability of the Madison). *Id.* at 53-54.

Relying on *The Montello*, the court held that portages do not destroy navigability (*id.*) or "require a piecemeal classification" of the river (*id.* at 58). The court explained that this Court had long recognized that most of the nation's rivers "'originally present[ed] serious obstructions to an uninterrupted navigation,'" but these "'natural barriers'" did not destroy navigability where the river still "'afford[ed] a channel

---

(continued)
on navigability, PPL purported to make an "offer of proof regarding navigability," comprising hundreds of pages of *additional* reports prepared by its paid experts. JA 38. The district court heard that *proffer* but did not accept these reports as part of the summary judgment record—and could not have under Montana Rule 56(c). PPL thus did not put these documents in the appendix before the Montana Supreme Court or refer to them in that court. PPL nevertheless included the late-filed Emmons report in the appendix to its certiorari petition (at 216-312) and continues to rely on both reports in its merits brief. *See, e.g.*, PPL Br. 14, 16, 17, 18. *Cf.* Br. in Opp. 11 n.1.

for useful commerce.'" *Id.* at 54a (quoting *The Montello*, 87 U.S. at 442-43). Applying that settled principle, the court held that, "[d]espite the presence of portages along the Clark Fork and Missouri Rivers, the historical evidence establishes that they provided a channel for commerce at the time of statehood, or were susceptible of such use." *Id.* at 56.

As for the post-statehood usage of the Madison, the court explained that, under this Court's decisions in *The Montello* and *United States v. Utah*, 283 U.S. 64 (1931), a river is navigable if "it was 'susceptible' of providing a channel for commerce," even if there is little evidence of "'actual use' at or before the time of statehood." Pet. App. 54. Applying that principle, the court held that, "[w]hile the historical usage of the Madison was not well-established, the evidence of a log float on its middle portion in the 19th century, combined with its present-day usage, demonstrates that this river was susceptible of providing a channel for commerce at the time of statehood." *Id.* at 56.

The court also carefully considered PPL's more particularized, evidence-specific objections to summary judgment. *See id.* at 56-62. Although PPL has suggested that the Montana Supreme Court gave short shrift to the navigability issue, the court's treatment of that issue was entirely consistent with the space devoted to this issue in the parties' briefs—in a case in which PPL presented several issues on appeal.[10]

---

[10] Because it agreed with the district court's conclusion that the State was entitled to judgment under the navigability-for-title test, the Montana Supreme Court did not need to reach PPL's direct admissions of navigability. Pet. App. 62.

SUMMARY OF ARGUMENT

The judgment reached by the Montana Supreme Court in this case would have seemed natural to Lewis and Clark and the many pioneers who followed in their wake and helped settle the State. PPL's sharp-edged attack on the reasoning and even motives of the Montana Supreme Court is unfounded and out of step with this Court's precedents. The judgment of the Montana Supreme Court should be affirmed.

I. Montana's interest in the riverbeds at issue in this case implicates a matter of core federalism. Under the equal footing doctrine, title to the lands beneath navigable waters is conveyed to the States upon their admission into the Union by the Constitution itself. That conveyance is consistent with the ancient public trust doctrine recognizing that the lands beneath navigable waters are held in public trust for all to use as common highways of commerce—a principle embodied in American law since at least as far back as the Northwest Ordinance of 1787. This Court has the final say over whether riverbeds are part of a navigable waterway, and thus conveyed to the States under the equal footing doctrine. But in reviewing a state court's judgment that rivers are navigable, there is no basis for the Court to adopt the extraordinary "rule of skepticism" proposed by PPL. Instead, the Court should approach navigability issues with the same care and respect it reserves for other matters bearing on an essential attribute of state sovereignty.

II. The Montana Supreme Court properly articulated the "constitutional test" (Pet. i) for navigability in determining whether Montana took title at statehood to the riverbeds at issue. Indeed, the test framed by the Montana Supreme Court is faithfully

grounded on this Court's navigability decisions going back to *The Daniel Ball*, which look to whether the river—at the time of statehood—was used, or susceptible of being used, as a public highway for commerce. PPL itself acknowledges (at 27) that *The Daniel Ball* supplies the proper constitutional test. In arguing that the Montana Supreme Court did not abide by that test, PPL really is asking this Court fundamentally to *change* the test. The test that PPL proposes is at odds not only with more than a century of this Court's jurisprudence, but with the concept of navigability—and the role of rivers in American life—that would have been familiar to the Framers at the time the Constitution was adopted.

As to the Missouri and Clark Fork, PPL's overriding complaint is that the Montana Supreme Court did not carve out the Great Falls and Thompson Falls from the surrounding waters and hold that the riverbeds underlying the falls are non-navigable because the *falls themselves* were not passable by boat. But since as far back as *The Montello*, this Court—relying on *The Daniel Ball*—has held that "obstructions" that preclude "unbroken navigation" do *not* defeat navigability, where the obstructions were portaged so that the rivers continued to serve as public highways of commerce. Here, there is undeniable evidence that the Great Falls and Thompson Falls were portaged so that the rivers continued to serve as public highways for commerce at the time of statehood. For example, in the 1860s, during the Montana gold rush, gold was transported down the Missouri from Helena to Fort Benton—and then back East—with the aid of a portage around the Great Falls. Although the falls prevented "unbroken navigation," they did not

stop the rivers from serving as highways of commerce—and thus they do not defeat navigability.

Relying on *United States v. Utah*, 283 U.S. 64 (1931), PPL argues that courts must carve out any non-"*de minimis*" or "negligible" interruption as its own segment and analyze that segment separately for navigability-for-title purposes. But *Utah* does not support PPL's segmentation rule. Unlike the falls at issue in this case (and the interruptions in *The Montello*), the canyon involved in *Utah* was *not* fully portaged, so the highway of commerce came to a dead end at the canyon. Nor does PPL's segmentation rule have much to commend it. PPL does not define what interruptions are "*de minimis*" or "negligible," and its segmentation approach is a recipe for uncertainty and invites litigation by riparian owners seeking to isolate and break off purportedly "non-navigable" bits and pieces. As *The Montello* teaches, what matters is not whether a particular interruption is one mile, 4.35 miles, or 20 miles, but whether the attendant stretch of the river served as a continuous highway of commerce, notwithstanding the interruption. That test is not only consistent with this Court's precedent, it is consistent with the history and geography of North America.

As to the Madison, PPL takes aim at the Montana Supreme Court's consideration of post-statehood evidence of use as relevant to the river's navigability at statehood. But since at least *The Daniel Ball* it has been settled that navigability may be determined not only on *actual* use as a highway for commerce, but *susceptibility* for use as such. The Montana Supreme Court simply recognized—as this Court itself has—that post-statehood evidence may be "relevant upon the issue of the susceptibility of the rivers" when it

shows that the rivers were used as highways of commerce *at statehood*. *Utah*, 283 U.S. at 82. Nor is there any merit to PPL's objection about the "*kind* of commerce that counts" (PPL Br. 49 (emphasis added)) in demonstrating navigability. Log floating was one of the classic commercial uses of rivers in the 19th century, and there is no reason to disregard commercial recreational uses—like drift boat fishing—where the boats used by present-day river-goers are comparable to the boats used by those plying and trading on the waters before statehood.

III. Because this Court granted certiorari solely to address whether the Montana Supreme Court articulated the proper "constitutional test" for navigability (Pet. i), there is no reason for the Court to entertain any record-specific objections to the grant of summary judgment. Nor is there any reason to turn this state court case into a reprisal of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), on when evidence is sufficient to create a material issue of disputed fact. In any event, contrary to PPL's objections, there is nothing inherently problematic—or off limits—about granting summary judgment on navigability issues. Courts and special masters frequently make summary judgment determinations on navigability. PPL's problem is not that the Montana courts improperly applied the standard for summary judgment. Its problem is that it litigated this case based on a mistaken understanding of the legal test for navigability. Thus, for example, PPL did not submit *any* evidence rebutting the fact that the Great Falls and Thompson Falls were portaged so that the rivers served as continuous highways of commerce. Properly

viewed, the summary judgment record supports the judgment of the Montana Supreme Court.

ARGUMENT

I. THE QUESTION PRESENTED RAISES A CORE ISSUE OF FEDERALISM

Montana's title to the riverbeds at issue in this case "uniquely implicate[s]" its sovereign interests. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284 (1997). Indeed, this Court has long recognized that state ownership of "lands underlying navigable waters" is "an essential attribute of sovereignty." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). Under the equal footing doctrine, the States' title to such lands is conferred "by the Constitution itself." *Idaho*, 521 U.S. at 283 (citations and internal quotation marks omitted). State ownership over such lands thus represents a core component of federalism. *See Idaho v. United States*, 533 U.S. 262, 272 (2001); *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *see also* Sonia Sotomayor, Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 Yale L.J. 825, 837 & n.69 (1979) (explaining that constitutional equal footing doctrine rests upon considerations of "'dual federalism'").

The equal footing doctrine is grounded on the centuries-old "public trust doctrine," which dates back at least to Ancient Rome and was adopted by the English Crown in the Magna Carta. *See Idaho*, 521 U.S. at 284; *supra* at 4-5. The public trust doctrine protects "'the paramount right of public use of navigable waters,'" and recognizes that the sovereign

holds the submerged lands beneath those waters "'as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade, and intercourse.'" *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458 (1892) (citation omitted). This principle was vital to the nation at the time of the founding, and before, when navigable waterways served as the primary arteries for inland travel and commerce. And it is embodied in the Northwest Ordinance of 1787, which was later enacted into federal law by the First Congress, and declares that "[t]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free."[11]

Especially in view of the constitutional foundation for the State's title to lands underlying navigable waters and its responsibility to manage public trust lands, PPL's attack on the motives of the State in seeking to protect the title to the riverbeds at issue is misguided. This Court generally presumes the good faith of all government actors, including the States. There is no reason to proceed from any other understanding when a State asserts title to public trust lands. Yet PPL essentially asks this Court to adopt a constitutional presumption that state claims of navigability are "contriv[ed]," and apply "a particular

---

[11] An Ordinance for the Government of the Territory of the United States North West of the River Ohio (Northwest Ordinance of 1787) (adopted by the First Congress in 1 Stat. 50, 52 (1789)). Because the Northwest Ordinance existed at the time of the founding and was enacted into law by the First Congress, it is strong evidence of how the Framers viewed the public trust doctrine embodied in the equal footing doctrine.

skepticism toward navigability determinations made by a State's own courts in the State's favor." PPL Br. 29-30. That approach would turn upside down cardinal principles of respect for the States, and for the judgments of state courts, that are central to "Our Federalism" and embedded in the constitutional design. This Court of course has the final say over the validity of a State's assertion of title over riverbeds under the equal footing doctrine. But in resolving such claims, there is no basis for proceeding from any premise but that the State has acted in good faith—and on behalf of the public trust it seeks to protect.

Federalism comes into play in another way in this case. To the extent that the riverbeds at issue in this case are held to be *non*-navigable, the United States no doubt would claim title to the lion's share of those lands. *See United States v. Utah*, 283 U.S. 64, 75 (1931); U.S. Br. 1 ("Where the waters were non-navigable at the time of statehood, the United States has asserted its ownership of the riverbeds ...."). As it turns out, the United States government historically has been adverse to the States in cases where title to submerged lands is at issue. *See, e.g., Alaska v. United States*, 545 U.S. 75, 100 (2005); *Utah*, 283 U.S. at 76; *United States v. Oregon*, 295 U.S. 1, 15 (1935); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922). Here, the United States takes the position that the rivers at issue are navigable for *federal* regulatory purposes, but not for state title purposes—a win-win for the federal government.

Ultimately, the constitutional test of navigability advanced by PPL, and fully backed by the United States, would have the effect of stripping the States of sovereignty over the lands underlying navigable waters by fundamentally narrowing the concept of

navigability long recognized by this Court. At a minimum, the Court ought to approach that far-reaching argument with the caution it typically exercises in matters impeding state sovereignty.

II. THE STATE COURT APPLIED THE PROPER CONSTITUTIONAL TEST FOR NAVIGABILITY IN DECIDING THIS CASE

PPL challenges the "constitutional test" (Pet. i) articulated by the Montana Supreme Court in deciding whether the rivers at issue are navigable. As the United States explained in its invitation brief, PPL's attacks on the Montana Supreme Court's decision are based largely on an "overstate[ment of] the Montana Supreme Court's rationale," U.S. Invitation Br. 10, and a misreading of this Court's precedents, *see id.* at 10-17. Fairly read, the navigability test articulated by the Montana Supreme Court is entirely consistent with this Court's precedents going back to *The Daniel Ball* (1870), and with the historical conception of navigability embodied in the Northwest Ordinance. In the end, it is the constitutional test proposed by PPL—not the one articulated by the Montana Supreme Court—that dramatically departs from settled law.

Indeed, although PPL acknowledges that the test for navigability is constitutionally grounded, it bases its position on a conception of the role of rivers—and trade and travel along rivers—that would have been foreign to the Framers. The Framers lived in a time when rivers provided the major arteries of commerce and travel in North America, and when rivers were regularly portaged so that trade and commerce could continue along the waters. The Framers would have appreciated that "there are but few of our fresh-water rivers which did not originally present serious

obstacles to an uninterrupted navigation." *The Montello*, 87 U.S. at 443. And they would not have conceived of a constitutional test for navigability under which portages around such obstacles would destroy navigability or require chopping up the nation's great rivers into navigable and non-navigable pieces based on the presence of such portageable interruptions.

This Court should reject PPL's invitation to adopt such an ahistorical conception of navigability now.

A. The Montana Supreme Court Applied This Court's Constitutional Test

The Montana Supreme Court based its conclusion that the State owns the riverbeds at issue on its determination that the evidence showed that the Missouri and Clark Fork "provided a channel for commerce at the time of statehood," and that the Madison was "susceptible of providing a channel for commerce at the time of statehood." Pet. App. 56. That analysis comes right out of this Court's decisions.

1. More than a century ago, in *The Daniel Ball*, this Court held that "rivers must be regarded as public navigable rivers in law" if they "are navigable in fact." 77 U.S. (10 Wall.) at 563. Rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.*

Four years later, this Court elaborated on that basic test in *The Montello*, explaining that "the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." 87 U.S. at 441. "If this be so," the Court held, "the river is navigable in fact, although its

navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars." *Id.* The Court rejected "the rule laid down by the district judge as a test of navigability," under which a river is non-navigable insofar as "obstructions" requiring portage prevent "unbroken navigation." *Id.* at 442. As the Court explained, the Northwest Ordinance itself had recognized such "carrying-places," where "boats must be partially or wholly unloaded and their cargoes carried on land," and the district court's test "would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break." *Id.* at 442-43. "Indeed," the Court continued, "there are but few of our fresh-water rivers which did not originally present serious obstacles to an uninterrupted navigation." *Id.* at 443.

Applying *The Daniel Ball* test, the Court held that the Fox River is navigable, notwithstanding "several rapids and falls" in its natural state that impeded "unbroken navigation," even with the use of small "Durham boats," and thus required "a few portages." *Id.* at 439, 441, 442. The Court focused on the history of the Fox River as means of trade—*i.e.*, "highway of commerce"—in the region and further explained that its test was consistent with "the purpose of the [Northwest] Ordinance of 1787." *Id.* at 442, 444.[12]

---

[12] The United States asserts (at 25) that "the obstructions to navigation [in *The Montello*] were removed by artificial navigation (locks and canals)." That is true—but misleading—because the Court determined that the Fox River was navigable based on the natural state of the river "*before* the navigation of the river was improved." 87 U.S. at 443 (emphasis added).

2. PPL acknowledges (at 27) that *The Daniel Ball* states the proper test, but claims that the Montana Supreme Court improperly relied on *The Montello* and so-called non-title cases. According to PPL, because *The Montello* did not address "*title* navigability," it does not count. PPL Br. 42 (emphasis added). PPL's attempt to sink *The Montello* is understandable—it answers PPL's theory that portaged interruptions destroy navigability. But PPL's argument fails.

The Montello Court did not believe that it was doing anything but applying *The Daniel Ball* test to the Fox River stretch at issue. The very first sentence of the decision refers to *The Daniel Ball*; the following sentences set forth the constitutional test established by *The Daniel Ball*; and the decision then states that the Court's holding is based on the "[a]ppl[ication]" of that test. 87 U.S. at 439. Moreover, far from purporting to break new ground, the Court observed that "[t]he views that we have presented on this subject receive support from the courts of this country that have had occasion to discuss the question of what is a navigable stream." *Id.* at 443 & n.16 (citing cases).

In the 140 years since they were decided, this Court has consistently relied on *The Daniel Ball* and *The Montello* in stating the constitutional test for state title to submerged lands. The Court did just that in *Utah*—the "title" case on which PPL and the United States principally rely. There, the Court drew the "test for navigability"—as "frequently stated by this Court"—directly from *The Daniel Ball* and *The Montello*. *Utah*, 283 U.S. at 76; *see also, e.g.*, *Packer v. Bird*, 137 U.S. 661, 667 (1891) (relying on *The Daniel Ball*); *Oklahoma*, 258 U.S. at 586 (citing *The Daniel Ball* and *The Montello*); *Brewer-Elliott Oil & Gas Co. v. United*

States, 260 U.S. 77, 86 (1922) (invoking *The Montello*'s "channel for useful commerce" test); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (citing *The Montello*); *Oregon*, 295 U.S. at 15 (relying on *The Daniel Ball*).

This Court also has observed that courts should be mindful of "the purpose for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 170-71 (1979). And the Court has adapted *The Daniel Ball* and *The Montello*'s test for navigability in three specific respects depending on the context in which it is invoked: (1) for title cases, the Court looks to the river's natural state, whereas for regulatory cases it considers the river's natural *and* improved condition; (2) for title cases, the Court determines navigability as of the time of statehood, whereas for regulatory cases it considers the river's condition today; and (3) for title cases, the Court asks whether the river was part of a useful channel for commerce, local or otherwise, whereas for regulatory cases it requires the river to be part of a channel of *interstate* commerce. *See* U.S. Br. 9-10. But these settled variations are in no way implicated by the decision under review: The Montana Supreme Court considered navigability at the time of statehood, looked to the rivers' natural state, and considered whether the rivers were part of a useful channel of commerce. Pet. App. 54-62.

It simply does not follow, as PPL suggests, that navigability cases from one context are categorically inapposite—and should be rigorously segregated from—cases that arise in other contexts. The inquiries overlap far more than they diverge. That is why this Court has relied on title and regulatory cases

interchangeably, except insofar as the settled distinctions above are implicated. Indeed, even PPL does not follow its own proposed dichotomy, because it relies affirmatively on regulatory cases, when it suits its own interests to do so. *See* PPL Br. 37, 49, 54 (relying on non-title cases); Pet. 21, 24. The dichotomy that PPL and the United States now try to create between *The Daniel Ball* and *The Montello* is completely artificial and out of step with precedent.

Principles of *stare decisis*, not to mention the need for "certainty and predictability" that PPL itself touts (at 33), counsel strongly against reconceiving more than a century of this Court's navigability precedents by retroactively holding that this Court's title and regulatory cases must be rigidly compartmentalized in a way that is completely at odds with this Court's own reliance on and use of those precedents.

B. The Montana Supreme Court Properly Considered The Stretches That Comprised The Relevant Channels Of Commerce

PPL argues (at 40) that the Montana Supreme Court erred by taking a "'whole river' approach" (at 40) to navigability, without considering navigability on a "segment-by-segment basis" (at 34). That argument is a straw man. The phrase "river as a whole" (or anything like it) does not appear in the Montana Supreme Court's decision. And the State has never argued, and the Montana courts did not hold, that a river that is navigable "as a whole" is necessarily navigable in fact along its entire length. At the certiorari stage, the United States recognized that PPL's "river as a whole" argument was based on an "overstat[ement of] the Montana Supreme Court's rationale" (U.S. Invitation Br. 10), though in its merits-

stage brief it chooses to perpetuate that mischaracterization itself (U.S. Br. 11-12, 18).

The Montana Supreme Court analyzed whether the rivers at issue were navigable by looking not to the rivers "as a whole," and not to natural interruptions in isolation (as PPL proposes), but by considering whether the stretches of the rivers that included the interruptions on which PPL focuses formed a continuous highway for commerce, notwithstanding the interruptions. Pet. App. 56. That analysis is perfectly consistent with this Court's precedents.

1. The crux of PPL's challenge to the navigability of the Missouri and Clark Fork is that the Montana Supreme Court should have focused exclusively on the natural interruptions—on which PPL's power plants generally sit—and should have disregarded the surrounding stretches of the rivers. *See, e.g.*, PPL Br. 40, 41, 59. As PPL sees it, because "boats ... could not pass the falls area itself," the riverbeds at issue are not navigable—end of story. *Id.* at 12; *see id.* at 8, 15-16, 46; *see also* Pet. App. 198 (emphasizing that "there has *never* been any navigation on the Missouri River in the Great Falls Reach because the physical characteristics of the falls prevent it") (Emmons); *id.* at 202 (same concerning Thompson Falls). The United States repeats this refrain. U.S. Br. 22 (emphasizing that the *falls themselves* were "impassable"). The Montana Supreme Court properly rejected that line of analysis.

PPL's argument is based almost entirely on *Utah*, which PPL says (at 36) "exemplifies the segment-by-segment approach." According to PPL, *Utah* holds that a court must analyze not just "the specific river sections at issue" but any "stretches *within* those sections that [have] distinct topographical

characteristics." PPL Br. 37 (emphasis added). Anything but a "*de minimis*" or "negligible" obstacle, PPL maintains (at 38), must be analyzed separately—and would almost certainly be deemed non-navigable in PPL's view, since an obstacle is by definition impassable. That approach finds no footing in *Utah*.

The *Utah* Court did not carve up the Colorado River like a Thanksgiving turkey, hacking away at every non-*de minimis* portion containing a natural obstacle and considering it in isolation as a new "stretch" with each change in the river's physical characteristics. Rather, the Court analyzed the head of navigation and concluded that, despite many obstructions in its natural state, the entire Colorado river was navigable, with the exception of a 36-mile stretch (Cataract Canyon), which had *never* been entirely portaged and had geological features making that portage infeasible. The Court therefore concluded that the Colorado ceased to be navigable at that point. *See* 283 U.S. at 77; *see also* PPL Supp. Br. App. 10-13.

Cataract Canyon is completely different than the Great Falls and Thompson Falls, and not just because—at 36 miles long—Cataract Canyon is more than *twice* as long as Lewis and Clark's 17-mile portage around the Great Falls. Unlike the Great Falls and Thompson Falls, Cataract Canyon was "not ... fully portaged." U.S. Br. 23 n.13. *Parts* of the canyon were portaged. *See* PPL Supp. Br. App. 12. But there is no evidence that the canyon was portaged so that the waterway—above and below the canyon—served as a continuous highway of commerce, or even that the canyon was susceptible to such use. Instead, it was uncontested that the canyon, and its forbidding terrain (*see id.*), created a dead end. In this case, by contrast,

it is undeniable that trade and travel portaged around the falls in question and that the river stretches served as *continuous* public highways of commerce.

PPL also points to *Oklahoma v. Texas*, 258 U.S. 574 (1922), and argues (at 38) that instead of analyzing the entire 1360-mile Red River the Court considered "the much shorter segment at issue." But that "much shorter segment" was 539 miles long—*i.e.*, *the entire length* of the Red River in the State of Oklahoma. 258 U.S. at 582, 585 & n.4. Moreover, the Court considered that entire 539-mile stretch even though the dispute between Oklahoma and Texas concerned "the proceeds of oil and gas taken from 43 miles" of the riverbed. *Id.* at 579. *Oklahoma* thus provides no support for the kind of piecemeal segmentation approach that PPL advances here, which requires a court to break a river up into navigable and non-navigable segments for any interruption that is not *de minimis*.[13]

2. PPL does not define what counts as a "*de minimis*," or "negligible," interruption for purposes of its über-segmentation approach. But it latches on to *Utah*'s consideration of "the first 4.35 miles of the stretch of the Colorado river" at issue in that case and argues that that stretch is not *de minimis*. PPL Br. 38. As the United States explained in its invitation brief (at 11), "*Utah* does not stand for the legal proposition that any 4.35-mile interruption in navigability must be treated as a distinct segment." Indeed, the "4.35-mile

---

[13] The other cases relied upon by PPL for its novel segmentation regime are also inapposite. *See* U.S. Invitation Br. 12-13 (explaining that these cases "did not address how to treat non-navigable 'middle section[s] of an otherwise-navigable river'") (quoting Pet. 20) (alteration in original)).

segment" relied upon by PPL (at 38) is not an *interruption* at all. Rather, Utah argued (and this Court agreed) that those 4.35 river miles properly belonged with the navigable waters upstream (the Green and Grand Rivers, which came together to form the Colorado), not the Cataract Canyon stretch that everyone agreed was non-navigable. *See Utah*, 283 U.S. at 89; *see also* U.S. Invitation Br. 12.

Moreover, elsewhere in *Utah* the Court made clear that it did not view a distance of 4.35 miles as significant in the context of a river like the Colorado, calling the 4.35 miles a "short stretch." 283 U.S. at 89. Likewise, the *Utah* Court saw no problem with the special master's reference to one stretch of the Grand River as "*only* six miles in all." *Id.* at 85 (emphasis added). Characterizing a stretch of several miles as "short" might seem odd in the abstract, but it is not in the context of a river. *Cf. Nebraska v. Wyoming*, 325 U.S. 589, 596 (1945) (referring to "short stretch" of "40-odd miles" of a river). And in the same vein, to the extent that it has any constitutional relevance to the navigability inquiry here, the stretches at issue in this case are likewise properly regarded as "short."

But as cases like *The Montello* teach, what matters in gauging navigability is not whether an interruption is one mile, 4.35 miles, or 20 miles long. What matters is whether the attendant stretch of the river served as a continuous highway of commerce—notwithstanding the interruption. *Supra* at 28-30. If PPL's position had been law, then the Court's decision in *The Montello* would have simply focused on identifying the impassable segments of the Fox River, isolated those segments from the rest of the river, and declared them to be non-navigable. That, in essence, is what the

district court did in *The Montello*. *See* 87 U.S. at 442. But this Court rejected that approach and looked to whether the rivers served as continuous highways of commerce—despite the obstacles. *Id.* at 442-43.

This does not mean that interruptions cannot defeat navigability. They can—and do. The longer or more severe the interruption, the more difficult it will likely be to establish navigability. In *Utah*, for example, it was clear that the highway of commerce *stopped* at the 36-mile Cataract Canyon; no one argued that the canyon was portaged to connect a trade route along the river above and below the canyon. This case is just the opposite. As the Montana Supreme Court explained, on the Missouri the Great Falls was portaged so that trade flowed from Three Forks to Fort Benton. Pet. App. 61. And on the Clark Fork, Thompson Falls was portaged to establish a trade route from the confluence of the Flathead River (above the falls) to Lake Pend Oreille in Idaho. *Id.*; *see supra* at 9-12.

The focus on whether the pertinent stretches were used as (or are susceptible for use as) a highway of commerce establishes a workable and time-honored principle grounded on more than a century of case law. By contrast, PPL's hyper-segmentation rule is highly manipulable and seems designed primarily to aid hydroelectric generators whose plants generally sit on interruptions. PPL offers little guidance, other than its vague "*de minimis*" or "negligible part" exception, on what interruptions do *not* qualify for segmentation. PPL's test thus is a recipe for uncertainty in an area in which PPL itself (at 33) demands "predictability," and will require courts to go back and carve up waterways that have long been found navigable into "navigable" and "non-navigable" pieces. After all, "there are but

few of our fresh-water rivers which did not originally present serious obstacles to an uninterrupted navigation." *The Montello*, 87 U.S. at 443.

C. The Montana Supreme Court Properly Recognized That Portaging Does Not Automatically Defeat Navigability

In a variation on their segmentation argument, PPL and the United States argue that portaged interruptions on a river are not "themselves navigable for the ... purpose of establishing title." PPL Br. 42; *see* U.S. Br. 23-27. In other words, according to PPL and the United States, any non-*de minimis* interruption requiring portage is non-navigable for title purposes. That position is inconsistent with the purposes of the public trust and equal footing doctrines as well as more than a hundred years of precedent.

1. As discussed, this Court has recognized since *The Montello* that falls, rapids, or other interruptions requiring portage do not destroy navigability—so long as the surrounding stretch of the river served as a useful channel for commerce. *Supra* at 28-30. And this Court has repeatedly reaffirmed—pointing to *The Daniel Ball* and *The Montello*—that "[n]avigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages." *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921); *see id.* at 121-22. Indeed, in *Economy Light & Power Company*, the Court confirmed the navigability of a river stretch that included over 24 miles of nearly-consecutive interruptions, including "a 7-mile portage," and a land "transfer of over 11 miles." *Economy Light & Power Co. v. United States*, 256 F. 792, 795-96 (7th Cir. 1919); 256 U.S. at 124 (affirming); *see also St. Anthony Falls*

Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349, 359 (1897) (holding river stretch navigable "at all points" including waterfall and surrounding rapids).

Likewise, other federal and state courts—in both the title and regulatory contexts—have recognized that portageable obstacles do not destroy navigability, and settled expectations have formed based on this rule.[14] To take just one example, it has been settled for more than 50 years that the riverbeds underlying Niagara Falls, which of course required a portage, are owned by the State of New York—"even at the point of the falls." *Niagara Falls Power Co. v. Duryea*, 57 N.Y.S.2d 777, 784 (Sup. Ct. 1945); *see also In re State Reservation at Niagara*, 37 Hun. 537, 16 Abb. No. Cas. 395 (N.Y. Sup. Ct. 1885), *appeal dismissed*, 7 N.E. 916 (1886). Under PPL's rule, however, the riverbeds underlying the falls would have to be carved out and declared non-navigable for title purposes.

2. PPL tries to tackle *The Montello*'s rule that portaging does not defeat navigability in two different ways. First, it argues that *The Montello* "addressed *regulatory* navigability, not title navigability." PPL Br. 42. But that is beside the point because, as

---

[14] *See, e.g., Knott v. FERC*, 386 F.3d 368, 372-73 (1st Cir. 2004); *Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1433 (9th Cir. 1993); *Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992); *Montana Power Co. v. FPC*, 185 F.2d 491, 493-94 (D.C. Cir. 1950); *Pennsylvania Water & Power Co. v. FPC*, 123 F.2d 155, 163 (D.C. Cir. 1941); *Alaska v. United States*, 662 F. Supp. 455, 466-67 (D. Alaska 1987), *aff'd*, *Alaska v. Ahtha*, 891 F.2d 1401 (9th Cir. 1989); *see also* 27 William Mark McKinney & Burdett Alberto Rich, *Ruling Case Law*, Waters, § 218, at 1310 (1920); *see generally* John A. Humbach, *Public Rights in the Navigable Streams of New York*, 6 Pace Envtl. L. Rev. 461(1989).

discussed, this Court has for more than a century relied upon *The Montello* interchangeably with *The Daniel Ball* in describing the constitutional test for navigability—and even did so in *Utah*, the case that PPL itself holds out as the vanguard for "title navigability." *See supra* at 31-32. Second, PPL argues that *Utah* establishes that "portageable interruptions" *do* defeat navigability, pointing to the fact that the Court held that the Cataract Canyon stretch was not navigable. PPL Br. 42. As discussed, however, Cataract Canyon was not fully portaged and so commerce came to a dead end at the canyon. In that key respect, *Utah* is entirely different from *The Montello*—and this case. *Supra* at 34-35.

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) (*AEP*), cited by the United States, is not to the contrary. As the United States itself concedes (at 25), that case did not involve "any obstructions requiring a portage." Moreover, in the passage relied upon by the government, the Court simply noted differences between the title and regulatory inquiries that are not pertinent here—namely, the fact that the regulatory inquiry is not confined to the time of statehood or the rivers' natural state. *See* 311 U.S. at 407-08. But, as the Montana Supreme Court recognized (Pet. App. 56), the State's assertion of title to the Missouri and Clark Fork here is based on evidence of actual use of the rivers in their natural state and before statehood. *Supra* at 18-19.[15]

---

[15] The United States suggests (at 24-25) that this Court should draw a negative inference from Congress's definition of "navigable waters" in 16 U.S.C. § 796. This is a 180-degree change from the government's position before this Court in *Montana Power*

(continued...)

3. As a fallback, PPL suggests (at 42) that "this Court's precedent at most might permit treating a portageable stretch of an otherwise navigable river as itself navigable for title purposes only if it qualified as a 'short interruption' or 'negligible part' within the meaning of *Utah*." *See* U.S. Br. 24. PPL takes this Court's language out of context and fails to account for the fact that "short" is a relative term when it comes to describing something like a river. *Supra* at 36. But in any event, that standard is unworkable for the same reasons that PPL's "*de minimis*" or "negligible part" exception to its segmentation rule is impracticable. *See supra* at 35-37. And once it is recognized (as this Court has held since *The Montello*) that portages do *not* defeat navigability where the river is used as a continuous highway of commerce, then there is no constitutional or principled basis for arbitrarily cutting off navigability at a particular mile marker.

PPL argues (at 42) that the 17-mile portage of the Great Falls was too long and "arduous" to qualify under this test. Early Americans, particularly those who helped settle the West, had a hardier conception of distances than the typical modern day city slicker.

(continued)
Company, where the Solicitor General told the Court that "this definition is *in accord with* established principles," and specifically invoked the holding in *The Montello*. Add. 8a (emphasis added). The United States was right then. Section 796 expands the navigability inquiry in certain respects for regulatory purposes (natural vs. improved condition and statehood v. present-day use), but not insofar as it recognizes that portages do not destroy navigability. More important, nothing in § 796 could narrow the *constitutional* definition of navigability for title purposes.

Lewis and Clark, for example, regularly traveled 20 or more miles a day during their expedition. There is no reason why the Constitution would draw a distinction between a 17-mile portage and a one-, five-, or 10-mile portage. *Cf. Economy Light & Power*, *supra* (7-mile portage). Actions speak louder than labels. By definition, any interruption that was in fact portaged to allow the river to continue to serve as a highway of commerce is "short" enough for any constitutionally relevant navigability purpose.

Moreover, the question for purposes of this case is not how long it took *Lewis and Clark* to portage the Great Falls—on the first try by any explorer, in an unknown territory roamed by grizzlies, with a full expedition (and a seriously ill Sacagawea) in tow. It is whether the falls were portaged at statehood so that the river was used as a highway of commerce. They were. By the 1860s, the portage was conducted regularly by large numbers of miners under far less "arduous" conditions and in a fraction of the time. *See supra* at 10-11. This history conclusively refutes PPL's suggestion (at 41) that the Great Falls portage was "wholly incompatible with commercial navigation."[16]

---

[16] The possibility that a river "could be portaged *in theory*" does not establish navigability. U.S. Br. 24 (emphasis added). Just as the application of the "susceptibility for use" prong of *The Daniel Ball*'s navigability test must be based on a realistic assessment of what is susceptible, so too must an assessment of the feasibility of portage. For example, given the history and geography of Cataract Canyon (*see supra* at 34), the theoretical possibility that an Ernest Shackleton might find a way to portage the canyon is not enough to establish navigability. Moreover, the key point is not simply whether the river was portaged, but whether it was portaged so that the river served *as a continuous highway of*

(continued...)

4. Finally, PPL's and the United States' position that portage always (or invariably) defeats navigability is out of step with the history of the nation—and the geography of North America. As *The Montello* recognizes in discussing the travels of the likes of Marquette and Joliet (87 U.S. at 440), portaging was a common means of overcoming obstructions along waterways that indisputably served as key channels of commerce and trade. The many towns and rivers across the country with "portage" in their name—like Portage City, Wisconsin (*id.* at 439) and Portage Creek, Montana—not to mention the reference to the "carrying places" in the Northwest Ordinance, speak volumes about how deeply ingrained the practice of portage was in early American travel and commerce. Adopting PPL's position would disregard the deeply rooted historical fact that interruptions necessitating portages did not prevent a river from serving as a public highway of commerce in America.

D. The Montana Supreme Court Properly Considered The Madison's Susceptibility For Use As A Highway Of Commerce

PPL's remaining criticisms of the Montana Supreme Court's decision relate principally to the Madison River and focus on its articulation of the "susceptible-for-use" prong of the navigability test. Here again, PPL's attacks prove unfounded.

(continued)
commerce. As discussed, the river stretches here were not simply portageable "in theory"; they were regularly portaged *in fact* by those using the rivers as public highways of commerce.

1. PPL acknowledges that *The Daniel Ball* test considers not only whether a river was actually used as a highway of commerce at statehood, but whether it is "'*susceptible* of being used'" as such. PPL Br. 27 (quoting *The Daniel Ball*, 77 U.S. at 563 (emphasis added)). But PPL argues that this Court should convert the *alternative* "susceptibility" prong into a "rare" exception that can be invoked only when there is "limited or non-existent settlement in the region, and even then only if river conditions are the same today as at statehood." *Id.* at 26; *see id.* at 43, 45. In other words, without asking this Court to overrule any precedent, PPL essentially asks this Court to all but scuttle the "susceptibility for use" prong.

The "susceptibility for use" prong has been a fixture of the constitutional test for 140 years. *The Daniel Ball*, 77 U.S. at 563; *Utah*, 283 U.S. at 76; *Holt State Bank*, 270 U.S. at 56. There is no evidence that it has proved unworkable or ineffectual in screening navigability claims. To the contrary, the "susceptibility for use" inquiry makes perfect sense in light of the purposes of the equal footing and public trust doctrines. The Founders no doubt understood that not all navigable rivers in America would have documented instances of commercial trade at the time of statehood. And although the navigability test is focused on navigability *at the time of statehood*, there is no reason to deny States title to rivers that were capable of meeting the navigability test at statehood.

Under well-settled law, the Montana Supreme Court in no way erred in holding that the Madison was navigable based on its conclusion that the Madison "was susceptible of providing a channel for commerce at the time of statehood." Pet. App. 56.

2. PPL tries a backdoor attack on the "susceptibility for use" prong by arguing (at 47) that this Court should adopt a rule that reliance on "modern-day usage" is "strongly disfavored." But there is no reason for this Court to adopt a special evidentiary rule for navigability determinations. The ordinary rules of evidence, including the rule of relevance (*e.g.*, Mont. R. Evid. 401), suffice. This Court has long recognized that post-statehood evidence may be "relevant upon the issue of the susceptibility of the rivers" when it shows that the rivers were used as highways of commerce at the time of statehood. *Utah*, 283 U.S. at 82; *see* U.S. Invitation Br. 15 (recognizing that such evidence "may be probative of navigability at statehood"). The Montana Supreme Court simply recognized that commonsense rule. *See* Pet. App. 55-56 (given that navigability be based on actual use or susceptibility for use, "present-day usage of a river *may be probative* of its status as a navigable river *at the time of statehood*") (emphasis added).

Nor is there anything suspect about the *way* in which the Montana Supreme Court consulted post-statehood evidence. PPL claims (at 48) that the court failed to take into account that the flow of the river was altered by PPL's dams. But the Montana Supreme Court specifically recognized that the flow of the river had been "altered" by PPL's dams, albeit not in the way PPL would have liked. Pet. App. 58; *see id.* at 57. As the court—and PPL's own expert—recognized, the dams *reduced* the flow of water along the Madison during most of the year. *Id.*; *see* Pet. App. 210-11 (Schumm). The Montana Supreme Court could take that asserted change into account and conclude that—since the river would have been only *more* navigable

before the dams at least part of the year—the evidence of substantial drift boat use on the Madison today was relevant to, and supported, a finding of navigability at statehood. Resp. Mont. S. Ct. Br. 31-32.

3. PPL's highly restrictive test for the "*kind* of commerce that counts" (at 49 (emphasis added)) in gauging navigability also should be rejected. This Court has admonished that navigability for title "'does not depend on *the mode* by which commerce is, or may be, conducted.'" *Utah*, 283 U.S. at 76 (emphasis added). And the Court has recognized log-floating, in particular, as a legitimate form of "commerce" for purposes of determining a State's title to navigable waters for at least 114 years. *St. Anthony Falls Water Power Co.*, 168 U.S. at 359 (relying on fact that river stretch had been used for floating "logs with chutes that are artificially prepared" in finding navigability, *even though it was asserted that the stretch could not* support boat traffic); *see also The Montello*, 87 U.S. at 441 (including as navigable "many of the large rivers of the country over which *rafts of lumber of great value* are constantly taken to market") (emphasis added).

The West's lumber industry in the late 19th century depended on rivers to transport lumber to market. *See Wisconsin Pub. Serv. Corp. v. FPC*, 147 F.2d 743, 746 (7th Cir. 1945). Logs were as much a commodity on rivers as the load of any steamboat. In line with this Court's cases, the lower courts have long treated commercial log-driving as a commercial use sufficient to establish navigability. *See, e.g., Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992); *City of Centralia v. FERC*, 851 F.2d 278, 281-82 (9th Cir. 1988); *Wisconsin v. FPC*, 214 F.2d 334, 336-37 (7th Cir. 1954). In considering evidence of log floating to assess

the navigability of the Madison, therefore, the Montana Supreme Court took a well-worn path.

There also is no reason categorically to exclude evidence of "recreational" uses of a river—especially when it comes to recreational uses like drift-boat fishing or rafting with both a substantial commercial and boating component. PPL Br. 49-52. This Court has recognized that recreational boat use of a river is probative of navigability, because "personal or private use by boats demonstrates the *availability* of the stream for the simpler type of commercial navigation." *Appalachian Elec. Power*, 311 U.S. at 416 (emphasis added). That is certainly true in the case of the Madison, which is floated in commercial drift boats by thousands of anglers each year. Opp. App. 63.[17]

---

[17] PPL also criticizes (at 22, 54-58) the Montana Supreme Court's statement that "[t]he concept of navigability for title purposes is very liberally construed by [this Court]." Pet. App. 54. But that statement must be read in context. The very next sentence refers to the fact that this Court's own precedents compel a finding of navigability not only where a river was actually used as a highway of commerce at statehood, but where it was *susceptible* for use as such. Presumably the reason that PPL asks this Court to discard the susceptibility-for-use test is that it believes the test *is* expansive. In any event, the rest of its decision makes clear that the Montana Supreme Court framed the proper constitutional test in deciding the navigability of the rivers at issue. And this Court, of course, "'reviews judgments, not statements in opinions.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011).

III. THE STATE COURT CORRECTLY FOUND THAT SUMMARY JUDGMENT WAS PROPER ON THE HEARING RECORD

1. PPL sought certiorari on a purely legal question concerning the "constitutional test" for navigability. Pet. i. It framed the question in terms of what the "constitutional test" for navigability requires "a trial court" to do. *Id.* (emphasis added). No doubt appreciating that this Court ordinarily does not second-guess the fact-specific determinations of state courts, PPL did not seek certiorari on whether the Montana trial court correctly held that summary judgment was proper on the particular record before it—assuming the court articulated the proper "constitutional test." That issue is outside the question on which this Court granted certiorari. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 193 (1997) (where the petition asked the Court to decide the legal rule, we "shall not go beyond the writ's question to reexamine the fact-based rule-application issue that the [petitioners] now raise"). Thus, if this Court agrees with the State that the Montana Supreme Court framed the correct constitutional test for navigability, it should affirm.

2. In any event, PPL's argument that the Montana courts improperly granted summary judgment in this case suffers from several basic methodological flaws. To begin with, PPL has exaggerated the evidence that it properly presented to the Montana trial court on summary judgment. *Supra* 18 & n. 9. In addition, PPL erroneously suggests (*e.g.*, PPL Br. 2) that there is something inherently problematic about granting summary judgment on navigability, or navigability-for-title issues. That suggestion is refuted by this Court's precedents and widespread practice before the courts

and special masters. Trial courts across the country frequently make summary judgment determinations on matters of navigability or the like, as do special masters appointed by this Court in original actions.[18]

Alaska v. United States, 545 U.S. 75 (2005), for example, involved a dispute over title to submerged lands that—like this case—turned in large part on historical materials. And like this case, *Alaska* was resolved on summary judgment. Special Master Gregory Maggs explained that despite numerous "genuine disagreements" between the parties, "summary judgment is an appropriate mechanism" for resolving the underlying title claim because the parties' disagreements were "really over the interpretation of the available undisputed facts" and the relative legal significance of available documents. *Alaska v. United States*, No. 128, original, Special Master's Report at 17-22 (2004), *available at* http://docs.law.gwu.edu/facweb/gmaggs/128orig/summary_judgment_report.pdf. This Court affirmed the special master's "thorough, commendable report" and findings. 545 U.S. at 83, 96.

Here, the "genuine disagreements" among the parties relate primarily to the proper *legal significance* of undisputed, or indisputable, historic facts. That is especially true for the Missouri and Clark Fork Rivers, where there is indisputable evidence that Great Falls and Thompson Falls did not prevent the rivers from

---

[18] *See, e.g., Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1406 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *Illinois v. Army Corps of Eng'rs*, No. 79 C 5406, 1981 U.S. Dist. LEXIS 14165, at *6-7 (N.D. Ill. Jan. 9, 1981); *Alaska v. United States*, 662 F. Supp. 455, 468 (D. Alaska 1987); *United States v. Underwood*, 344 F. Supp. 486, 496 (M.D. Fla. 1972).

serving as continuous highways of commerce, with the aid of portage. *See supra* at 10-12. PPL did not offer any evidence disputing the historical fact that the falls were portaged so that the rivers could serve as highways for commerce at statehood. Instead, PPL argued that there was no evidence that anyone boated the falls themselves. *See supra* 33. As explained, that legal theory is incorrect.[19]

While a closer call, PPL has presented no reason for this Court to overturn the Montana courts' summary judgment determination as to the Madison either. The State presented evidence that the Madison was susceptible for use as a highway of commerce at statehood and, indeed, was ideal for log driving. *See supra* at 14. Even the dissent on the Montana Supreme Court acknowledged that "the State met its initial burden to prove navigability under the title test." Pet. App. 116. PPL points to a Corps Report that evaluated—more than 40 years after statehood—the river's potential for improvements for *modern-day* use. JA 485-86. But that report has no bearing on

---

[19] As to the Clark Fork, PPL has pointed to a 1910 federal district court decree—a judgment issued two decades after statehood concerning alleged property rights as between two *private* parties—that referred in dictum to the Clark Fork generally as "not navigable" without any underlying findings of fact relevant to that conclusion. *See* Supp. Pet. App. 11. The Montana Supreme Courts properly concluded that this statement—which was not binding on the Montana courts or any party in the case—was the epitome of the kind of conclusory statement that does not create a genuine issue of material fact. Pet. App. 57; *see Williams v. Union Fid. Life Ins. Co.*, 123 P.3d 213, 218 (Mont. 2005) ("[M]ere conclusory ... statements" do not raise a genuine issue of material fact.).

Contrary to the caricature of judicial proceedings that PPL tries to paint, the Montana courts carefully considered the summary judgment record under the constitutional test for navigability established by this Court's precedents and reasonably concluded that PPL had failed to create a genuine issue of disputed fact precluding summary judgment. There is no reason for this Court to re-do the summary judgment determination for the Montana courts. The Court should address the question presented and affirm.

* * * * *

Adoption of PPL's novel constitutional test for navigability would have the immediate practical effect of stripping Montana—and Montanans—of the title that they gained to the riverbeds at issue upon admission into the Union in 1889. That includes title to the Great Falls of Montana—a symbol of Montana since territorial times.[21] But the impact of such a ruling would extend much further. PPL's test would call into question the navigability of rivers throughout the United States—at least in any place where there exists (or existed) a non-*de minimis* interruption. At a minimum, that test is a recipe for confusion and litigation over title to submerged lands throughout the country. And worse, the test is likely to result in the balkanization of rivers, like the Missouri, that always have been regarded as navigable, into bits and pieces of navigable and non-navigable "segments." That result almost certainly would interfere with the management of fish and wildlife along such waterways and hinder

---

[21] For the history of the Great Seal of the State of Montana, see http://sos.mt.gov/about_office/State_Seal.asp.

public access to the waters for fishing. And it could scarcely be more at odds with the public trust doctrine—embodied in the constitutional equal footing doctrine—which sought to ensure that America's great rivers and waterways would remain "common highways, and forever free," for the benefit of the people. Northwest Ordinance of 1787, 1 Stat. at 52.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Montana should be affirmed.

Respectfully submitted,

STEVE BULLOCK
Attorney General
ANTHONY JOHNSTONE
Special Assistant Attorney General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders Street
Helena, MT 59620-1401
(406) 444-2026

CANDACE F. WEST
Chief Legal Counsel
MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1625 Eleventh Avenue
Helena, MT 59620-1601
(406) 444-6702

GREGORY G. GARRE
Counsel of Record
LORI ALVINO MCGILL
KATYA S. GEORGIEVA
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Respondent

OCTOBER 27, 2011

ADDENDUM

ADDENDUM

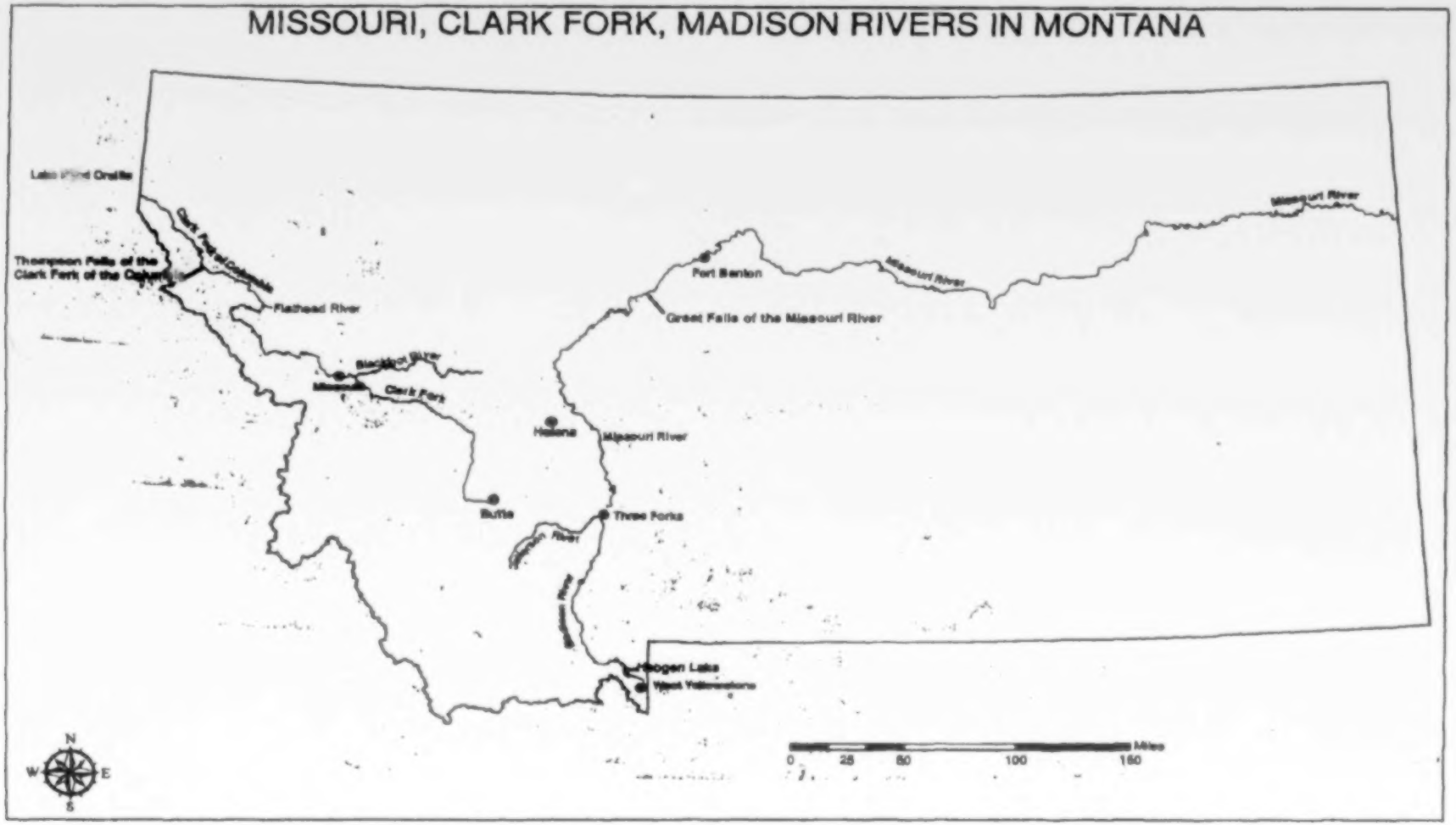
TABLE OF CONTENTS

Map of the Missouri, Clark Fork, and Madison Rivers in Montana 1a

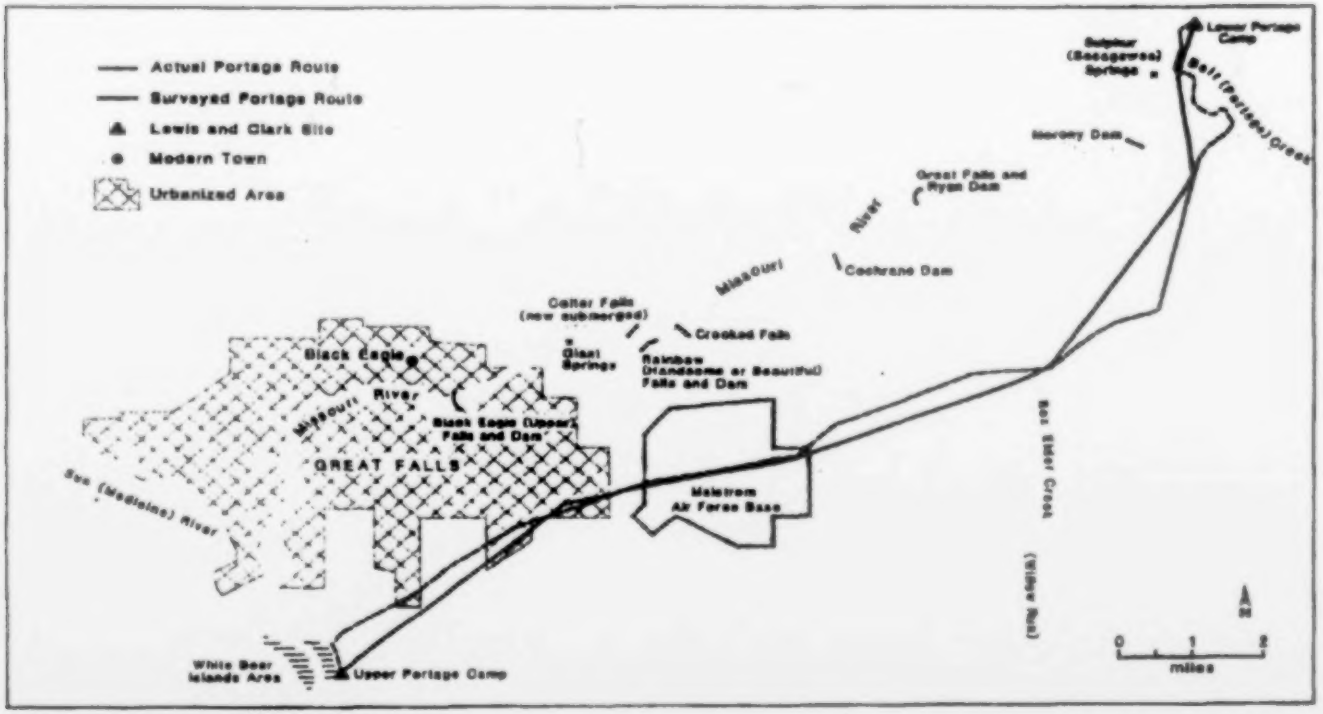
Map of Lewis and Clark Great Falls Portage 2a

The Montana Power Company v. Federal Power Company, No. 518, Brief for the Federal Power Commission in Opposition (Feb. 1951) (excerpts of pp. 6-9, 21-23) 3a

The Montana Power Company v. Federal Power Commission, No. 10200, Brief for the Federal Power Commission (D.C. Cir. 1950) (excerpts of pp. 15-20, 23-26) 9a



Montana Trust Land Management Division, Montana Department of Natural Resources and Conservation. (Teresa Kinley, ed. 2011)



3. Portage and Falls of the Missouri River

[Source: 4 The Journals of the Lewis & Clark Expedition 322 (Gary E. Moulton ed., Univ. of Neb. Press 1987)]

No. 518

In the Supreme Court of the United States

OCTOBER TERM 1950

THE MONTANA POWER COMPANY, a corporation,

PETITIONER

V.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

* * *

STATEMENT

* * *

Actual Use: For the steamboats which came up the River from St. Louis, the Great. Falls presented a natural barrier (R. 65). As a result, Fort Benton was sometimes labelled [sic] the "head of navigation," and until 1888, when the advent of the railroads curtailed the demand for water transportation, steamboat traffic up to Fort Benton flourished (R. 64-65, 543-558, 1014-15, 1434). The record shows, however, that three steamboats from Fort Benton successfully navigated the River to points more than 30 miles upstream from

Fort Benton and back (R. 65, 215-216, 1013, 1141-1142, 1207, 1450). Similarly, steamboats operating above the Great Falls were confined there, portages being made around the Falls only with smaller craft; for this upper part of the River, the "foot of navigation" was sometimes placed just above the Falls (R. 1207; Ex. 17(a) (1880), p, 1474).

Before 1900, there was considerable use of the 263-mile reach of the River above Fort Benton, the Falls always requiring a portage around them. A number of exploratory and Government survey trips were made in manually-powered crafts of various sizes, notably the 1805 expedition under Lewis and Clark, whose party made a successful ascent to Three Forks and beyond (R. 64-65, 1357-1383, 1549-1575). In 1872, Thomas P. Roberts, an engineer for the Northern Pacific Railroad, in the course of a survey of this part of the River, descended the River from Three Forks to Fort Benton in a skiff (R. 66, 1147-1208).[7] In addition, Hubert Howe Bancroft's (1890) "History of the Pacific States" records the use of the River between Stubbs Ferry (mile 2390), about 85 miles below Three Forks, and Fort Benton for the transportation of large numbers of miners returning to the States following the 1864 discovery of gold where Helena is now located; according to Bancroft, a stage line was established to carry passengers from Helena to a point

---

[7] Roberts concluded that the River above Fort Benton could be relied upon for navigation without improvement and his report supported a plan for a steamboat link between Fort Benton and Three Forks, trans-shipping freight around the Falls (R. 66, 1195-99). The Roberts' report was regarded as so useful that the Secretary of War approved its publication for use of the Army Engineers (R. 1147).

on the River whence was operated a line of mackinaw boats carrying passengers to Fort Benton, portaging around the Falls (R. 66-67, 1415-1419).[8] This use of the River apparently started soon after the 1864 discovery of gold in Helena, probably diminished soon after 1868 when most of the gold had been extracted, and ceased around 1870 when the placers were exhausted; clearly, however, the business was lively around 1866-1867 (R. 67).[9]

Between 1867 and 1900, there was extensive intrastate use of the River between Stubbs Ferry and Great Falls for the downstream transportation of loose logs and large rafts of lumber (R. 66, 417-418, 1142-1146, 1209, 1224-1228, 1263-1265, 1328-1329). Also, several small steamboats were placed on the River above the Falls, for the most part in the period after the close of the navigation era below Benton (R. 66). This operation continued around 1900 and was confined principally to the 55-mile stretch known as "Long Pool," located immediately above the Great Falls (R. 66, 391-397, 563-564, 1313-1315, 1323-1327, 1343, 1354, Ex. 17(b) (1892) p. 1906, (1895) p. 2227, (1898) p. 1850). Some steamboats were engaged in the local,

---

[8] Although no description of those boats is available, it seems certain that they were manually-powered and probably were large sharpended bateaux (R. 67).

[9] Bancroft's account is confirmed (1) by advertisements of the boat service in contemporary Helena newspapers (R. 67, 1417, 1139-1141, 1210), and (2) by an 1867 legislative grant of an exclusive privilege for a portage-toll road to the Missouri River Falls Wagon Road Company (Mont. Laws, Territory, 1867, 4th Reg. Sess., p. 109.) (R. 67)

commercial carrying of freight and passengers (R. 66).[10]

* * *

ARGUMENT

* * *

[1.] (b) The Company claims that since the Great Falls preclude literal through use of the River and thus prevent it from forming an unbroken highway, the portion of the River here involved could not be a "navigable water" of the United States (Pet. 3, 22). But while no stream can by itself constitute an unbroken highway if at any point a land carriage or portage is necessary, such a condition is not a prerequisite to a finding of navigability. This is clear from the Act's definition of "navigable waters" which expressly includes "all falls, shallows, or rapids compelling land carriage" where the stream is used or suitable for use despite such interruptions between the navigable parts. And this definition is in accord with established principles. In *The Montello*, 20 Wall. 430, this Court rejected the lower court holding that the Fox River was not navigable by reason of "several rapids and falls" and concluded that it had always been navigable in fact, saying (20 Wall. at 442-443):

> the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country

---

[10] The Annual Report of the Chief of Engineers for the Year 1901 (Ex. 17 (b)) combining figures for traffic between Great Falls and Cascade with those for traffic between Cascade and Stubbs Ferry shows a total of 2,528 tons of freight and 11,175 passengers carried (p. 2394).

> which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation.

In the *Economy Light Co.* case, the Court stated that (256 U.S. at 122):

> navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages * * *

And the *Appalachian* case declares that (311 U.S. at 408-9) "There never has been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries, or shifting currents."

In the instant case, the interrupting Falls cover a 17-mile section, never navigated in fact, and require a portage of about 18 miles (R. 69). But, as shown *supra*, pp. 7-8, many trips along the River were made via portage around the Falls. Such an interruption does not sever the upper 214 miles of the Missourri from the lower 2,244, but rather is merely an obstruction notwithstanding which the River was used as a continued highway in interstate commerce at least as far upstream as Stubbs Ferry. Cf. *The Daniel Ball*, 10 Wall. 557, 563; *Pennsylvania Water &: Power Co.* v. *Federal Power Commission*, 123 F.2d 155, 161 (C.A.D.C.), certiorari denied, 315 U.S. 806. It follows that the presence of the Falls does not destroy the

River's status as a navigable water of the United States.[20]

* * *

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
HERMAN MARCUSE,
Attorneys.

BRADFORD ROSS,
General Counsel.

WILLARD W. GATCHELL,
Assistant General Counsel.

BERNARD A. FOSTER, JR.,
Special Counsel,
FEDERAL POWER COMMISSION

FEBRUARY, 1951.

---

[20] Even if the Act's definition of navigable waters does not fully correspond with established judicial criteria, Congress clearly has the power, and the legislative history plainly indicates that it intended to exercise it (H. Rep. No. 910, 66th Cong., 2d Sess., p. 7), to regulate waters in such an interrupting reach of a navigable stream. Otherwise, its admitted power to regulate lower navigable portions of the stream could be destroyed through the location of obstructions in the interrupting reach.

BRIEF AND APPENDIX FOR RESPONDENT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10200

THE MONTANA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

* * *

ARGUMENT

* * *

The historic actual use of the Missouri River in Interstate and Intrastate Commerce.—The Missouri River is formed by the confluence of the Jefferson, Madison and Gallatin Rivers at Three Forks in southwestern Montana. Generally, it flows northeastward to a point approximately 30 miles beyond Fort Benton and thence in an easterly and southeasterly direction to its junction with the Mississippi River about 17 miles above St. Louis, Missouri. Between its headwaters and its mouth the Missouri flows across or along seven States. In round figures its length is 2,475 miles; its drainage basin 529,000 square miles; and its fall 3,630 feet.

The Commission noted several facts with respect to the past actual use of the river from its mouth to Fort Benton (App. 64, 65). These facts seemingly have not been controverted by the Petitioner and the Commission's determination that the Missouri River from its mouth to Fort Benton is a navigable water of the United States is not questioned (Pet. Br. 15). Petitioner has made one contention, however, with respect to this stretch of the river which may be related to the Commission's over-all finding. That contention is that Congress by its authorization and construction of the Fort Peck Dam has abandoned "navigability" insofar as the exercise of its jurisdiction is concerned from the site of the dam upstream (Pet. Br. 18, 19; 96-102). This particular contention is discussed *infra*, p. 33.

The facts in the record with respect to the St. Louis-Fort Benton section of the river establish so completely that this part of the river was used both in its natural and improved condition for the transportation of persons and property in interstate commerce that the Commission gave only brief mention of that evidence in its opinion (App. 64-65). The opinion notes that in this so-called lower section steamboat traffic flourished from 1819 until 1888 and that this traffic between Fort Benton and points on the Missouri River downstream therefrom involved millions of dollars worth of freight and thousands of passengers.

The record in this case is clear as to the reasons for the decline of the steamboat traffic in the lower section. The Commission observed that in 1859, the very year the Missouri River steamboat reached its perfection, the railroad invasion began (App. 65). With each

westward step of the rails steamboat traffic was sharply curtailed (App. 1014). Service to Fort Benton ceased in 1888. During the period of heavy use of the lower section for navigation the river above Fort Benton was not used to any extent comparable to the use made of the lower section. The upstream terminal of large steamboats was Fort Benton (App. 64).

The real controversy in this case is related to the section of the river between Fort Benton and Three Forks. This section of the river is about 263 miles long. All of the Petitioner's hydroelectric installations on the Missouri River are located in this stretch.

Beginning about 32 miles above Fort Benton is a series of rapids and sheer falls descending about 520 feet in 17 miles known as the Great Falls of the Missouri. It has been recognized by all throughout the proceeding before the Commission that the Great Falls presented a natural barrier to steamboat traffic originating at points below. Fort Benton was sometimes labeled the "head of navigation" (App. 1008, 1013, 1448) although the record shows that three steamboats from Fort Benton successfully navigated the river to and from points more than 30 miles upstream from Fort Benton (App. 215, 216, 1450; 1141). Similarly, steamboats operating above the Great Falls were confined there, portages being made around the Falls only with smaller craft. For this upper part of the river, therefore, the "foot of navigation" was sometimes placed just above the Falls (App. 1207).

Before 1900 there was considerable use of this 263-mile reach between Fort Benton and Three Forks, the Great Falls always requiring a portage around them. In this section a number of exploratory and Government survey trips were made in manually

powered craft of various sizes. The 1805 trip under the famous explorers Lewis and Clark is perhaps the best known trip of exploration (App. 1357, 1549, 1577). These explorers with their party made a successful ascent with crude handpowered craft to Three Forks and beyond. There are only two rapids above the Falls section which have ever presented difficulty in continous [sic] navigation. These are known as Half-Breed Rapids (mile 2327) and Beartooth Rapids (mile 2365). The "Journals of Lewis and Clark" are quite detailed, particularly with respect to the difficulties encountered on this 1805 trip. The two rapids sections, however, received only casual mention.

In 1872 Thomas P. Roberts, an engineer for the Northern Pacific Railroad, made a detailed and informative survey of the 263-mile section of the stream (App. 1181). Roberts' purpose was to provide his employer with information so that plans might be laid by the railroad company for a combination boat and rail route through this area. Roberts considered his report so important that he sent it to the Chief of Engineers of the U. S. Army for the information of that officer, who in turn regarded it as so significant that it was published under the auspices of the War Department. Roberts descended the river from Three Forks to Fort Benton in a skiff. He concluded that the Missouri in the section that he had examined could be relied upon for navigation without improvement and he set forth in his report a tentative plan for utilization of this upper portion of the river with a rail link for trans-shipping freight around the Falls (App. 1197, 1198).

In the period from 1867 until around 1900 there was extensive intrastate use of the river between Stubbs Ferry (mile 2390), which is 85 miles below Three Forks,

and the City of Great Falls (mile 2260) for the downstream transportation of loose logs and large rafts of lumber. (App. 1142, 1210, 1256, 1264-5, 1283, 1297, 1308, 1311, 1313, 1355, 414 *et seq.*, 385 *et seq.*, 398 *et seq.*, 225 *et seq.*, 236 *et seq.*). Also, several small steamboats were placed on the river above the Falls. These boats were operated in the period after the close of the navigation era below Fort Benton and continued until around 1900 (Ex. 17-B, *lodged).* Most of the steamboat traffic in the upper section of the Missouri River took place within a 55-mile stretch known as the "Long Pool" located just above the Great Falls. This traffic consisted of a local commercial carrying of freight and passengers. One steamboat operated for a relatively long period in a scenic section of the river known as the "Gates of the Mountains." This boat was used for the purpose of carrying excursion passengers on a sightseeing trip. The vessel could and did operate over a larger section, however (App. 392, 397, 1435, 1436, 1444).

The uses of the river above Fort Benton for navigation were, for the most part, either intrastate or noncommercial in character. However, the record shows that the river between Stubbs Ferry and Fort Benton served as an artery for downstream transportation in interstate commerce of large numbers of miners following the 1864 discovery of gold where Helena is now located.

Hubert Howe Bancroft's *History of the Pacific States*, published in 1890, records such use of this part of the river for the transportation of miners returning to the States (App. 1415, 1139, 1140). A stage line was established to carry passengers from Helena to a point on the Missouri River whence Kennedy & Company

operated a line of mackinaw boats carrying passengers to Fort Benton, portaging around the Falls (App. 1140, 1417). From its general study of the navigation of the area, the Commission, in the absence of a specific description of these boats, concluded that they were probably manually powered and probably were large sharp-ended bateaux. The Commission noted in its opinion that it was not possible to fix the beginning and ending of this particular use of the river. From its study of the general historical facts relating to the area, the Commission estimated that it started soon after the 1864 discovery of gold at Helena and that it diminished soon after 1868 when most of the gold had been extracted. It assumed that any transportation of this kind must have ceased around 1870 because history records that the placers were exhausted at about that date. The evidence in the record established satisfactorily to the Commission, however, that the business was most lively in the years 1866 and 1867 (App. 1417).

Petitioner has attacked this aspect of the Commission's findings of fact particularly and claims that this use of the river has not been established as a fact (Pet. Br. 74-8). The primary source of the information upon which the Commission relied is the historical writings of Hubert Howe Bancroft, generally acknowledged to be the foremost historian of the northwestern part of the United States as of the time his works were published. His books are considered today, by modern historians, to be an invaluable source of historical information (App. 204, 212).

It has been the use of this information derived from the Bancroft volume which has disturbed the Petitioner most, and in its briefs both before the

Commission and this Court, Petitioner has made an attempt to relate this material entirely to what it considers an improper use by the Commission of newspaper accounts as evidence. It suggests that the only real evidence of actual use of the upper section of the river in conjunction with the lower section for purposes of interstate commerce is this data respecting the movement of gold miners. It is clear from the record that the Commission did not rely solely upon the newspaper remarks and advertisements in arriving at its findings of fact. The Bancroft volume of history was the primary source of the information used by the Commission, and this Bancroft material was *corroborated* by information from contemporary newspapers of the period. It is noted further that an expert witness who was acknowledged by Petitioner to be a specialist in historical research found the Bancroft data and the newspaper material to be acceptable for purposes of historical research and so testified (App. 212). Attention will be given to the legal aspect of the claims of the Petitioner with respect to the character of the evidence used by the Commission in this proceeding in a later section of this brief, *infra*, p. 30. However, it is submitted, that the evidence of the interstate movement of the gold miners as used by the Commission is not evidence based upon conjecture, speculation, or uncorroborated hearsay. Any historical evidence respecting the movement of persons and property nearly a century ago is necessarily "hearsay" from a technical standpoint. The use by an administrative fact-finding agency of *probative* hearsay has never been proscribed.

The evidence of actual use of the upper section of the Missouri River, as summarized in its opinion (App.

65-6-7), led the Commission to the conclusion that this stream is a navigable water of the United States and within the meaning of Sec. 3 (8) of the Act.

* * *

Comparison With Other Rivers Established as Navigable Waters.—Petitioner points out in its brief that the Commission in its opinion did not discuss the physical characteristics of the streams held navigable in any of the cases it cited or the evidence of use or suitability for use found in any of them; nor did the Commission make any comparison between facts in any of those cases and the facts in this case (Pet. Br. 55). The absence in the Commission's opinion of such comparisons does not mean, of course, that such comparisons were not made by the Commission in arriving at its decision. This Missouri River case is but one of many cases of its same type which have been heard and decided by the Commission. Thorough treatment of the comparable physical characteristics of the Missouri River and adjudicated streams was furnished to the Commission by its staff in the briefs filed. Comparisons between the Missouri River and the Fox River and the New River were presented to the Commission in this proceeding during an oral argument heard by it prior to its final determination.

The Missouri River between Fort Benton and Three Forks compares favorably with the New River held navigable in *United States* v. *Appalachian Electric Power Co., supra,* with the Fox River held navigable in *The Montello, supra,* with the DesPlaines River, held navigable in *Economy Light and Power Company* v. *United States, supra,* and with some parts of the Colorado River, held navigable in *United States*

v. *Utah, supra.* The space permitted in this brief will not allow a detailed presentation with respect to these other rivers, but a few of the salient facts relating to the physical characteristics of the rivers named, and the navigation which had taken place will be given.

(A) The New River

The fall between Allisonia and Hinton was established by a survey to average about 4.5 feet per mile. Comparative slope profiles of portions of the New River, held navigable by the Supreme Court in *United States* v. *Appalachian Electric Power Company, supra,* and the portions of the Missouri River here in question have been included in this Brief as Appendix B.

(B) The Fox River

The portion of the Fox River involved in *The Montello, supra,* was 37 miles in length, the upper 18 miles of which in their natural condition had an average fall of approximately 8 feet per mile. Within this reach the maximum fall was 29.5 feet within a distance of only three-fourths of a mile, while within another portion of 2.5 miles there was a fall of 38 feet. (Annual Report of the Chief of Engineers, 1876, p. 235; I, p.204.) Continuous navigation by boats of shallow depth was not possible because of the obstruction by shoals, rapids and falls which made portages necessary. For this reason the trial court held the entire lower Fox River nonnavigable; but the decision was reversed by the Supreme Court. Prior to its improvement by locks and dams such commerce as existed was by Durham boats propelled by animal power. These Durham boats, in size, draft and capacity, were not unlike the mackinaws used by the gold miners on the upper Missouri. A reproduction of the only available profile

of the Fox River in the portion in question has been included in this Brief as Appendix A.

(C) The DesPlaines River

The portion of the DesPlaines River in controversy in the *Economy* case, *supra*, was only 45 miles in length, 60 percent of which was pool water and 40 percent shoal water. The discharge was as much as 600 c. f. s. during an average of only 73.2 days per year. This amazing deficiency in streamflow, as computed from gage [sic] readings made daily over a 20-year period, rendered it incapable of floating a boat through 40 percent of its length during an average of 175 days per year, while lengthy portages, either of the entire cargo or parts thereof, were required during an average of 248 days per year. With the exception of an average period of 4.3 days per year, the controlling depths over the rapids were never more than 15 inches, and such controlling depths were found only during an average period of 116.2 days per year. At all other times the controlling depths were 12 inches or less, and a number of portages were required, totalling [sic] in excess of 12 miles, and consisting either of part of the cargo, the entire cargo, or both cargo and boat. During a period of 175 days it was necessary to portage not only the entire cargo, but also the boat, over 40 percent of the entire distance from Riverside to the mouth of the river, a distance of approximately 18 miles (256 F. 792, 795-6).

(D) The Colorado River

The case of *United States* v. *Utah*, *supra*, came to the Supreme Court as the court of original jurisdiction, and a Special Master was appointed to hear the evidence and submit findings and conclusions. The Special Master found that the Colorado River from

mile 176 above Lees Ferry south to the Utah-Arizona boundary was navigable. His findings were sustained by the Supreme Court (283 U.S. 64, 80-1, 82-3). This case did not involve a determination of whether the Colorado River was a "navigable water of the United States," but the same tests of navigability were used, and the Special Master stated unequivocably [sic] that he had utilized the Federal rule.

* * *

REPLY BRIEF

RECORD
AND
BRIEFS

No. 10-218

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Montana

REPLY BRIEF FOR PETITIONER

ASHLEY C. PARRISH
PAUL A. MEZZINA
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St., Ste. 1500
Billings, MT 59101
(406) 252-2166

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M St. NW, Ste. 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

Counsel for Petitioner

November 28, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

ARGUMENT 3

I. The Title Navigability Test Demands Skepticism Of Belated State Efforts To Claim Title. 3

II. The Court Should Confirm The Controlling Federal Test For Determining Navigability For Title Purposes. 6

A. Title Turns On Whether A Particular River Segment Can Be Navigated, Not Whether It Can Be Bypassed. 6

B. Modern-Day Recreational Use And Isolated Log Floats Do Not Establish Title Navigability. 14

C. There Is No Presumption In Favor Of Navigability. 18

III. Under A Correct Application Of This Court's Precedents, The Decision Below Cannot Stand. 20

A. There Are No Procedural Hurdles To Applying The Proper Test. 20

B. The Evidence Overwhelmingly Supports PPL's Position. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Brewer-Elliott Oil & Gas Co. v. United States,
260 U.S. 77 (1922) 5, 13

Donnelly v. United States,
228 U.S. 708 (1913) 13

Economy Light & Power Co. v. United States,
256 U.S. 113 (1921) 10

Idaho v. United States,
533 U.S. 262 (2001) 19

In re State Reservation at Niagara,
37 Hun. 537,
18 Abb. N. Cas. 395 (N.Y. 1885) 11

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 9

*Kaukauna Water-Power Co. v.
Green Bay & M. Canal Co.*,
142 U.S. 254 (1891) 9

*Minneapolis Mill Co. v.
Board of Water Comm'rs*,
58 N.W. 33 (Minn. 1894) 11

*Montana Coal. for Stream Access, Inc. v.
Curran*,
682 P.2d 163 (Mont. 1984) 3

Niagara Falls Power Co. v. Duryea,
57 N.Y.S.2d 777 (Sup. Ct. 1945) 11

Oklahoma v. Texas,
258 U.S. 574 (1922) ..... *passim*

St. Anthony Falls Water-Power Co. v. Board of Water Comm'rs of City of St. Paul, 168 U.S. 349 (1897) 11

The Daniel Ball, 77 U.S. 557 (1870) 10

The Montello, 87 U.S. 430 (1874) 8, 18

The Propeller Genesee Chief v. Fitzhugh, 53 U.S. 443 (1851) 10

United States v. Alaska, 521 U.S. 1 (1997) 19

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 17, 20

United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908) 3

United States v. Holt State Bank, 270 U.S. 49 (1926) 5, 19

United States v. Oregon, 295 U.S. 1 (1935) 17, 18

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 18

United States v. Utah, 283 U.S. 801 (1931) ..... *passim*

Statute

16 U.S.C. § 796(8) 10

Other Authorities

J. Bricker, *Navigability and Public Use*, 38 Willamette L. Rev. 93 (2002) 18

REPLY BRIEF

Montana's brief focuses at length on the view that an impassable stretch of river does not necessarily render portions of the river beyond it non-navigable. But *the dispute here centers on the stretches of rivers that Montana concedes were impassable at statehood.* And Montana never explains why the ability to bypass a significant stretch of river, whether by a standard portage, arduous overland journey, or narrow-gauge railway, renders *the bypassed stretch* navigable for title purposes. Because most of PPL's hydroelectric plants lie on the bypassed stretches of the Missouri and Clark Fork, this omission is more than just curious. It is fatal.

Montana does not seek to defend a "whole river" approach to title navigability. Instead, it stakes its case on the closely related proposition that unless there is a "dead end" that precludes all navigation beyond it, the whole river is navigable. But that is no more compatible with this Court's precedents than the whole-river approach the courts below applied and Montana abandons. And what remains critically missing is any explanation why an impassable 17-mile river stretch should be treated as navigable merely because it could be bypassed. The fact that the disputed stretch *was* bypassed affirmatively supports a finding of non-navigability, and the fact that it *could be* bypassed seems irrelevant to the question whether the bypassed stretch *itself* was navigable. And unless there is some reason why the bypassed stretches themselves should be deemed navigable, this case is over for the Clark Fork and almost all of the Missouri.

The situation is even bleaker for Montana when it comes to the Madison. The grant of summary judgment in Montana's favor depended on a "very liberal" rule of construction favoring navigability, evidence of modern-day recreational use, and a single, unsuccessful log float. The state now walks away from the lower court's rule of construction. And its efforts to defend the lower court's reliance on modern-day recreational evidence and the failed log float cannot be squared with this Court's precedents or any sensible test for title navigability.

The difficulties with Montana's position do not end there. The state conflates concepts of regulatory navigability and title navigability in ways that ignore this Court's admonition to keep the concepts separate. And although Montana and its *amici* raise the specter of unregulated rivers, a state does not need to own a riverbed to regulate a river or its beds.

The real threat that lurks in this case is not to state or federal regulatory authority, but to private property owners along riverbanks throughout the nation. The same private property owners who for decades have been paying property taxes or who long ago negotiated easements now face the prospect of states seeking to reopen long-settled titles armed with new evidence of modern-day recreational use and immunity from doctrines of equitable estoppel and laches. The temptation for a state to engage in traditional takings is tempered by the requirement to pay just compensation. But when the demand for just compensation goes in the opposite direction, and states can obtain not only title but back-rent, then the threat to private property is grave indeed. Fortunately, the tools for limiting abuse are already

present in this Court's navigability precedents. The Court need only decline Montana's invitation to rewrite them and reverse the decision below.

ARGUMENT

I. The Title Navigability Test Demands Skepticism Of Belated State Efforts To Claim Title.

Montana's invocations of sovereignty, the public trust, and the mystical qualities of Montana and its trout streams do nothing to justify its massive land grab. This case is not about "the paramount right of public use" of rivers. Mont.Br.24 (internal quotation marks omitted). The relevant river segments have long been and will continue to be open for fishing, recreational pursuits, and other beneficial uses. *See Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984) ("waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability"). Nor does this case threaten the public trust. The Court concluded long ago that it "cannot be pretended that private ownership" of riverbeds, "subject to the public rights" of navigation and fishing, "will impair the interest of the public." *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 452 (1908).

This case is about rent-seeking and Montana's effort to upset long-settled expectations by manipulating federal navigability doctrines in its state courts. While Montana invokes concerns about its own expectations, the settled expectations all belong to PPL and other private landowners. PPL's predecessors-in-title began building these dams

within a year of statehood and arranged for the requisite easements from private landowners and the federal government. PPL continues to pay the federal government for the use of federally owned riverbeds, a fact that, contrary to Montana's assertions, Mont.Br.7 n.2, PPL raised long before the certiorari stage. *See* 2006-10-06 Kinnard Aff. ¶ 12 [Dkt.144]; U.S.Br.3 n.3 (PPL pays "a portion of" its federal rent "for riverbed" land). And Montana has been collecting *property taxes* from PPL, its predecessors-in-title, and other riparians for more than a century for the very riverbeds it now claims to own. *See* MWRA.Br.6-9; 2006-10-06 Young Aff. ¶¶ 3-13 [Dkt.145].

Against this overwhelming evidence, Montana's claim to settled expectations relies on its own trust land website developed *after* this litigation and on pre-statehood meander lines on federal surveys. Mont.Br.5-7. But a post-litigation website hardly speaks to settled expectations, and this Court has rejected "meander line[s]" as having "little significance" to questions of title navigability. *Oklahoma v. Texas*, 258 U.S. 574, 585 (1922). Although Montana asserts that before this litigation no one "ever claimed title to the riverbeds ... as against the State," Mont.Br.7, the fact that no one claimed title *against* the state simply reflects that no one—including the state itself—ever thought, or acted as if, the riverbeds belonged to Montana.

Montana evokes its sovereignty, but Montana's sovereign status and related doctrines of sovereign immunity are precisely why federal law has an important role to play. If a private party waited decades to assert title or actively participated in

regulatory proceedings without so much as mentioning that it had a claim to back-rent, doctrines of laches and equitable estoppel would bar any belated claim to title. Montana's sovereign immunity shielded it from those same doctrines. Tr.591-92. Montana's suggestion that PPL's approach would "require courts to go back and carve up waterways that have long been found navigable," Mont.Br.37, thus gets matters exactly backwards. Equitable doctrines like laches and estoppel are fully applicable against private parties and protect the state's settled expectations. Federal law standards of navigability that put the burden on the party seeking to establish navigability and view modern-day evidence with skepticism are necessary to protect private parties and are an appropriate counterweight to the advantages the sovereign enjoys in its own courts.

Contrary to Montana's assertions, the notion that navigability determinations made by a state's own courts should be viewed with healthy skepticism is not PPL's invention. This Court long ago recognized that "[s]ome states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so." *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922). And the Court has repeatedly declined to defer to state court determinations that further that impermissible end. *See id.* at 87; *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *Oklahoma*, 258 U.S. at 591.

To be sure, "[t]his Court generally presumes the good faith of all government actors." Mont.Br.25. But that is no reason to ignore the powerful

structural incentives for self-dealing, as even Montana recognizes on the very next page of its brief when it comes to the *federal* government. Mont.Br.26.

II. The Court Should Confirm The Controlling Federal Test For Determining Navigability For Title Purposes.

The tools for policing the temptation for states to misuse navigability principles to effect improper takings are already present in this Court's title-navigability rules. The Court should clearly and expressly reaffirm those rules, including that (1) title navigability should be decided on a segment-by-segment basis; (2) title navigability should be based on reliable historical evidence of actual commercial use at statehood (except in rare circumstances absent here); and (3) the burden of proof rests on the party asserting navigability. Montana has no convincing responses to these key points.

A. Title Turns On Whether A Particular River Segment Can Be Navigated, Not Whether It Can Be Bypassed.

Montana concedes that this Court's precedent forecloses a whole-river approach and that "interruptions" along a river "can—and do" defeat navigability of the stretches in which they appear. Mont.Br.37. Although Montana denies that the lower courts applied a whole-river approach, that is belied by the record: The trial court rejected PPL's argument "that the appropriate analysis" requires "look[ing] at the relevant reaches of the river," Pet.App.138, and the Montana Supreme Court declared the river-as-a-whole conception of

navigability both "unequivocally ... correct" and a "crucial[] aspect of the District Court's" decision. Pet.App.53-54; *see also* U.S.Br.5, 19-23.

Ultimately, Montana's rejection of the lower courts' approach is more about semantics than substance, because it relies on an only slightly modified river-as-a-whole test. According to Montana, a state holds title to an entire river, including its concededly non-navigable segments, no matter how long or impassable, as long as a non-navigable stretch could be "portaged," such that the river *surrounding* it formed a "continuous highway of commerce." Mont.Br.22. In other words, every non-navigable stretch is state-owned unless it creates "a dead end." *Id.*

Montana's theory suffers from serious practical and analytical flaws. As a practical matter, there is the insurmountable problem that the Missouri and Clark Fork rivers were *not* continuous highways of commerce, because the Great Falls and Thompson Falls created precisely the dead ends even Montana concedes are dispositive. *See infra*, pp. 14, 22-23; Professors.Br.25, 28-29. Moreover, the practical problems with the whole-river approach, including the anomaly of having the rights of riparian property owners turn on the navigability of *different and distant* stretches of the river, *see* PPL.Br.35-36; U.S.Br.18, apply equally to Montana's modified-whole-river-unless-dead-end approach. But the fatal analytical flaw is that Montana never explains why the concededly non-navigable stretch *itself*, as opposed to the purportedly navigable stretches on either side, should be treated as navigable. And in a case about hydroelectric facilities predominantly

situated on segments the state concedes were (and are) impassable, that is no small omission.

Montana complains about the imprecision concerning what makes an interruption *de minimis*, but it never explains what constitutes a "portage," even though its entire theory rests on whether a river is "portageable." It appears to embrace the position that *anything* that allows an impassable stretch to be bypassed to produce a "continuous highway" is sufficient, no matter whether that means carrying a boat a few yards alongside the river's edge, trekking several miles off-bank to undertake an arduous 17-mile overland journey, or riding "a narrow gauge railroad" to bypass 50 miles of non-navigable river. JA319. It is not clear how Montana's approach would *ever* render a river segment so impervious to bypass that the river as a whole would not be at least "susceptible" for use as a highway of commerce. *See* U.S.Br.24 ("*any* river segment that this Court has held non-navigable for title could be portaged in theory"). Nor does Montana ever explain *why* the bypassed stretch should be treated as *navigable* or why any of this would be a sensible rule for ascertaining title navigability. Montana instead insists that *The Montello*, 87 U.S. 430 (1874), compels that bizarre result.

The Montello does no such thing. It is not a case about title to riverbeds, or about whether bypassed river segments are nonetheless navigable. It is a case about whether *an entire river*, including navigable stretches, falls outside the scope of Congress's *regulatory* authority because navigation was "difficult" on some stretches. *Id.* at 442. Faced

with this version of the whole-river approach, the Court rejected it. But in rejecting one variant of the whole-river approach for regulatory purposes, it did not endorse, let alone adopt, the converse rule that the existence of navigable stretches renders the entire river, including bypassed, *impassable* sections, *navigable*.

Nor did *The Montello* say anything about title navigability Title was never an issue because, under relevant state law, all riverbeds were owned by the riparians, not the state. *See Kaukauna Water-Power Co. v. Green Bay & M. Canal Co.*, 142 U.S. 254, 271 (1891). Although Montana (like the courts below) dismisses the critical distinction between regulatory and title cases, this Court has emphasized the need to focus on the discrete "*purpose* for which the concept of 'navigability' was invoked." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (internal quotation marks omitted).

Such a focus makes clear that Montana's extensive reliance on *The Montello* is misplaced. When the question is federal regulatory jurisdiction, a focus on whether a river forms part of a *continuous* highway of *interstate* commerce makes sense. That factor is less relevant for title purposes, as even Montana recognizes. Mont.Br.31. Even more important, what is relevant for federal regulatory jurisdiction does not carry any necessary implication for title. After all, the provision at issue in *The Montello* extended federal jurisdiction to overland "carrying places," but no one would suggest that it divested title to such lands. And the Federal Power Act reaches not only navigable waters, but "falls, shallows, or rapids compelling land carriage." 16

U.S.C. § 796(8). It is hard to understand why the latter language is necessary if Montana is correct and bypassed stretches "compelling land carriage" are actually navigable for all purposes, including title. More broadly, Montana's effort to conflate regulatory navigability and title navigability ignores the unique impact of title navigability on property rights. Indeed, the seminal case, on which *The Montello* and *The Daniel Ball*, 77 U.S. 557 (1870), both rest, explained that judicial doctrines of navigability-based admiralty and regulatory jurisdiction can be changed precisely because they do *not* interfere with private property rights. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 458 (1851).

Nor does Montana cite a single case—in either the title *or* regulatory context—in which this Court applied a "portageability" rule. Montana states that *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921), "confirmed the navigability of a river stretch that included ... a 7-mile portage, and a land transfer of over 11 miles." Mont.Br.38 (internal quotation marks omitted). But that case has nothing to do with portageability. Moreover, the portages and land transfers were descriptions of the modern state of the river. And the premise of *Economy Light* was that *artificial* obstructions rendered the river "incapable" of supporting navigation in its then-present state. 256 U.S. at 123. The Court nonetheless upheld regulatory jurisdiction because the river originally "ha[d] actual navigable capacity in its natural state." *Id.* *Economy Light* thus supports the commonsense notion that long portages and land transfers cut *against* navigability.

Montana also offers *St. Anthony Falls Water-Power Co. v. Board of Water Commissioners of City of St. Paul*, 168 U.S. 349, 359 (1897), as an example of the Court holding a "river stretch navigable 'at all points' including [a] waterfall and surrounding rapids." Mont.Br.39. But that was a case about water use rights, not about riverbed ownership, and the Court did not even mention portaging. 168 U.S. at 359; *see also Minneapolis Mill Co. v. Board of Water Comm'rs*, 58 N.W. 33 (Minn. 1894). Nor did New York's courts apply Montana's approach when concluding that the riverbeds underlying Niagara Falls are state property. Those decisions were rooted "neither in the common or civil law" of navigability but in a different rule for rivers, like the Niagara River, that "constitute[] the natural boundary between this and another country." *In re State Reservation at Niagara*, 37 Hun. 537, 18 Abb. N. Cas. 395, 407 (N.Y. 1885). Under New York law, because most riverbeds are owned by the riparians, not the state, New York's title claim was based not on title navigability but on the river's status as a "public *and international boundary* stream." *Niagara Falls Power Co. v. Duryea*, 57 N.Y.S.2d 777, 784 (Sup. Ct. 1945) (emphasis added).

Besides failing to identify any cases that apply its novel approach, Montana also fails to distinguish the case that squarely rejects it. In *Utah*, the Court held that a 36-mile stretch of the Colorado River was non-navigable, despite finding the same river navigable above *and* below that stretch. *United States v. Utah*, 283 U.S. 801 (1931) (decree). Moreover, the special master made that finding, and the Court affirmed it, notwithstanding Utah's

contention that "if the Master shall find that the remainder of the River was navigable, he should also find that the River was as a whole (including this section) navigable." 2d.Supp.Pet.App.13.

Montana attempts to minimize *Utah* as a narrow exception for river stretches that cannot be "portaged" and therefore "create[] a dead end" to navigation. Mont.Br.34. It fashions that exception out of a single line in the master's report where, after finding "portaging" along the river's banks "possible at most places," the master noted one short place where it was not. 2d.Supp.Pet.App.12. That says nothing about whether the Cataract Canyon stretch as a whole could be bypassed or portaged. In fact, it could be: At statehood, there were rough trails along the canyon rim and one person who crashed his boat walked out of the canyon "on a sheep grazer's trail." Master's Report (No. 14 Original) 81. In all events, the relevant portion of the master's report focuses not on whether the river above and below Cataract Canyon could be connected, but on whether the river within the canyon could be safely navigated for commerce. Tellingly, when this Court explained the evidence supporting the finding that the whole stretch (not just the non-portageable part) was non-navigable, it highlighted the master's findings as to the commercial navigability, not portageability, of the stretch. *Utah*, 283 U.S. at 80 (stretch "has a rapid descent or slope of about 399 feet, a drop of 11 feet per mile, with a long series of high and dangerous rapids").

Montana also fails to reconcile its portageability theory with other aspects of *Utah*. For example, the

Court noted that four "small rapids" elsewhere on the Colorado did not impede navigation because they "d[id] not ordinarily make necessary any portage of boat or cargo," an odd observation if portaging renders the segments navigable, but a perfectly sensible one if the *need to portage supports* a finding of *non-navigability*. *Id.* at 85. And although Montana makes much of the fact that the Cataract Canyon stretch is longer than the Great Falls Reach, Montana elsewhere declares that distinction irrelevant, as it insists that "any interruption that was in fact portaged to allow the river to continue to serve as a highway of commerce is 'short' enough for any constitutionally relevant navigability purpose." Mont.Br.42.

In the end, Montana's focus on "portageability" is inconsistent with far more than just *Utah*. Montana's test would focus on the river-as-a-whole and allow almost any non-navigable stretch to be ignored. That approach is flatly inconsistent with this Court's repeated focus in its title-navigability cases on river segments. *See Brewer-Elliott*, 260 U.S. at 85 (examining whether Arkansas River was "navigable in fact at the locus in quo"); *Donnelly v. United States*, 228 U.S. 708, 709 (1913) (same for Klamath River); *Oklahoma*, 258 U.S. at 589 (addressing navigability of three different segments of Red River); *Utah*, 283 U.S. at 71, 77-78 (examining six river segments and leaving others for future adjudication). Focusing on segments does not require, as Montana suggests, "carving up" the rivers; it merely requires application of the bedrock principle that navigability in law depends on

navigability in fact, and the relevant facts vary along a river's course.

In all events, Montana's modified river-as-a-whole approach cannot rescue the decision below. PPL provided compelling evidence that commercial navigation above the Great Falls and Thompson Falls was not possible *at all*, let alone connectable to navigation below. PPL.Br.15-17, 19-20; Professors. Br.5-32. For example, PPL relied on a 1915 Army Corps report concluding that "[a]s far as navigation is concerned the headwaters of the Missouri are completely and permanently separated from the river below." JA919. To the extent Montana attempted to prove otherwise, its limited evidence of navigability largely ended *at the falls*. *See* JA315-25 (recounting unsuccessful travails of two steamboats above Great Falls); JA236-37 (recounting short-lived line of tag-teaming steamboats with multiple portages below Thompson Falls). Even Montana's flawed navigability reports acknowledged that "Fort Benton was the practical head of navigation" on the Missouri, JA317, and that a federal court in 1910 had decreed the Clark Fork non-navigable above *and* below Thompson Falls, JA217. Accordingly, in addition to its far more serious—indeed, fatal—legal flaws, Montana's test fails to justify the decision below.

B. Modern-Day Recreational Use And Isolated Log Floats Do Not Establish Title Navigability.

The Montana courts deemed the Madison River navigable, despite "admittedly 'sparse'" evidence of navigation near the time of statehood, based on

modern-day recreational use and a single log float that proved an abject failure, while largely dismissing historical evidence of non-navigability. Pet.App.26, 56, 143. That was doubly erroneous: Contemporaneous evidence that the Madison was not navigated at statehood should have raised a strong inference that it was not navigable, particularly when coupled with powerful, unrefuted evidence that the Madison is far more amenable to navigation now than at statehood.

Montana insists there is "no reason for this Court to adopt" a rule disfavoring reliance on modern-day use. Mont.Br.45. But there is an obvious reason to do so when the relevant question is navigability *at statehood*. In the title context, evidence of modern-day use is irrelevant without an explanation for the absence of historical evidence and a demonstration that river conditions have not materially changed. Indeed, modern-day evidence is inherently suspect because rivers change over time, and any probative value such evidence may have will almost always be outweighed by the danger of unsettling long-recognized property rights. PPL.Br.46-47. On these points, Montana's brief is silent.

Montana emphasizes that navigability can be based on "susceptibility" to use at statehood. But Montana ignores the important caveat that "susceptibility" is relevant only "where conditions of exploration and settlement explain the infrequency or limited nature of" contemporaneous use. *Utah*, 283 U.S. at 82; *see also id.* at 83 ("the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed

had made recourse to navigation a late adventure"). That caveat is critical. Unless "conditions of exploration and settlement explain" it, then the absence of evidence of actual navigation at statehood supports a conclusion of non-navigability. Here, both opportunities and incentives for commercial navigation were plentiful. *See* PPL.Br.45-46. In those circumstances, there is no need to inquire into susceptibility for use or consider modern-day evidence. The combination of ample incentives for navigation at statehood with the absence of evidence of navigation demonstrates that the river was neither used for commerce nor susceptible to such use at statehood.

The lower courts' heavy reliance on modern-day evidence was especially inappropriate given PPL's compelling evidence that the Madison has materially changed since statehood. As Dr. Schumm explained, PPL's hydropower projects "have made the river more susceptible now to commercial navigation" by reducing flow during the high season and increasing flow during the low season. Pet.App.208. Remarkably, Montana draws the opposite conclusion from Dr. Schumm's findings. Mont.Br.45. Montana's felt need to dispute Dr. Schumm's conclusions from his own findings demonstrates the absurdity of granting summary judgment in Montana's favor.

Dr. Schumm also explained that, even apart from changes in flow, "relevant portions of the river appear to have been either anastomosing or braided" and therefore "*not susceptible to navigation*" at statehood. JA574 (emphasis added). Like the courts below, Montana simply ignores that unrefuted

evidence, which defeats whatever relevance modern-day use might have. *See* U.S.Br.32.

The Montana courts' improper reliance on modern-day evidence was amplified by their heavy reliance on mere *recreational* use. Montana insists that evidence of recreational use is probative, Mont.Br.47, but it fails to acknowledge that a navigable river must be capable of supporting "*commercial* utilization on a large scale." *Utah*, 283 U.S. at 83 (emphasis added). And it makes no attempt either to distinguish cases holding recreational use insufficient to establish title navigability, *see* PPL.Br.50-51, or to defend the single (Ninth Circuit) case on which the Montana Supreme Court relied for the contrary proposition.

Montana instead relies solely on *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), a case finding a river navigable for *regulatory* purposes. But the "personal or private use by boats" deemed relevant there was worlds apart from the recreational use here. *Id.* at 416. In *Appalachian*, the disputed river segment had been navigated end-to-end by larger vessels (like bateaux and derrick boats) capable of carrying goods and passengers. *See id.* at 414-16 & n.52. Reliance on such evidence does not make "recreational use" by "fishing guides and their clients" in small, modern drift boats sufficient to establish title navigability. Pet.App.18, 26. Not every body of water "large enough to float a boat" is navigable. *United States v. Oregon*, 295 U.S. 1, 23 (1935).

The only other evidence proffered by Montana was a single, unsuccessful log float. Montana insists

that log floats count as "commerce," but fails to explain why log floats qualify as "navigation," or how they can be sufficient given this Court's insistence that a navigable river support "trade *and travel*." *Oklahoma*, 258 U.S. at 586 (emphasis added). This Court has never held that successful log floats, let alone disastrous ones, suffice to establish title navigability. *The Montello* referenced as navigable "the large rivers of the country over which *rafts* of lumber ... are constantly taken to market," but it elaborated that navigability refers to *vessels*, 87 U.S. at 441-42 (emphasis added), and "likely had in mind the great log rafts" that were "so large they supported crews [and] sleeping quarters." J. Bricker, *Navigability and Public Use*, 38 Willamette L. Rev. 93, 97 (2002). This Court has made clear that "occasional[]," *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899), or "sporadic and ineffective," *Oregon*, 295 U.S. at 23, log floats will not do. If anything, the abysmal failure of the never-repeated 1913 log float, JA803-04, only confirms that the Madison was *not* navigable at statehood.

C. There Is No Presumption In Favor Of Navigability.

Montana does not dispute that as the party seeking to establish title navigability—on summary judgment, no less—it has the burden of proof. And it effectively concedes that the Montana Supreme Court erred in holding that "[t]he concept of navigability for title purposes is very liberally construed." Pet.App.54. Montana nonetheless asks this Court to overlook that egregious misstatement because "*the rest* of [the] decision" supposedly

"framed the proper constitutional test." Mont.Br.47 n.17 (emphasis added). But even indulging the dubious assumption that the lower court committed no other constitutional errors, one cannot ignore the court's application of a fundamentally backwards rule of "very liberal[] construc[tion]." Far from being inconsequential dictum, the court's rule of construction, coupled with its failure to acknowledge Montana's burden of proof, contributed to the court's otherwise inexplicable grant of summary judgment on a record rife with factual disputes.

Although Montana does not deny its burden, some of its *amici* do, asserting that a "well established presumption ... favors state ownership." Cal.Sportfishing.Br.6. But that presumption applies only to waters already conceded or determined to be navigable. *See Idaho v. United States*, 533 U.S. 262, 272-73 (2001) (presumption applies when "deciding a question of title to the bed of *navigable* water") (emphasis added). In that context, courts disfavor pre-statehood conveyances or reservations by the federal government that would defeat a state's ability, upon entering the Union, to take title to lands under navigable waters. *See, e.g., United States v. Alaska*, 521 U.S. 1, 36 (1997); *Holt*, 270 U.S. at 55. But that presumption has no place in the threshold navigability determination where the burden is on the proponent of navigability. *See* PPL.Br.55; *Oklahoma*, 258 U.S. at 583 (Oklahoma bore "burden of showing that the rights in the river bed" had "passed or been transferred" to Oklahoma because river was navigable).

III. Under A Correct Application Of This Court's Precedents, The Decision Below Cannot Stand.

Implicitly recognizing the weakness of its position, Montana attempts to limit this Court's consideration to the Montana Supreme Court's erroneous legal test, without considering its application and how overwhelming evidence of non-navigability was ignored to grant summary judgment to Montana. But critical and clear guidance is needed lest the same errors and temptations resurface on remand.

A. There Are No Procedural Hurdles To Applying The Proper Test.

Contrary to the state's position, the Montana Supreme Court's application of the navigability test is not "outside the question" presented. Mont.Br.48. In navigability cases, "[b]oth the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied." *Appalachian*, 311 U.S. at 404. Nothing about the question presented confines this Court to the artificial review Montana proposes.

Montana also resurrects its contention that PPL waived the argument that the relevant river stretches are non-navigable. That contention is wrong. As Montana acknowledges, any supposed concessions were made in the context of determining Congress's *regulatory* authority. Although Montana points to an early pleading in which it asserted title to the riverbeds, it omits PPL's responses, which did not concede title to the riverbeds *in question*, but instead emphasized that federal preemption

rendered title irrelevant. Opp.App.15 (¶ 3). That PPL challenged title navigability when the issue arose is clear from Montana's request for *sanctions* based on PPL's decision to challenge the state's title claim. *See* Mont.Summ.J.13 ("[u]tilities know the rivers at issue are navigable, yet they have refused to admit it"). The Montana Supreme Court thus correctly declined to "rel[y] upon any ostensible admissions" when it resolved the constitutional navigability question. Pet.App.62.

Notwithstanding its suggestion that this case turns on "undisputed, or indisputable, historic facts," Mont.Br.49, Montana continues its attempts to preclude consideration of evidence it claims PPL did not properly submit. But Montana is again wrong. Before the district court's summary judgment order became final, PPL submitted an offer of proof consisting of additional reports from its experts. Although Montana initially objected to PPL's offer, it ultimately suggested that the court accept both PPL's additional evidence and a counteroffer of proof from Montana, which is how the trial court proceeded. *See* 2007-10-29 Tr. 1055; JA38 [Dkt.420]. Accordingly, both the affidavits and the additional reports from PPL's experts were properly before the courts below.

In any event, most of the evidence discussed in PPL's opening brief comes from materials that are indisputably part of the summary judgment record. Those materials include "a 'mountain'—over 500 pages—of affidavits and exhibits demonstrating that the portions of the Missouri, Madison, and Clark Fork Rivers at issue were non-navigable at the time of statehood." Pet.App.100; *see also* JA347-628.

Applying the correct title navigability test, without a rule of "very liberal[] construc[tion]" in Montana's favor, Pet.App.54, that evidence was more than sufficient to defeat Montana's summary judgment motion.

B. The Evidence Overwhelmingly Supports PPL's Position.

Montana's contention that this case merely turns on "the proper *legal significance* of undisputed, or indisputable, historic facts," Mont.Br.49, is only partially correct. Montana's concession that the Great Falls Reach and the vicinity of Thompson Falls are impassable should dispose of Montana's claims to the riverbeds under those stretches as a matter of law. But Montana's assertion of indisputable evidence concerning other stretches is manifestly wrong.

Montana states that it provided "indisputable evidence that Great Falls and Thompson Falls did not prevent the [Missouri and Clark Fork] rivers from serving as continuous highways of commerce." Mont.Br.49-50. But that is not true. The affidavit from PPL's expert specifically challenged Montana's evidence as "unreliable from a historical perspective," JA370, and set forth detailed objections to Montana's heavy reliance on hearsay from untrustworthy frontier-era newspapers with reports of 28-pound radishes and other misleading sources. JA371-74. PPL's expert attested that, in his "opinion as a historian, the State's evidence lacks the credibility to prove *anything* about the historical use of these rivers." JA373.

Montana's claim that "PPL did not submit *any* evidence rebutting the fact that the Great Falls and Thompson Falls were portaged so that the rivers served as continuous highways of commerce," Mont.Br.23, is even more astounding. PPL's expert opined not only that the Great Falls Reach *itself* was not navigated, but that "the reach of the Missouri River between Great Falls and Stubbs Ferry"—the stretch *above* the falls—did not support commercial navigation and "would have required post-statehood improvements" to do so. JA378; *see also* JA743-801. In contrast, the only evidence of "continuous" navigation Montana has ever offered is Hubert Howe Bancroft's uncorroborated report of portaging mackinaws, Mont.Br.11, the credibility of which PPL's expert specifically challenged. JA374. "Today, no reputable historian would use Bancroft as a sole source," Professors.Br.23, and it is telling that Montana has to reach back to sixty-year-old briefs addressing regulatory navigability to find support for its position.

PPL's expert similarly opined that the Clark Fork above and below Thompson Falls was non-navigable at statehood. JA381. He based that conclusion on contemporaneous sources including 1891 and 1940 Army Corps findings of non-navigability and a 1910 federal district court decree granting title to the riverbeds to PPL's predecessor after finding the same river stretch non-navigable. JA379-81, JA566-69; Supp.Pet.App.11. Montana follows the lead of the court below in dismissing that near-contemporaneous finding as "the epitome of the kind of conclusory statement that does not create a genuine issue of material fact." Mont.Br.50 n.19.

The decision of a federal court is not a "conclusory statement," particularly when, as here, it is supported by detailed factual findings. Supp.Pet.App.3.

Even Montana concedes, with considerable understatement, that the Madison River is a "closer call." Mont.Br.50. Montana nonetheless claims summary judgment in its favor should be affirmed because the Madison "was viewed as ideal for log driving." Mont.Br.14, 50. But the document Montana cites recounts that the single, unsuccessful log drive on a river stretch where neither of PPL's dams is located was "a task which for many years ha[d] been ridiculed and deemed by many impossible," and was attempted only because of post-statehood "water power" from the dams. JA154-55. Without even pausing to acknowledge the inconsistency in its position, Montana dismisses a 1931 Army Corps finding of non-navigability as too far removed from statehood to have *any* relevance, all the while continuing to defend the lower courts' reliance on *present*-day usage to demonstrate navigability more than a century ago.

* * *

Montana's brief, and even more recent public statements of Montana's Governor at a Land Board meeting, confirm the need for this Court to lay down clear rules to govern any remand. At a minimum, the Court should make clear that Montana's concession concerning the impassability of the Great Falls Reach and Thompson Falls ends the litigation with respect to the Great Falls Reach of the Missouri and the Clark Fork. Beyond that, this Court should emphasize that what matters is the navigability of

the particular stretches at issue. What is good for hydroelectric generation is bad for navigation. Thus, a focus on the relevant stretches—without the distorting effects of irrelevant modern-day evidence, "very liberal" rules of construction, or undue weight being given to isolated log floats—will restore settled expectations and prevent this unprecedented land grab.

CONCLUSION

The Court should reverse and remand with instructions for the Montana courts to apply the correct title-navigability test.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

ASHLEY C. PARRISH
PAUL A. MEZZINA
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St., Ste. 1500
Billings, MT 59101
(406) 252-2166

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

Counsel for Petitioner

November 28, 2011

SUPPLEMENTAL BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 31 2011
OFFICE OF THE CLERK

No. 10-218

In the
Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

SUPPLEMENTAL BRIEF OF PETITIONER

ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
1919 M St. NW, Ste. 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St., Ste. 1500
Billings, MT 59101
(406) 252-2166

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

Counsel for Petitioner

May 31, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

SUPPLEMENTAL BRIEF 1

I. The United States' Effort To Downplay The Impact On Federal Interests Exacerbates Problems Faced By Private Parties. 2

II. The United States Understates The Conflicts With Precedent. 6

III. The United States Understates The Federal Power Act's Preemptive Reach. 11

CONCLUSION 13

SECOND SUPPLEMENTAL APPENDIX

TABLE OF SUPPLEMENTAL APPENDICES

Appendix A

Letter from the U.S. Department of the Interior to the Montana Department of State Lands, August 26, 1988 ..... App-1

Appendix B

Letter from PPL Montana to the Federal Energy Regulatory Commission, May 20, 2011, responding to 2010 Statement of Annual Charges for U.S. Lands App-4

Appendix C

United States v. Utah,
Excerpts from Special
Master's Reports App-10

Appendix D

Summary of Report, Maps, and Other
Materials Provided to the United States
Identifying Lands Owned by the Federal
Government on the Madison, Upper
Missouri, and Clark Fork Rivers App-18*

---

* In this brief, "App" refers to the petition's appendix. "SApp" is the reply brief's supplemental appendix. "2dSApp" is the supplemental appendix included herein.

TABLE OF AUTHORITIES

Cases

Brewer-Elliott Oil & Gas Co. v. United States,
260 U.S. 77 (1922) 6

George v. Beavark, Inc.,
402 F.2d 977 (8th Cir. 1968) 11

Montana Power Co. v. FPC,
185 F.2d 491 (D.C. Cir. 1950) 5

Oklahoma v. Texas,
258 U.S. 574 (1922) 11

The Daniel Ball,
77 U.S. 557 (1871) 8

Three Buoys Houseboat Vacations USA v. Morts,
921 F.2d 775 (8th Cir. 1990) 11

United States v. Holt State Bank,
270 U.S. 49 (1926) 6

United States v. Oregon,
295 U.S. 1 (1935) 7

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 7

United States v. Utah,
283 U.S. 64 (1931) 7, 9

Utah v. United States,
304 F.2d 23 (10th Cir. 1962) 9

Wyeth v. Levine,
129 S. Ct. 1187 (2009) 11

SUPPLEMENTAL BRIEF

The judicial taking effected by the decision below is measured in the tens of thousands of acres. And because the vehicle for this landgrab was federal navigability doctrine, rather than eminent domain, no just compensation will be coming the victims' way. Instead, because the court below concluded that land long thought to be owned by private parties and the federal government has belonged to the State all along, it is petitioner who has been presented with a demand for "just compensation" in the form of a bill for tens of millions in back-rent. The Montana Supreme Court achieved this remarkable result by fundamentally distorting both the federal navigability doctrine and the normal rules of procedure. And it worked this massive landgrab by concluding on summary judgment—in the face of a federal court decree, a "mountain" of opposing expert evidence, and time-of-statehood federal agency reports—that the upper Missouri, Madison, and Clark Fork rivers were navigable in their entirety at Montana's statehood in 1889. App-62, 91.

The United States acknowledges the decision below is infected with fundamental errors. It nonetheless urges this Court to deny review because the federal ox has not yet been definitively gored. The federal government, because it enjoys sovereign immunity and the protection of the federal courts, may yet escape the full consequences of this judicial taking. But that short-sighted view minimizes the departures from federal law and disregards the significant federal interests at stake.

The United States also ignores the impossible position petitioner and other private parties are put in by the combined effect of the decision below and the federal government's view that the decision is both wrong and uncertworthy. The decision below is the state court system's final word on federal navigability law and the ownership of the riverbeds. Private parties face direct and immediate consequences from that definitive state view, as dramatically illustrated by petitioner's obligation to pay the State $40 million in back-rent (plus millions in interest) and potentially millions more in future rent. Pet. 13. At the same time, because the United States maintains the decision below is both wrong and non-binding on the federal government, it continues to charge rent to PPL for the *same* lands the Montana court has deemed state-owned. 2dSApp-4-9. Accordingly, while the United States enjoys the cloak of sovereign immunity and urges this Court to deny review, its position leaves PPL doubly charged by the State and the federal government. That cannot be right. The Court should grant review.

I. The United States' Effort To Downplay The Impact On Federal Interests Exacerbates Problems Faced By Private Parties.

The United States believes the decision below is wrong, but that it does not have a significant enough impact on the federal government to warrant review. About this, the United States is quite candid. Its brief asserts that review is unnecessary "absent some more significant consequence, such as an attempt to apply the decision below more broadly to claim not only back-rent from a private utility, but

title from others, including the federal government." U.S.Br. 15. The United States is not only wrong about the decision's consequences for others, it downplays the extent of the decision's potential impact on federal interests in general and federal lands in particular. *See* 2dSApp-18-22 (describing amount of federal lands at stake); 2dSApp-1-3. The United States can do so because it has the option of asserting sovereign immunity and forcing litigation in federal court. But that is cold comfort to private landowners. And private parties are placed in a particularly untenable position precisely in those river stretches where the federal and state governments now have competing claims to the riverbeds. For that reason, a full understanding of the total riverbed acreage on the upper Missouri, Madison, and Clark Fork to which the federal government claims title is necessary. *See* 2dSApp-18-22. The extent of that claim to federal ownership demonstrates not so much the impact on the federal government as the wide span of riverbeds on which there are now competing claims of federal and state ownership.

1. Contrary to the United States' suggestion, the decision below is not limited to a multi-million-dollar claim of "back rent" against PPL. By its plain terms, the decision awards the State "*title* to the riverbeds of the Missouri, Clark Fork, and Madison," and grants the State control over "the disposition [and] use" of those riverbeds. App-62, 91. Because the State's highest court has determined *as a matter of law* that the rivers were navigable at statehood, the decision has practical, preclusive effect against thousands of private landowners who claim contrary

title, even those (like PPL) with title by federal decree.

Moreover, although the United States speculates the State might not apply the decision "more broadly" to "others," the court below held that state officials have a binding "fiduciary obligation ... to seek compensation for the use of state-owned lands." App-68. Wishful thinking about state restraint is especially misguided because, as happened in this case, third-parties can pursue litigation to force the State to exercise its trust responsibility to seek rent. Indeed, the decision below expressly contemplates that "other" water users, such as "irrigators, stockmen, [and] recreationists," will be liable for their use of "state-owned riverbeds," albeit not necessarily "in the same manner as PPL." App-90. That is why organizations representing thousands of Montana farmers and hundreds of water users have filed *amicus* briefs urging this Court to remedy the widespread "devastation ... wrought" by the decision below. Farm Bureau Br. 22; MWRA Br. 2-7.

2. Just as the decision below sweeps far more broadly than the United States acknowledges, it also implicates significant federal interests the United States fails to address. Most glaringly, the United States all but ignores the 1910 federal court decree that, after a trial, granted PPL's predecessor title to the same Clark Fork riverbeds the State claims as its own. SApp-8-18. In conflict with the decision below, the federal decree held that "Clark's Fork of the Columbia River at all points in Sanders County, Montana, always was and is a non-navigable, torrential, mountain stream, full of rapids and falls." SApp-3; *see also Montana Power Co. v. FPC*, 185

F.2d 491, 493 (D.C. Cir. 1950) (PPL's Madison river dams are "on concededly non-navigable waters").

The United States likewise says nothing about the 1988 letter expressing the federal government's disagreement with the State's earlier assertions of navigability and noting that the State's "navigable rivers list" unlawfully swept in "some 8 million acres of federally-owned surface" and "hundreds of [federal] mineral leases." 2dSApp-2. Recognizing its "responsibility" to defend federal property interests, the Interior Department warned of the "disquieting" and "enormous" effect the State's navigability claims would have "on the title to thousands of parcels of private land." 2dSApp-2-3. The United States' brief neither acknowledges nor disclaims these declared federal interests.

The United States also ignores the federal War Department declaration and the Army Corps' reports to Congress concluding that for the relevant river segments "commercial navigation" was "entirely out of the question." App-102; App-109 ("utterly unnavigable"). And it offers no response to the serious concern, explained both in the petition and by *amici*, that Montana's approach will inevitably spread to other cash-strapped states and impose substantial burdens on the nation's electric and hydropower industries. Pet. 37; Edison Electric Inst. Br. 8-9.

3. Instead, the United States has taken a not-my-problem stance. But its position exacerbates the problem for everyone else. While the United States enjoys sovereign immunity that allows it to declare the decision non-binding, other affected parties now

face competing, irreconcilable claims of ownership to the same riverbeds. To be clear: the United States continues to assert title to the same riverbeds the Montana court has held belong to Montana. That explains why the United States is unconcerned by the decision below, but it puts others in an untenable position. Indeed, FERC recently sent PPL a "U.S. Lands" usage invoice for 1,300 riverbed acres that the decision below declared state-owned. 2dSApp-4-5. PPL is thus required to pay double rent for the use of the same 1,300 acres: once to the State which claims ownership *because of* the decision below and once to the United States which claims ownership *despite* the decision below.

II. The United States Understates The Conflicts With Precedent.

While the United States acknowledges the court below erred, it contends there is no conflict in authority and the errors were fact specific. U.S.Br. 15. That is untrue. The Montana court did not merely misapply the law to the facts; it fundamentally subverted federal law.

1. The navigability-for-title test and the related equal-footing doctrine establish a "constitutional rule of equity" that must be applied uniformly. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). Especially in light of the obvious temptation for state courts to err on the side of state claims to title, this Court has acknowledged its obligation to prevent states from misapplying the test to "destroy a title already accrued under federal

law and ... enlarge what actually passed to the state, at the time of her admission." 260 U.S. at 88.

The navigability-for-title test requires navigability to be "determined *upon evidence*," even in circumstances "where the navigability of a river, speaking generally, is a matter of common knowledge." *United States v. Utah*, 283 U.S. 64, 77 (1931) (emphasis added); *id.* at 87 ("[e]ach determination as to navigability must stand on its own facts"); *United States v. Rio Grande Dam*, 174 U.S. 690, 698 (1899) (navigability is a matter "requiring evidence, and to be determined by proof"). That is why this Court has held that the burden of proof falls on the party asserting navigability—contrary to the standard effectively applied below. *See United States v. Oregon*, 295 U.S. 1, 14 (1935); Farm Bureau Br. 14-15. It is also why the *Utah* Court appointed a special master to prepare detailed reports supporting his navigability findings. And it is why title navigability questions are ill-suited to resolution on summary judgment. *See* Professors Br. 18-19.

2. The United States asserts that PPL "overstates the Montana Supreme Court's rationale." U.S.Br. 10. In its view, the Montana court never definitively adopted a whole-river approach; it merely addressed the relevant sections and found them too short to defeat navigability. But the district court *rejected* PPL's position "that the appropriate analysis" requires examining "the *relevant reaches* of the river, not the *entire stretch of the river*." App-138 (emphasis added). And the Montana Supreme Court declared that analysis "unequivocally ... correct." App-54, 58. Indeed, it

described *Utah*'s focus on "certain sections of the rivers, *as opposed to the rivers themselves as a whole*," as having "limited applicability." App-59 (emphasis added). As the dissent demonstrated, the majority looked at the "*entire river*," not "particular reaches." App-96.

This whole-river approach conflicts with the section-by-section approach required under this Court's precedents. From *Rio Grande* to *Utah* to *Appalachian*, the Court has applied a fact-intensive inquiry to particular river sections. Pet. 18-26. The United States attempts to distinguish these precedents by emphasizing case-specific reasons why the Court examined particular river sections, but its distinctions miss the point. If the whole-river approach were correct, parties' disputes would *never* focus on particular sections; instead, the parties would dispute and the courts would consider only the navigability of the whole river.

Moreover, as PPL, its *amici*, and the dissent below have all explained, this "short interruptions" exception threatens to swallow *Utah*'s rule. The touchstone for title navigability is not length but whether the relevant river section was "susceptible to being used" in its "ordinary condition" as a "highway[] for commerce, over which trade and travel" could have been "conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1871). To be sure, *Utah* recognized that "negligible" interruptions will not prevent a river section from being used as a highway of commerce. Nor do longer non-navigable stretches prevent other parts of a river from being navigable. But nothing allows substantial stretches—similar to

and longer than those considered in *Utah*—to be dismissed as neither navigable nor non-navigable, but as utterly irrelevant. *E.g.*, *Utah*, 283 U.S. at 74, 89-90 (36.5-mile middle reach of Colorado non-navigable; 133-mile lower reach of San Juan non-navigable); *Utah v. United States*, 304 F.2d 23, 24 (10th Cir. 1962) ("no significant part of the river" in 55-mile middle reach of San Juan "was navigable").

That the Montana Supreme Court distorted *Utah*'s "short interruptions" language is evident from its bare conclusion that the Missouri River's 17-mile Great Falls stretch is "merely a short interruption." App-57, 59, 61. The court did not explain what made the disputed section too "short," especially given the 4.35-mile and 36.5-mile stretches considered in *Utah*. App-99, 116. Nor did it explain how it could reach any conclusions "without the benefit of the extensive fact-finding done in *Utah*" as to the specific section's topography, history, impediments, and use and susceptibility to use for commerce purposes. App-100.

3. The United States seeks to rationalize the Montana court's lack of explanation by emphasizing a purported factual distinction—here "the relevant segments *had* been portaged *to allow commerce to continue uninterrupted*," while in *Utah* the non-navigable middle segment of Cataract Canyon "could not be portaged." U.S.Br. 12 (emphases added). That is demonstrably wrong. *Utah*'s Special Master found the river section *had* been portaged and its rapids "shot." 2dSApp-12 ("portaging" was "possible at most places"). But even that did not permit a finding of navigability because, as the Special Master likewise concluded for a portaged section of

the San Juan, the river sections could not be used as a highway of commerce. 2dSApp-14-17. So too here. Although Lewis and Clark trekked around the Great Falls, the historic record establishes they were forced to make an arduous, month-long, overland climb that was completely incompatible with "uninterrupted" water-borne commerce. Professors Br. 14-15; App-197-201, 232-35.

In any event, the Montana court's navigability analysis conflicts with precedent because PPL's objections were not limited to the impassable 17-mile Great Falls stretch but included other "length[y]" interruptions in navigability. U.S.Br. 15 (conceding point). As the dissent below recognized, PPL offered expert evidence challenging more than 125 miles of the Missouri, the entire Madison (approximately 133 miles), and approximately 235 miles of the Clark Fork.

4. Finally, the Montana court's decision deepens existing conflicts in the case-law because it relies on present-day recreational usage as evidence of navigability in 1889. The United States dismisses the conflict, claiming the cases "merely reach different outcomes after applying the relevant principles to different facts." U.S.Br. 16. But this Court has indicated that, to consider evidence of present-day usage, a court must make specific fact-findings that the river's original condition has not changed and present-day usage is comparable to statehood usage. Pet. 26-27. In contrast, the Montana court rejected expert evidence that the rivers had changed dramatically and concluded without qualification that "present-day recreational

use is *sufficient*" to establish navigability. App-54, 58 (emphasis added).

Contrary to the United States' suggestion, the decision below did not recognize the correct legal principle; it merely described its understanding of PPL's position. U.S.Br. 16 (citing App-20-21). Nor did it consider whether present-day recreational vessels are comparable to 1889 vessels. Designating present-day recreational fishing as "commerce" dispositive of navigability is "absurd[]," *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968), for only "boats with a sufficient draft to be of any service" in practical and beneficial commerce are sufficient to support a finding of title navigability. *Oklahoma v. Texas*, 258 U.S. 574, 589-92 (1922); *Three Buoys Houseboat Vacations USA v. Morts*, 921 F.2d 775, 779 n.6 (8th Cir. 1990). And, of course, how any of this modern-day evidence could possibly overcome, on summary judgment, contemporaneous evidence of non-navigability, like the 1910 federal court decree, is inexplicable and unexplained.

III. The United States Understates The Federal Power Act's Preemptive Reach.

The United States argues that the State's attempt to collect retroactive back-rent under the Montana Hydroelectric Resources Act is not preempted. That view is entitled to no deference. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009). It also is non-responsive to PPL's arguments.

1. The Montana statute's rental-payment provision exists only to collect rent in connection with lease and licensing provisions that directly conflict with FERC's plenary authority over federal

power projects. Recognizing that conflict does not require second-guessing the Montana court's severability analysis. The severed portion of the problematic statute is itself preempted because it is designed to extract value from the federal license.

PPL has never argued that a "FERC license ... turn[s] every 'assumption' underlying the license application into preemptive federal law." U.S.Br. 18. Instead, PPL's point is that Congress structured the federal scheme to allow FERC and the licensee to analyze the project economics and establish license conditions that could not be achieved if land rights were unresolved by the time of project construction. Specific statutory and regulatory provisions are designed to bring affected states into the licensing process. The federal scheme cannot work if, decades after the license is awarded, the State retroactively lays claim to thousands of acres long understood to be owned by others.

2. Ultimately, the reason the United States does not perceive a frustration of the federal scheme is the same reason it thinks this case is uncertworthy: sovereign immunity allows it to ignore the decision below, while continuing to collect charges premised on continuing federal ownership over lands for which the State also seeks rent. While such a system may be fine for the federal regulators in the short run, it ignores the plight of the regulated entity that must pay two sovereigns for the same land. It is hard to imagine a more concrete state-federal conflict than here, where PPL is being required to pay both the State and federal government for lands over which they are asserting competing claims of title.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
BANCROFT PLLC
1919 M St. NW, Suite 470
Washington, DC 20036
(202) 234-0090

ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

ROBERT L. STERUP
KYLE A. GRAY
HOLLAND & HART LLP
401 N. 31st St, Ste. 1500
Billings, MT 59101
(406) 252-2166

ELIZABETH THOMAS
K&L GATES LLP
925 Fourth Ave., Ste. 2900
Seattle, WA 98104
(206) 623-7580

Counsel for Petitioner

May 31, 2011

SECOND SUPPLEMENTAL APPENDIX

TABLE OF SUPPLEMENTAL APPENDICES

Appendix A

Letter from the U.S. Department of the Interior to the Montana Department of State Lands, August 26, 1988 ..... App-1

Appendix B

Letter from PPL Montana to the Federal Energy Regulatory Commission, May 20, 2011, responding to 2010 Statement of Annual Charges for U.S. Lands App-4

Appendix C

United States v. Utah, Excerpts from Special Master's Reports App-10

Appendix D

Summary of Report, Maps, and Other Materials Provided to the United States Identifying Lands Owned by the Federal Government on the Madison, Upper Missouri, and Clark Fork Rivers App-18

Appendix A

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
MONTANA STATE OFFICE
222 NORTH 32ND STREET
P.O. BOX 36800
BILLINGS, MONTANA 69107-6800

L 118
(932.2)

August 26, 1988

Dennis Hemmer, Commissioner
Department of State Lands
State of Montana
1625 Eleventh Avenue
Helena, Montana 59620

Dear Mr. Hemmer:

A recent article published in the July 1988, issue of "The Treasure State Surveyor," the official publication of Montana Registered Land Surveyors Association, is causing the Bureau of Land Management (BLM) some concern. This article, by Roy S. Henderson, Chief, of Resource Development Bureau, Lands Division of the Department of State Lands (DSL), describes how the State of Montana through the DSL is claiming ownership to the bed of 37 different streams within Montana based on their historic use for commercial navigation, thereby qualifying these streams as navigable waterways for title purposes.

The purpose of this letter is to place the State of Montana on notice that, based on available information, the BLM, as the agency responsible for protecting and managing some 8 million acres of federally-owned surface and all of the federally-owned minerals within the state, does not agree with the DSL's determination of the navigability of these waterways.

Our concern stems from the conflict between our two agencies which will inevitably arise in the future over the ownership of the bed of some of these waterways. At this point in time, the United States only recognizes portions of the Missouri, Yellowstone, and Big Horn Rivers within the State of Montana as being navigable for title related purposes. It is very possible, although we have not conducted any research as yet, that BLM has issued hundreds of mineral leases on lands to which the state now claims ownership. It is the responsibility of the BLM to defend the United States title to these minerals should the need arise. In addition, this action will have a disquieting effect on the title to thousands of parcels of private land through which these streams pass. Portions of or all of most of these streams were not meandered by the government surveyors while conducting the original surveys. This means that the acreage contained within the beds was not deducted from the legal subdivisions in which it is contained. Current owners' titles generally encompass complete legal subdivisions with no exceptions for the stream bed which might traverse the subdivision.

In conclusion, if the actions as reported in the above publications are recommended proposals by your

department, I would strongly recommend that you contact us to explore the situation. The effect on established land and minerals title could be enormous as it relates to the numerous ownerships involved.

Sincerely,

/s/

Ray Brubaker
State Director
Acting

cc: w/copies of publications
WO(320), MIB, Rm 3643
WO(720), PRE Bldg 201
Field Solicitor, Billings

Appendix B

PPL Montana, LLC
303 North Broadway, Suite 400
Billings, MT 59101-1255
Tel: 406.237.6900 Fax: 406.237.6901

May 20, 2011

VIA U.S. MAIL AND E-MAIL
(annualcharges@ferc.gov)

W. Doug Foster
Director, Financial Management Division
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: PPL Montana, LLC, Company ID 015298
Payment of Annual Federal Land Charges for
Bill Year 2010

Dear Mr. Foster:

PPL Montana has arranged for timely electronic payment in full (on the due date of June 3, 2011), of the 2010 Statement of Annual Charges for U.S. Lands that accompanied your email of April 19, 2011 (copy attached for reference). The purpose of this letter is to alert you that the State of Montana has asserted that it owns approximately 1300 acres of the lands covered by this statement. The State of Montana has obtained a state court judgment awarding the State compensation from PPL Montana for its use of all Montana-owned streambeds within PPL Montana's projects, which includes these approximately 1300 acres charged for

as "U.S. lands" by FERC, even though the State already receives substantial portions of PPL Montana's federal lands use and enjoyment charges pursuant to Section 17 of the Federal Power Act. *See PPL Montana, LLC v. State of Montana*, 229 P.3d 421 (Mont. 2010). This places PPL Montana in the untenable position of paying the State twice, both pursuant to its claim of ownership and through this payment premised on federal ownership.

As FERC is aware, PPL Montana is disputing the State's position and the state court judgment on the grounds that the United States is the owner of the 1300 acres (not the State of Montana), and has a Petition for Certiorari currently pending before the United States Supreme Court. *See PPL Montana, LLC v. State of Montana*, No. 10-218. Accordingly PPL Montana is making payment in full electronically (on the due date of June 3, 2011), in the amount of $571,196.91, on the invoice from the Commission.

Please contact the undersigned with any questions.

Sincerely,

/s/
Peter J. Simonich
Chief Operating Officer

cc: Anton Porter, Deputy Chief Financial Officer

Enclosure (Email from "AnnualCharges" dated Tuesday April 19, 2011 with its attachments)

* * *

From: AnnualCharges [mailto:annualcharges@ferc.gov)

Sent: Tuesday, April 19, 2011 9:36 AM

To: Randall, Pamela E.; sevidrich@pplweb.com

Subject: 2010 Statement of Annual Charges for U.S. Lands – PP&L MONTANA, LLC (015298) (20110418-61781)

Dear Regulated Entity,

The Federal Energy Regulatory Commission (Commission) is issuing revised FY 2010 Statement of Annual Charges for U.S. Federal Lands. Please disregard the bill issued on April 4, 2011. This revised bill(s) is replacing the bill issued on April 4, 2011 because the initial bill was incorrect. The Commission issued a Notice on April 15, 2011 (http://www.ferc.gov/industries/hydropower/annual-charges/fy2010-lands-re-issue.pdf) explaining the errors and how to proceed with your revised land charges. The revised due date for any amount due to the Commission for the FY 2010 U.S. Federal Charges bill is June 3, 2011. For those licensees that are owed a credit, the credit will be applied to your FY 2011 U.S. Federal Lands bill, which will be issued approximately June 3, 2011.

If you have any questions regarding the annual charges assessment process, or payment methods, please send an e-mail to annualcharges@ferc.gov. Please see General Payment Instructions for acceptable payment methods.

I apologize for any confusion and/or inconvenience this matter may have caused you.

Respectfully,

W. Doug Foster, Director

Financial Management Division

<<2010 Statement of Annual Charges For U.S. Lands – PP&L MONTANA, LLC (015298) (20110418-61781).pdf>>

FEDERAL ENERGY REGULATORY COMMISSION
HYDROPOWER ANNUAL CHARGES
SUMMARY OF BILLS FOR U.S. LANDS
FOR BILL YEAR 2010

Payment must be received by: 06/03/2011	Company-id: 015298		
PP&L MONTANA, LLC PETE SIMENICH 303 NORTH BROADWAY SUITE 400 BILLINGS, MT 59101-1255			
Bill Number	Project-id	Amount Due	PLEASE INDICATE AMOUNT PAID
L00083-00	01869	4,578.76	
L00155-00	02188	553,173.58	
L00173-00	02301	13,444.57	
TOTAL AMOUNT DUE		$571,196.91	

Please indicate amount paid by project/bill by completing the last column intitled AMOUNT PAID. The total AMOUNT PAID should equal the total of the check(s) being submitted.

RETURN THIS COMPLETED FORM AND CHANGE OF ADDRESS FORM WITH REMITTANCE(S) TO:

Federal Energy Regulatory Commission
P.O. Box 979010
St. Louis, MO 63197-9000

Appendix C

EXCERPTS FROM THE *UNITED STATES V. UTAH* SPECIAL MASTER'S REPORT

Consideration of the use of the Colorado River by boats may be divided into two parts: (a) its use from the Junction of the Grand and the Green River to the end of Cataract Canyon at about Mile 176 above Lees Ferry; and (b) its use from Mile 176 or thereabouts down to the Utah-Arizona boundary line, a stretch of about 150 miles. I have taken as the point of division Mile 176 (which is at the foot of Millecrag Bend), since the end of Cataract Canyon is marked on the Government's Topographic Survey map of 1921 as at Mile 176 (Complainant's Exhibit 10). The last rapid in the Canyon, however, is at Mile 181.

(a) Cataract Canyon.

The section of the Colorado River, for its first 40 miles from its beginning at the junction of the Grand and Green Rivers at Mile 216.5 above Lees Ferry down to Mile 176, differs materially in its conditions, from any other section of the Rivers involved in this suit. Only a brief consideration need be given of the evidence, and the question of the navigability of this section of the River may be disposed of before considering the navigability of the remainder of the River south to the Utah-Arizona boundary line. In this section, the descent is from an elevation of 3879 feet to 3465, or 414 feet in 40.5 miles – an average of about 10 feet per mile. It consists of a series of rapids, long and short, which have been variously

estimated by witnesses as from 40 to 70 in number, according to the stage of water when they were observed and according to individual judgment in separating or combining the rapids into distinct or continuous stretches. These rapids vary in steepness of gradient and violence of flow from 15 feet per mile to 100 feet per mile. It is useless to give additional figures, as the evidence is conclusive as to the dangerous conditions presented by the rapids. In addition the bed of the River is a tumbled mass of boulders and rocks which in combination with the swift current produce swirling whirlpools, sucking holes in the water, and high and rough waves. The conditions of the River through this Cataract Canyon can only be adequately visualized by consulting the excellent photographs introduced in evidence and found in bound volumes constituting Complainant's Exhibits 11 B, 24-45, 234-248.

The account of the boat trips made on the Green and Grand Rivers (heretofore given in my Report supra pp. 60-98) includes substantially all boats which are known to have succeeded in passing through Cataract Canyon; but there have been many instances of failure of passage and of the death of the adventurers, as to which no one has ever been able to make a record.

The stories of those who have passed through this Canyon, as told on the witness stand in this suit and in their books, are replete with thrilling adventure, hazard to life, hair-breadth escapes, and injury to and destruction of boats. As a rule, the passage has been made in boats of special construction, with air-tight compartments at bow and stern; and to make the passage without wearing

life-preservers is dangerous. Some men have shot all the rapids; others have made the passage by portaging the contents of the boats and "lining" the boats themselves through some of the rapids (i.e., by letting the boats down by means of ropes tied to bow and stern and manipulated by the men on the bank). Such portaging and "lining" is possible at most places in the Canyon owing to the fact that on the water side at the foot of the Canyon walls, there are talus slopes or banks made up of gravel and jumbled rock, though frequently of huge size over which one may travel, with difficulty. At Dark Canyon rapids, however, the Canyon walls close in, without any shore between the walls and the River.

Many of the men who have come through the Canyon have had special experience in the operation of boats; and those who have had no previous experience with these or other rapids have owed their passage to courage and considerable good luck.

No motor boat has ever gone through Cataract Canyon and in my opinion no such boat could be navigated through it under power. No articles of commerce, other than supplies for the men making the passage, have ever been taken through the Canyon in boats.

In view of the above facts, I find that the 40 miles of Cataract Canyon and Dark Canyon, i.e., the first 40 miles of Colorado River from its beginning at the junction of the Grand and Green Rivers and down to Mile 176 above Lees Ferry were, in 1986, non-navigable. I do not understand that the State in this suit makes any very earnest claim that this section of the Colorado River was in fact navigable in

1896, but the State contends that even if this section were not navigable, nevertheless, if the Master shall find that the remainder of the River was navigable, he should also find that the River was as a whole (including this section) navigable, and that he should not split the River up into parts.

* * *

I am of the opinion and accordingly find as follows:

(1) The Colorado River south from the confluence of the Green River with the Grand River at Mile 216.5 above Lees Ferry down to the end of Cataract Canyon at Mile 176 above Lees Ferry, was, on January 4, 1896, not capable or susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel might be conducted in the customary mode of trade and travel on water.

(2) The Colorado River, on January 4, 1896, was in fact and in law a non-navigable water of the State of Utah from the confluence of the Green River with the Grand River at Mile 216.5 above Lees Ferry down to the end of Cataract Canyon at Mile 176 above Lees Ferry; and in consequence title to the bed of the River between such points was vested on that date in the United States of America, except so far as the United States of America may have theretofore made grants of said bed.

(No. 14, Original, pp. 125-127, 153; alternative stamped pages 156-158, 193.)

* * *

(c) Velocities, Gradient, and Rapids [on the San Juan river from the Mouth of Chinle Creek to its Confluence with the Colorado River].

* * *

I find that, in 1896, water conditions existed which should be termed "rapids" at the following points at least, viz., at the Narrows (about Mile 124), at Gypsum Creek (Mile 113.80), above at or below Slickhorn Creek (Miles 79, 77, 73) at Grand Gulch (Mile 70), at Piute Creek (Miles 21, 20), at Thirteen-Foot Rapid (Miles 11, 10). The actual drop at these points varied from 3 to 17 feet and from a drop of 16 feet per mile to a drop of 72 feet per mile. At other points there were conditions which might or might not be described as rapids, according to the witnesses and according to the time of year when they were seen; but even at these other places, the actual drop ranged from 3 to 9 feet and from 18 to 40 feet per mile.

The amount of impediment to navigation occasioned by these rapids at a low stage of water has been described by Miser and other members of the 1921 Survey party in their testimony, and in substantially the same manner by Miser in his report from which I quote (pp. 50-52) (and it is to be noted that the rapids will naturally create more of an impediment at high water, though they may be reduced in number and though their depth may be increased).

> "Most of the rapids are produced by boulder bars, at the mouths of side canyons. ... The

> rapids over such bars are known as boulder rapids. ... Others occur where the channel runs between close canyon walls ... . The boats of the Trimble expedition were run through most of the rapids. In shooting the worst ones, Loper, the boatman, was the only member of the party to stay in the boats; the other men walked along the banks around such rapids. The loaded boats were nosed one at a time through a few rapids by the boatmen, who in wading held on to the bow and guided it downstream ahead of him. Both the boats and the camp equipment were portaged around the Thirteen-Foot Rapid (at Mile 10-11). The equipment was portaged around a rapid 3 miles above the mouth of Slickhorn Gulch (at Mile 77) and then the boats were run empty through the rapid. The equipment was portaged around the first and second rapids at the mouth of Piute Canyon (at Mile 20-21); the empty boats were nosed through the first rapid but were run through the next. The loaded boats were run through a small rapid half a mile above the mouth of Johns Canyon at Mile 82-83, but one of the boats containing two members of the party not only narrowly missed striking the canyon wall but struck a boulder and was burst on one side from bow to stern. ..."

There was testimony that miners using this River occasionally were obliged to "line" their boats around or through the rapids. Frank H. Karnell

testified to a rather remarkable method of running rapids (Record 4468), stating that sometimes "it was necessary for me to strip and act as a rudder to the boat and shoot the rapids; in one or two places the other men would catch the boats and hold them below, after I got through."

W.E. Mendenhall, an old river-man who appeared as a witness defined rapids as follows (Record 3453): "a rapid is rough water, more or less dangerous, filled with large rocks, water running down very rapidly and rough"; and he testified to the presence of rapids in the upper canyon about 6 to 10 miles below Comb Wash (Record 3457). "It is pretty swift through these canyons. ... These rapids occurred quite frequently."

* * *

The number of difficult rapids, with steep and rapid drops ... made it impossible, in my opinion, for any boat to navigate safely unless conducted with great caution and by expert boatmen; and even then boats must ordinarily be "lined" or portaged or their cargoes portaged at several places.

* * *

I am of the opinion and accordingly find as follows:

(1) The San Juan River from the mouth of Chinle Creek at Mile 133 above the confluence of the San Juan River and the Colorado River down to the mouth of the San Juan River at such confluence was, on January 4, 1896, not capable or susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel

might be conducted in the customary mode of trade and travel on water.

(2) The San Juan River, on January 4, 1896, was in fact and in law a non-navigable water of the State of Utah from the mouth of Chinle Creek at Mile 133 above the confluence of the San Juan River and the Colorado River down to the mouth of the San Juan River at such confluence; and in consequence title to the bed of the River between such points was on that date vested in The United States of America, except so far as the United States of America may have theretofore made grants of said bed.

(No. 14, Original, pp. 166, 170-171, 181-182; alternative stamped pages 211, 221-222, 227-228.)

Appendix D

SUMMARY OF REPORT, MAPS, AND OTHER MATERIALS PROVIDED TO THE UNITED STATES IDENTIFYING LANDS OWNED BY THE FEDERAL GOVERNMENT ON THE MADISON, UPPER MISSOURI, AND CLARK FORK RIVERS

In connection with PPL's petition for certiorari, PPL's outside counsel (Holland & Hart LLP) prepared a 20-page federal ownership report, along with large, color-coded maps and other related materials, to identify, by section, township, and range descriptions, the property interests, including surface and mineral interests, owned by the United States abutting the Madison, Clark Fork and upper Missouri Rivers in Montana. The report, maps, and other materials were prepared based on, among other things, information gathered from the master title plats, serial register pages, and grant documents (patents) maintained by the Bureau of Land Management, Billings District Office. The report and maps were prepared assuming—in agreement with the 1988 letter from the U.S. Department of the Interior to the Montana Department of State Lands—that the Upper Missouri, Madison, and Clark Fork rivers are not "navigable for title related purposes."

These materials were shared with the United States and personnel from several federal agencies, including the Department of Justice, Environmental and Natural Resources Division. Given the materials' bulk, however, they are not easily

reproduced in a booklet-form appendix. Accordingly, the following provides a summary of some of the information shared with the United States. Upon the Court's request, PPL would be pleased to submit the maps, federal ownership report, and related materials to the clerk's office.

1. The Montana court's decision puts at risk millions of acres of valuable surface and subsurface mineral acres managed by the federal land-owning agencies throughout Montana, including tens or hundreds of thousands of acres of riverbed lands otherwise owed by the United States (or U.S. patent holders) that the Montana court has now adjudicated to be owned by Montana, or which are on the State's Navigable Rivers List, within the following:

- 8 million surface acres and more than 20 million subsurface mineral acres managed by the Bureau of Land Management ("BLM").
- 1.2 million surface acres managed by the National Park Service ("NPS").
- 1.2 million surface acres managed by the U.S. Fish & Wildlife Service.
- 16.9 million surface acres managed by the United States Forest Service ("USFS").

2. The Montana court's decision awarding title to the riverbeds to Montana competes with the United States' title as riparian owner of the same beds within five national forests, a BLM

wilderness area, BLM-managed Public Domain surface and mineral lands, and Yellowstone National Park, all of which the three rivers flow through.

- Madison River: Beaverhead-Deerlodge National Forest, Gallatin National Forest, the Lee Metcalf Wilderness Area, and Yellowstone National Park.

- Missouri River: Helena National Forest, Public Domain surface and mineral lands.

- Clark Fork River: Kaniksu National Forest. Lolo National Forest, Grant-Kohrs Ranch National Historic site.

3. "Title" to tens of thousands of acres of riverbed lands between the high water marks on the upper Missouri, Madison, and Clark Fork Rivers otherwise owned by the United States (or its patent-holders) has been adjudicated by Montana's highest court to be owned by Montana. *PPL Montana v. Montana,* 229 P.3d 421, 449, 460 (Mont. 2010). These lands include:

- hundreds of acres of federal BLM title to the surface and subsurface of upper Missouri riverbeds between Fort Benton and Great Falls, including oil & gas interests in a currently producing area. This reach of the river contains PPL's Black Eagle, Rainbow, Ryan, Cochrane, and Morony dams.

- thousands of acres of federal BLM/USFS title to the surface and subsurface of the upper Missouri riverbeds between Cascade and Three Forks, including the riverbed lands belonging to the Helena National Forest, and those connected to BLM's "Chain-of Lakes Complex," which include the following federal BLM Recreation Areas: Holter Dam, Holter Lake, Log Gulch, Departure Point, Beartooth Landing, Devil's Elbow I and II, and the Upper Toston Recreation Site. This reach of the river contains PPL's Holter and Hauser dams, and also the riverbed acres underlying the U.S. Bureau of Reclamation's Canyon Ferry dam and reservoir.

- thousands of acres of federal BLM/USFS title to the surface and subsurface of the Madison riverbeds between the Wyoming border and Three Forks, including riverbed lands within the Beaverhead-Deerlodge and Gallatin National Forests, and within the BLM's Lee Metcalf Wilderness Area, including the Beartrap Canyon National Recreation Trail. The parts of the Madison River deemed by the Montana court to be owned by the State include the river stretches that contain PPL's Hebgen and Madison dams, as well as riverbed acres within the western edge of Yellowstone National Park.

- thousands of acres of federal BLM/USFS title to the surface and subsurface of riverbeds between Deer Lodge and the Idaho border on the Clark Fork River. The river area declared

navigable for title purposes by the Montana court that includes PPL's Thompson Falls dam also grants riverbed ownership to Montana within the NPS's Grant Kohrs Ranch National Historic Site, and to riverbeds within the Kaniksu and Lolo National Forests, and along recreation areas managed by BLM.

4. The Montana court's decision raises serious concerns for potentially thousands of private landowners who since 1889 have received lands from the federal government by patent, grant, or decree, including (for example) the 1910 Federal Decree regarding Thompson Falls that decreed fee title to the riverbeds beneath PPL's Thompson Falls dam to be in PPL's federal patent-holding predecessor-in-title.

AMICUS CURIAE BRIEF

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC, PETITIONER

v.

STATE OF MONTANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

WILLIAM M. JAY
Assistant to the Solicitor General

ELIZABETH ANN PETERSON
KATHERINE J. BARTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioner owns federally licensed hydroelectric facilities on three rivers in Montana. The Montana Supreme Court held that the State owns the submerged lands underlying the facilities and that petitioner owes rent for the use of these lands. The question presented is:

Whether the Montana Supreme Court erred in concluding on summary judgment that riverbeds occupied by petitioner's hydroelectric facilities are the property of the State of Montana because they were navigable for title purposes at the time Montana became a state.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 7
Argument:
I. Title to riverbeds under the equal-footing doctrine rests on a distinct concept of navigability 8
II. The Montana Supreme Court erred in holding that some segments were navigable as a matter of law despite not being navigable in fact 10
A. A State does not acquire title to river segments that are not navigable at the time of statehood 11
1. Navigability may vary by segment 11
2. A segment may be non-navigable for title purposes even though it interrupts two navigable segments 15
3. Examining navigability by segment is consistent with the need to determine each new State's rights as it enters the Union 18
B. In concluding that the rivers were navigable as a matter of law, the Montana Supreme Court misapplied the relevant test for navigability in fact 19
1. Montana's evidence of navigability on one segment was not sufficient to show navigability on other segments 20
2. Montana did not show that the segments at issue here were "short interruptions" as a matter of law 22
3. Montana did not establish title to non-navigable stretches by showing that those stretches could be portaged 23

Table of Contents—Continued: Page

III. The Montana Supreme Court erred in basing summary judgment on post-statehood evidence of navigability without a proper foundation 27
A. To support a title determination, evidence of post-statehood navigation must be substantially probative of pre-statehood capacity 28
B. The Montana Supreme Court failed to assess the materiality of post-statehood evidence on summary judgment 30
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Alaska v. *Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), cert. denied, 495 U.S. 919 (1990) 29, 31
Brewer-Elliott Oil & Gas Co. v. *United States*, 260 U.S. 77 (1922) 12, 14, 18, 28
Economy Light & Power Co. v. *United States*, 256 U.S. 113 (1921) 9
FPC v. *Union Elec. Co.*, 381 U.S. 90 (1965) ... 10, 24, 25, 26
Idaho v. *United States*, 533 U.S. 262 (2001) 2
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 10
Leo Sheep Co. v. *United States*, 440 U.S. 668 (1979) 18
Montana Power Co., In re, 7 F.P.C. 163 (1948), aff'd in part and remanded in part, 185 F.2d 491 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951) 27
Montana Power Co., The, 8 F.P.C. 751 (1949) 26
Montana Power Co. v. *FPC*, 185 F.2d 491 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951) 26

Cases—Continued: Page

North Dakota ex rel. Board of Univ. & Sch. Lands v. *United States*, 972 F.2d 235 (8th Cir. 1992) 29, 30, 32

Northwest Steelheaders Ass'n, Inc. v. *Simantel*, 112 P.3d 383 (Or. Ct. App.), review denied, 122 P.3d 65 (Or. 2005), cert. denied, 547 U.S. 1003 (2006) 29

Oklahoma v. *Texas*, 258 U.S. 574 (1922) 14, 15

Oklahoma ex rel. Phillips v. *Guy F. Atkinson Co.*, 313 U.S. 508 (1941) 26

Philadelphia Co. v. *Stimson*, 223 U.S. 605 (1912) 10

Phillips Petroleum Co. v. *Mississippi*, 484 U.S. 469 (1988) 12, 23

Roe v. *City of Missoula*, 221 P.3d 1200 (Mont. 2009) 20

Scott v. *Lattig*, 227 U.S. 229 (1913) 17

Shively v. *Bowlby*, 152 U.S. 1 (1894) 2

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871) 9, 11

The Montello, 87 U.S. (20 Wall.) 430 (1874) 8, 25

United States v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) 31

United States v. *Chandler-Dunbar Water Power Co.*:

209 U.S. 447 (1908) 17

229 U.S. 53 (1913) 26

United States v. *Grand River Dam Auth.*, 363 U.S. 229 (1960) 27

United States v. *Holt State Bank*, 270 U.S. 49 (1926) 11, 15, 29

United States v. *Oregon*, 295 U.S. 1 (1935) 27, 29

Cases—Continued: Page

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 10
United States v. *Utah*:
283 U.S. 64 (1931) ..... *passim*
283 U.S. 801 (1931) 14
Utah v. *United States*:
304 F.2d 23 (10th Cir.), cert. denied, 371 U.S. 826 (1962) 13
403 U.S. 9 (1971) 2, 11, 21

Statutes and rules:

Federal Power Act, 16 U.S.C. 796 *et seq.* 3
16 U.S.C. 796(8) 25, 26
Montana Hydroelectric Resources Act, Mont. Code Ann. § 77-4-201 *et seq.* (2009) 4
§ 77-4-201 4
§ 77-4-205 4
§ 77-4-207 4
§ 77-4-208 4
§ 77-4-209 4
Fed. R. Civ. P. 56 20
Mont. R. Civ. P. 56(c) 20

In the Supreme Court of the United States

No. 10-218

PPL MONTANA, LLC, PETITIONER

v.

STATE OF MONTANA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

When a State enters the Union, title to the bed and banks of navigable waterways ordinarily passes from the United States to the new State. This case involves the proper legal standard for determining whether particular waters were navigable at the time of statehood for purposes of transferring title from the United States to the new State. The United States has a significant interest in the resolution of that question. The federal government owns riparian land throughout the Nation, including along the three rivers whose navigability is at issue in this case. Where the waters were non-navigable at the time of statehood, the United States has asserted its ownership of the riverbeds in various ways, including by issuing patents, leases, and permits.

STATEMENT

This case concerns whether the beds of particular stretches of three rivers—the Missouri, the Clark Fork, and the Madison—became the property of the State of Montana when it entered the Union in 1889.

1. Before American independence, the English Crown held the lands beneath navigable waters in a public trust. The original 13 States succeeded to that trust responsibility. *Shively* v. *Bowlby*, 152 U.S. 1, 11, 16 (1894). Under the "equal footing" doctrine, subsequently admitted States enter the Union on an equal footing with the original States, so they, too, take title at statehood to the lands under waters that are navigable at that time.[1] See *Utah* v. *United States*, 403 U.S. 9, 10 (1971). Title to lands beneath waters that are not navigable at the time of statehood, however, is not affected by a State's entry into the Union. *United States* v. *Utah*, 283 U.S. 64, 75 (1931). Thus, whether the State or the adjacent riparian landowner owns the submerged lands underlying the relevant portions of the Missouri, Clark Fork, and Madison Rivers depends on whether those portions were navigable when Montana entered the Union. *Ibid.*

2. The Clark Fork originates east of Missoula, Montana, and flows generally northwest to its terminus in Lake Pend Oreille in Idaho. The Madison River originates in Yellowstone National Park in Wyoming, flows west into Montana, and then flows north until it joins two other rivers to form the Missouri River at the town of Three Forks. The Missouri continues flowing north

---

[1] Lands beneath navigable waters do not transfer at statehood if the United States reserves such lands or grants them to others. See, *e.g.*, *Idaho* v. *United States*, 533 U.S. 262, 272-273 (2001).

past Helena; through the Stubbs Ferry stretch; northeast past the city of Great Falls and through the "Great Falls reach," a 17-mile stretch of rapids and falls; past Fort Benton; eastward to North Dakota; and ultimately into the Mississippi River near St. Louis.

Petitioner operates two hydropower projects on those three rivers. Petitioner acquired the projects from the Montana Power Company in 1999. Pet. App. 3. Both projects are licensed by the Federal Energy Regulatory Commission, formerly the Federal Power Commission (FPC), pursuant to its exclusive authority under the Federal Power Act (FPA), 16 U.S.C. 796 *et seq.*

The Thompson Falls Project consists of one dam at Thompson Falls, Montana, on the Clark Fork. The project was constructed in 1915, licensed under the FPA in 1949, and relicensed in 1979. Pet. App. 2. The Missouri-Madison Project consists of nine dams. Two are located on the Madison: Hebgen, near the Wyoming–Montana border, and Madison, north of Ennis, Montana. The other seven dams are located on the Missouri: five dams (Black Eagle, Rainbow, Ryan, Morony, and Cochrane) are on the Great Falls Reach, and the other two (Holter and Hauser) are on the Stubbs Ferry stretch north of Helena.[2] The Missouri-Madison dams were constructed between 1891 and 1958, were licensed under the FPA in 1956, and were relicensed in 2000.[3] *Id.* at 2-3.

---

[2] All seven dams on the Missouri are upstream from Fort Benton, where the parties agree the river was navigable in 1889.

[3] Petitioner's six dams not on the Great Falls reach are constructed on or flood some federal lands, for which petitioner pays annual rental charges of approximately $500,000 to $600,000. See Pet. Supp. Br. App. 8. Only a portion of the rent is for riverbed rather than flooded upland.

3. In 1931, the Montana Legislature enacted the Montana Hydroelectric Resources Act (HRA), Mont. Code Ann. § 77-4-201 *et seq.* (2009). That statute contains regulatory provisions, such as a limit on the terms of hydropower leases on state-owned lands, *id.* §§ 77-4-205, 77-4-207, 77-4-209, and compensatory provisions, which require the State to charge rent for the use of state-owned lands for hydropower projects. *Id.* §§ 77-4-201, 77-4-208.

4. In November 2004, petitioner filed suit in Montana state court against the State of Montana. Petitioner sought a declaration that it owed the State no compensation for the use of the riverbeds underlying its hydroelectric facilities. Pet. App. 5.

The State counterclaimed. It sought a declaration that it owned submerged lands beneath petitioner's projects and that petitioner owed it compensation for use of those lands. The State also sought damages for petitioner's past uncompensated use. Pet. App. 147; Br. in Opp. App. 1-13.

5. a. The state district court granted the State partial summary judgment on the question of ownership and held that the three rivers were navigable at statehood. Pet. App. 130-143. Petitioner had contended that the stretches of the Missouri and Clark Fork where its dams are located were not navigable at statehood. Although the court agreed that the Great Falls reach "ha[d] never been navigated," *id.* at 137, the court concluded that both rivers were navigable as a general matter and that under *United States* v. *Utah*, *supra*, the interruptions to navigation identified by petitioner do not defeat navigability for title purposes. Pet. App. 137-142. The court concluded that the Madison was navigable at statehood, relying in part on modern-day evidence

of "considerable recreational use" of the river. *Id.* at 143.

b. After trial on damages and other issues, the court entered judgment for the State and held that petitioner owed back rent in the amount of $40,956,180. Pet. App. 45.

6. The Montana Supreme Court affirmed by a vote of 5 to 2. Pet. App. 1-117.

a. The state supreme court rejected petitioner's argument that "certain portions of the rivers at issue in this case" were non-navigable. Pet. App. 60. The court agreed with the trial court that "portages do not defeat navigability, so long as the river itself was used, or susceptible of being used, as a channel of commerce at the time of statehood," and that "short interruptions" to navigability are not separately analyzed as non-navigable segments. *Id.* at 53-54, 60-61. On this basis, the court concluded that the 17-mile stretch of rapids and falls on the Great Falls reach of the Missouri, and the rapids and obstructions to navigation in the vicinity of the Thompson Falls Project on the Clark Fork, were "short interruptions of navigability" that were "insufficient as a matter of law * * * to declare any portions of these rivers non-navigable." *Id.* at 61.

b. The court then affirmed the summary-judgment ruling that all three rivers were navigable at the time of statehood. The court concluded that "[d]espite the presence of portages along the Clark Fork and Missouri Rivers, the historical evidence establishes that they provided a channel for commerce at the time of statehood, or were susceptible of such use." Pet. App. 56. The court acknowledged, however, that "the historical usage of the Madison was not as well-established." *Ibid.*

Although the court acknowledged that navigability for title purposes is assessed as of the time of statehood, Pet. App. 55-56, it stated that "present-day recreational use is sufficient for purposes of 'commerce.'" *Id.* at 58. With respect to the Madison, the court rejected the submission of petitioner's expert that the Madison had physically changed since the time of statehood, including through the presence of petitioner's dams, in ways that improved its susceptibility to navigation. *Ibid.* The court then concluded that post-statehood evidence—"present-day usage" plus "the evidence of a log float on [the Madison's] middle portion in the 19th century [actually 1913]"—demonstrated that the Madison was navigable in its entirety in 1889. *Id.* at 56.

The court held that petitioner had not established any genuine issue of material fact as to the navigability of any of the rivers, because petitioner's evidence of non-navigability at statehood was "conclusory." Pet. App. 57, 58.[4]

c. Justice Rice dissented, joined by Judge Salvagni. Pet. App. 93-117. In the dissent's view, "in applying the navigability for title test, courts are not to assume an *entire river* is navigable merely because certain reaches of the river are navigable," but instead should apply "a section-by-section analysis." *Id.* at 96, 98. The dissent also concluded that the majority erred in holding "that all of the challenged reaches of all the rivers are 'relatively short' and thus unable, as a matter of law, to be declared non-navigable for title purposes"; in the dis-

---

[4] The court declined to hold that petitioner had admitted navigability, as the State has urged. Pet. App. 62; see Br. in Opp. 25-26. The court also held that the FPA does not preempt the compensatory provisions of the Montana HRA, which are severable from the regulatory provisions. See Pet. App. 70-72.

sent's view, the proper treatment of each segment was a factual question. *Id.* at 100. The dissent concluded that that question could not be answered on summary judgment, because petitioner "ha[d] satisfied its burden to produce substantial evidence that the disputed reaches of the rivers were, at the time of statehood, non-navigable." *Id.* at 117. The dissenters would have remanded for trial. *Ibid.*

SUMMARY OF ARGUMENT

The Montana Supreme Court erred in applying the principles that govern navigability for title purposes, which differ in relevant respects from other navigability tests. The proper analysis would have examined the relevant river segments, divided as the rivers' natural features make appropriate, and asked whether each segment was navigable for title purposes at the time Montana became a State. Instead, the state supreme court erroneously held that every segment of the three rivers was navigable as a matter of law, either because the segments at issue were "relatively short" or because they could be portaged around. But non-navigable segments like the 17-mile Great Falls reach cannot be dismissed as too "short" to be relevant to questions of title. When a discrete and substantial segment is not navigable at statehood, the State does not take title to that segment, whether or not the segment could be portaged. Although portaging may connect *navigable* segments into a continuous highway for commerce, portaging around a non-navigable segment does not make *that* segment navigable for title purposes.

The state supreme court also erred in concluding that evidence of navigation *after* statehood, without more, could establish navigability *at* statehood for title

purposes. Present-day use, including some recreational use, may be probative. To establish its relevance, however, Montana would have to show that evidence of navigation by today's boats under today's river conditions is persuasive evidence that craft used in trade and travel at statehood could have navigated a particular river reach as it existed at statehood. For instance, Montana could present evidence that neither the boats nor the rivers have materially changed since statehood. Montana has not laid that foundation, and indeed petitioner has disputed it. The evidence of post-statehood navigation therefore could not be a basis for summary judgment.

Petitioner presented sufficient evidence to survive summary judgment. This Court should therefore remand for the sort of intensive factual inquiry that navigability for title demands, in which the ultimate question is whether each relevant segment was "navigable in fact" at the time of statehood.

ARGUMENT

I. TITLE TO RIVERBEDS UNDER THE EQUAL-FOOTING DOCTRINE RESTS ON A DISTINCT CONCEPT OF NAVIGABILITY

Concepts of navigability are used not only to determine whether a State gained title to submerged lands at statehood, p. 2, *supra*, but also to delineate admiralty jurisdiction, see, *e.g.*, *The Montello*, 87 U.S. (20 Wall.) 430 (1874), and to aid in determining the extent of federal regulatory authority under statutes adopted pursuant to the Commerce Clause, see, *e.g.*, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). Although those three navigability standards do have some common elements, they are not identical. Navigability

for title purposes is in many ways the most restrictive definition: it looks only at one point in time and only at the river in its natural state. Thus, although a stretch that is navigable for title is likely to be within the scope of federal regulation under the commerce power, the reverse is not necessarily true.

This Court initially set forth a "navigable in fact" standard for determining whether waters are navigable in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871), an admiralty case. The Court stated that:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563.

Although the *Daniel Ball* standard plays a role in all three sorts of navigability determinations, each context calls for its own variations on the concept of "navigability in fact." See *Appalachian Elec. Power*, 311 U.S. at 406 (noting that "[e]ach application of [the *Daniel Ball*] test * * * is apt to uncover variations and refinements which require further elaboration"). For example: Navigability for title must be determined as of the time a State entered the Union and based on the river's "ordinary condition." Navigability for admiralty jurisdiction extends to waters that are currently navigable, even if they were non-navigable in the past. *E.g.*, *id.* at 408. And navigability for purposes of federal regulatory authority encompasses waters that were once navigable but are no longer, see, *e.g.*, *Economy Light & Power Co.*

v. *United States*, 256 U.S. 113, 123-124 (1921), or only recently have become passable, see, *e.g.*, *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 634-635 (1912), or are not now and never have been navigable but may become so, by improvements, in the future, see, *e.g.*, *Appalachian Elec. Power*, 311 U.S. at 409. Furthermore, navigability in fact is not the only basis of federal regulatory jurisdiction under the commerce power, which can encompass particular stretches that are non-navigable. See, *e.g.*, *id.* at 426-427; *FPC* v. *Union Elec. Co.*, 381 U.S. 90, 105 & n.21 (1965); see also *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173-174 (1979).

Given these differences, this Court has cautioned that "any reliance upon judicial precedent [in this area] must be predicated upon careful appraisal of the *purpose* for which the concept of navigability was invoked in a particular case." *Kaiser Aetna*, 444 U.S. at 171 (internal quotation marks and citation omitted). That a river segment is navigable (or non-navigable) for one purpose does not establish whether it is navigable for another purpose. This case involves only navigability for title.

II. THE MONTANA SUPREME COURT ERRED IN HOLDING THAT SOME SEGMENTS WERE NAVIGABLE AS A MATTER OF LAW DESPITE NOT BEING NAVIGABLE IN FACT

The Montana Supreme Court erred in its conclusion that, as a matter of law, the riverbeds at issue in this litigation were navigable at statehood based on the court's view that other stretches of the Missouri, Clark Fork, and Madison Rivers were or are navigable. See Pet. App. 60-61. Indeed, the state supreme court expressed skepticism that it would ever be appropriate to

adopt a "piecemeal classification of navigability—with some stretches declared navigable, and others declared non-navigable." *Id.* at 58; see *id.* at 58-60. That skepticism was misplaced. This Court has long considered navigability for title on a segment-by-segment basis, because navigation on one part of a river does not necessarily establish that the remainder is navigable for title purposes. Only portions of a river that were capable of serving as part of a highway of commerce at statehood should be held to be navigable for title purposes. Although those portions may not themselves be contiguous (*e.g.*, navigable portions may be linked by portages), discrete and substantial portions that could not be navigated at all (but could only be portaged around) are not "short interruptions" to navigability and thus are not navigable for title purposes.

A. A State Does Not Acquire Title To River Segments That Are Not Navigable At The Time Of Statehood

1. Navigability may vary by segment

Many navigable rivers are navigable only in part. Between a river's headwaters and mouth—which in the Missouri's case are more than 2000 river miles apart—the conditions that affect navigability may vary significantly. As a result, this Court has never suggested that determinations of navigability for title purposes must focus on the river as a whole, or presume as a matter of law that a representative showing is enough to establish the navigability of an entire river. To the contrary: for purposes of title, rivers are "navigable rivers in law" when they are "navigable in fact." *E.g.*, *Utah* v. *United States*, 403 U.S. 9, 10 (1971) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563); *United States* v. *Utah*, 283 U.S. 64, 76 (1931) (same); *United States* v.

Holt State Bank, 270 U.S. 49, 56 (1926). And when this Court has examined that factual question in the title context, the evidence has often divided the relevant rivers into "long reaches with particular characteristics of navigability or non-navigability." *United States* v. *Utah*, 283 U.S. at 77. In places where the river was actually navigated as a highway for commerce at the time of statehood, or was susceptible of such use even though not actually navigated, the State takes title. In places where the river was *not* susceptible of such navigation, the State has no claim to title under the equal-footing doctrine. See, *e.g.*, *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 86-87 (1922).[5] The state supreme court called that approach "piecemeal," but the test for title is navigability *in fact*; when the facts show that conditions of a river's navigability varied from segment to segment at statehood, the State's ownership will vary as well.

Thus, in *United States* v. *Utah* the Court awarded title not to rivers as a whole, but to particular segments of the Colorado River and three of its tributaries: the Green and Grand, which flowed together to form the Colorado, and the San Juan, which met the Colorado downriver. 283 U.S. at 73-74, 89.[6] The Court concluded that when Utah entered the Union, the Colorado River was navigable for its first 4.35 miles; that the next 36.15 miles, which flowed through Cataract Canyon, were not

---

[5] For an exception not relevant here, see *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 476-480 (1988) (States also take title at statehood to lands beneath waters subject to the ebb and flow of the tide, even if non-navigable).

[6] The Grand River is now considered to be the upper part of the Colorado. 283 U.S. at 73.

navigable; and that the next 149 miles were navigable.[7] Similarly, the Court held that the last 95 miles of the Green River, beginning roughly where that river receives a major tributary, were navigable at the time of statehood; the Court did not address the remainder of that river (nearly 600 miles). See *id.* at 73-74, 77-78, 89.[8] Indeed, although the parties had introduced evidence about conditions on portions of the Green and Grand Rivers upriver from the segments at issue, the Special Master declined to make findings on that subject because the water and navigation conditions were "essentially different" upriver. Report of the Special Master at 53, *United States* v. *Utah*, *supra* (No. 14, Original) (*Utah* Report). The Court approved of the Special Master's approach to particular segments, "in view of the physical characteristics of the streams." 283 U.S. at 77. In fact, the Court concluded that the Special Master had been insufficiently precise in segmenting the river and that navigability ended at the beginning of Cataract Canyon, rather than 4.35 miles upriver. See *id.* at 89. The Court stated that "the exact point at which naviga-

---

[7] Although Utah initially disputed the United States' title to the segment within Cataract Canyon, based on a river-as-a-whole approach, the Special Master found that the discrete segment was not navigable, and Utah did not except. *United States* v. *Utah*, 283 U.S. at 79-80; see Report of the Special Master at 5, 7, 127, *United States* v. *Utah*, *supra* (No. 14, Original) (*Utah* Report).

[8] The United States sought to quiet title only to the 95-mile segment. *United States* v. *Utah*, 283 U.S. at 71. Similarly, the United States sought to quiet its title only to the last 133 miles of the San Juan River; although Utah initially opposed, the Master agreed that that segment was not navigable, and Utah did not except. *Id.* at 71, 74; see *Utah* Report 5,7; see also *Utah* v. *United States*, 304 F.2d 23 (10th Cir.) (subsequent dispute over different, 55-mile segment of San Juan), cert. denied, 371 U.S. 826 (1962).

bility may be deemed to end * * * should be determined precisely." *Id.* at 90.[9]

The Court has applied a similar approach to other cases involving title to riverbeds beneath allegedly navigable waters. For instance, in *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), the question was whether the portion of the Red River along the Oklahoma-Texas border was navigable. *Id.* at 583. Within that segment, the Court evaluated navigability for title in two separate sections. The first section, above the confluence with the Washita River, was not navigable because of low flow. *Id.* at 587-588. The second section, below that point, had a more constant flow, but navigation in that section was not regularly or readily feasible because of shifting sandbars. *Id.* at 589-590. The river became navigable only once it left Oklahoma and entered Arkansas. *Id.* at 589.

Similarly, in *Brewer-Elliott*, *supra*, the Court recognized that the correct question was whether, at the time of statehood, the Arkansas River was navigable "at the place where the river bed lots * * * in controversy[] are." 260 U.S. at 86. The dispute was confined to the portions of the riverbed adjacent to the Osage Reservation. *Id.* at 79. The court held that although the lower Arkansas was apparently navigable, the portion at issue in the case was above the head of navigation and so not navigable. *Id.* at 86.

Each of these decisions establishes that, for purposes of title, the mere fact that a river is navigable downstream does not establish that all segments upstream are navigable. Rather, "how far navigability extends" must "be determined upon evidence." *United States* v.

---

[9] The parties subsequently resolved that dispute in a stipulated decree. See *United States* v. *Utah*, 283 U.S. 801, 801 (1931).

Utah, 283 U.S. at 77. The facts relevant to determining navigability for title often serve to divide a watercourse into segments—for example, where the gradient changes, cf. *id.* at 77-79, or where a tributary adds flow to the main river, cf. *Oklahoma* v. *Texas*, 258 U.S. at 589. For title purposes, the ultimate question to be resolved remains whether the particular part of the river, "in its natural and ordinary condition[,] afford[ed] a channel for useful commerce" at statehood. *Holt State Bank*, 270 U.S. at 56.

2. A segment may be non-navigable for title purposes even though it interrupts two navigable segments

Some rivers may neatly divide into two segments—above and below the "head of navigation." But because navigability for title turns on the evidence of particular conditions along particular river segments, some rivers—especially those as long and varied as the rivers in this case—will alternate between non-navigable and navigable stretches. That is an appropriate application of the segment-by-segment approach.

Where an upstream stretch is "navigable in fact" in its own right, it does not matter that the next segment downstream is non-navigable. That was the case in *United States* v. *Utah*: the lower Green and Grand Rivers were navigable, and so was the Colorado River above and below Cataract Canyon, even though the navigable segments were divided from one another by the non-navigable 36-mile stretch passing through Cataract Canyon. Thus, the State took title to the segments that were navigable in fact; the United States retained title to the non-navigable segment between them. Indeed, Utah did not challenge the Special Master's decision

that a middle segment was non-navigable. See note 7, *supra*.

This Court did suggest in *United States* v. *Utah* that to constitute a distinct segment, a stretch of river must be of greater than "negligible" length. 283 U.S. at 77. The Court noted that the facts of that case did not present "a short interruption of navigability in a stream otherwise navigable," nor did they present "a negligible part, which boats may use, of a stream otherwise non-navigable." *Ibid.* Rather, the case concerned "long reaches" that shared "particular characteristics of navigability or non-navigability." *Ibid.*

Because the facts of *United States* v. *Utah* involved "long reaches" rather than "negligible" or "short interruptions," the Court's holding did not involve any segment that boats could not navigate but that was too short to warrant separate treatment. The Court gave separate consideration to a three-mile segment of the Grand River that had "three small rapids" and was "not characteristic" of the Grand as a whole. 283 U.S. at 79, 85. And the Court affirmed the Special Master's finding that although the rapids made the three-mile stretch "less susceptible of practical navigation" than the rest of the river, even that three-mile stretch could be, and regularly was, navigated for commercial purposes by lumber rafts. *Id.* at 79.

Indeed, none of the disputed river segments in *United States* v. *Utah* was completely impassable to navigation at any point. The United States did not seek title to any one fixed spot where navigation was interrupted altogether; rather, it pointed to shifting sandbars that somewhat impeded navigation and, the United States contended, showed that the entire river segment was not a useful highway of commerce. The Court concluded

that although shifting sandbars sometimes made navigation difficult, the sandbars did not actually interrupt navigation on any of the rivers in question; those rivers were usable as channels for commerce at the time of statehood and, therefore, navigable for title. 283 U.S. at 85-87.

Thus, *United States* v. *Utah* did not present the question whether the State acquires title to non-navigable "short interruptions" at the time of statehood. This Court's previous cases suggest, however, that where a non-navigable segment can be defined with sufficient precision (unlike, *e.g.*, the "shifting sandbars" in *United States* v. *Utah*, 283 U.S. at 85), and where that segment is more than just a "negligible" or "short interruption," *id.* at 77, the test for title remains what it always has been: "navigability in fact" at statehood. The Court has suggested that segments as short as a few miles may be "long reaches" rather than "short interruptions." *Ibid.* A "short interruption" is a segment that is not sufficiently distinct to warrant separate consideration. Cf. *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U.S. 447, 451 (1908) (holding that a State took title at statehood to two tiny islands "of no apparent value" that were "little more than rocks, rising very slightly above the level of the water [of a navigable river], * * * contain[ing] respectively a small fraction of an acre and a little more than an acre"); *Scott* v. *Lattig*, 227 U.S. 229, 240, 244-245 (1913) (distinguishing *Chandler-Dunbar* and holding that a State did not take title to a much larger island of more significant value).

3. *Examining navigability by segment is consistent with the need to determine each new State's rights as it enters the Union*

Navigability, in this context, determines a question of significant practical significance to a property owner along the river: does his title to the riparian land also include title to the riverbed, or does he own only the riparian land while the State owns the riverbed? The very nature of that question suggests an answer based on conditions on a particular stretch of river, or conditions adjacent to a particular piece of riparian land, at a particular time (statehood). See, *e.g.*, *Brewer-Elliott*, 260 U.S. at 86.

If title to a particular stretch of riverbed turned on the navigability not of that stretch alone, but on the much broader question whether the river is navigable as a whole, any one owner's title would become dependent on conditions elsewhere—potentially hundreds of river miles away. This Court has recognized "the special need for certainty and predictability where land titles are concerned." *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687-688 (1979). A riparian owner will naturally form his expectations as to whether or not he owns the adjacent riverbed based on conditions at his location, not somewhere else. A river-as-a-whole approach would impede riparian landowners' ability to settle their own expectations of title soon after statehood.[10] Cf. *Brewer-Elliott*, 260 U.S. at 88 (rejecting any "retroactive rule for determining navigability which would destroy a title already

---

[10] Indeed, although this case arises long after Montana entered the Union, navigability for title has often been litigated and decided with the benefit of firsthand evidence of conditions at statehood. See, *e.g.*, *Utah* Report 52 (eyewitness testimony).

accrued under federal law and grant or would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked").

Those expectations are significant ones. For instance, the United States owns millions of acres of riverbed, and it undertakes numerous actions in reliance on its settled expectation of ownership: *e.g.*, issuing leases for minerals underlying the riverbeds, installing facilities such as dams and docks, and patenting interests to third parties. By requiring that a State's title to a riverbed accrue *at statehood*, the equal-footing doctrine allows federal, state, and private landowners to settle their expectations and act on them.

B. In Concluding That The Rivers Were Navigable As A Matter Of Law, The Montana Supreme Court Misapplied The Relevant Test For Navigability In Fact

The Montana Supreme Court did not correctly apply the foregoing principles to the summary-judgment record before it. Rather, the state supreme court made three crucial legal errors, and as a result its judgment cannot be sustained. First, the state supreme court treated evidence that one segment was navigable as applying to other segments as well, without basing that inference on actual facts about river conditions. Second, the state supreme court incorrectly concluded that, even though on certain stretches Montana presented no evidence that navigation *ever* occurred, those stretches were too short as a matter of law to be non-navigable in their own right. Third, and relatedly, the state supreme court incorrectly held that portaging around those substantial stretches amounts to navigating those stretches in fact. Summary judgment for Montana was inappro-

priate for each of those reasons. Under Montana law, as under Rule 56 of the Federal Rules of Civil Procedure, the burden rested on Montana to establish the absence of any genuine issue of material fact.[11] Under the correct principles of navigability for title, Montana did not carry that burden.

1. Montana's evidence of navigability on one segment was not sufficient to show navigability on other segments

As shown above, the test for navigability for title contemplates that, based on all the evidence, "some stretches [may be] declared navigable, and others declared non-navigable"—precisely the result that the state supreme court skeptically called a "piecemeal classification." Pet. App. 58. The court incorrectly perceived petitioner as arguing that "particular stretches of a river which are non-navigable * * * can defeat a finding of navigability with respect to the whole river." *Ibid.* In fact, petitioner argues—correctly—that evidence that a particular stretch is non-navigable for title can defeat a finding of navigability *with respect to that stretch*.

The state court further misapplied the test when it merged evidence from various different segments to come to a conclusion that an entire river was navigable. Although evidence of navigation on one segment might

[11] See, *e.g.*, Mont. R. Civ. P. 56(c); *Roe* v. *City of Missoula*, 221 P.3d 1200, 1204 (Mont. 2009). Petitioner suggests (Br. 54-57) that the burden always lies with the party seeking to prove navigability. This Court has never adopted such a categorical rule, and it need not do so here, because the navigability question is presented by a grant of summary judgment for Montana on a counterclaim brought by Montana. The burden therefore clearly rests with Montana in this context.

help to show that another, *comparable* segment was also navigable, the record did not establish beyond dispute that navigation took place (or could have) on the segments at issue in this case or on a comparable segment.

On the Madison River, the state supreme court relied in part on one occasion in 1913—after statehood and after petitioner's dams were built—when logs were floated on the river's "middle portion." Pet. App. 26, 56.[12] That log float occurred between the mouth of one tributary, the West Fork Madison River, and the town of Varney. *Id.* at 26. That stretch is only about 55 miles of the 140-mile-long Madison River, and it is located between petitioner's dams (Varney is ten miles upriver from Madison Dam). See J.A. 219, 248, 257-259. The State's own evidence stated that the Madison has four physically "distinct natural subdivisions" in Montana, and that physical obstructions such as shallows and rapids increase as one travels upstream. J.A. 247-249. Hebgen Dam, at least, was upstream from the log float and on a different river segment. *Ibid.*; see also J.A. 679-680. A reasonable factfinder could conclude from that evidence that a log float to Varney (even if successful, but see Pet. Br. 10, 59) simply was not probative of navigability on the stretches that are at issue in this case.

On the Clark Fork, too, the state supreme court stated that "actual use" was "documented from the Pend Oreille Lake at least to this river's confluence with the

---

[12] The relevance of post-statehood evidence is discussed below. See pp. 27-33, *infra*. Evidence limited to a single log float might be inadequate to show navigability for title in any event, cf. *United States* v. *Utah*, 283 U.S. at 79 (repeated use by lumber rafts), unless the evidence also showed that the relevant stretch was *susceptible* of greater use. Cf. *Utah* v. *United States*, 403 U.S. at 11.

Blackfoot River," a stretch that includes Thompson Falls. Pet. App. 61. But the court appeared to acknowledge that there was no evidence of actual use "in the vicinity of [petitioner's] Thompson Falls project." *Ibid.* Montana did not establish beyond dispute that the evidence of "actual use" was relevant to the contested river segment.

2. Montana did not show that the segments at issue here were "short interruptions" as a matter of law

The record contains no evidence that, at the time of statehood, anyone had ever navigated the 17-mile Great Falls reach, or could have navigated that stretch. Pet. App. 137 (stating that "the falls have never been navigated"). The falls were not merely an impediment, like a sandbar that slows navigation or a shallow stretch over which boats sometimes had to be dragged. Rather, the falls were completely impassable by boat. Similarly, as the state supreme court acknowledged, petitioner presented evidence that navigation of the Clark Fork was interrupted at Thompson Falls. *Id.* at 61.

The state supreme court erred in dismissing these segments as "relatively short interruptions" that were "insufficient as a matter of law." Pet. App. 60-61. There is no basis for that conclusion in the record or in any decision of this Court. To the contrary: in *United States* v. *Utah* the Special Master and the Court examined stretches even shorter than the 17-mile Great Falls reach. See pp. 12-13, 16-17, *supra*. Although 17 miles may be a fraction of the Missouri's 2400-mile length, petitioner has presented evidence that the 17-mile stretch is a physically distinct portion of that river. The State cannot claim title to a distinct, non-navigable 17-mile stretch merely because it is characterized as rela-

tively short—no matter whether the river has other stretches that are navigable or how long those stretches may be. To be sure, the question of navigability is not "answered * * * inch by inch." *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 490 (1988) (O'Connor, J., dissenting). But the 17-mile Great Falls reach—which is longer than some entire rivers—is no "short interruption."

The state supreme court did not identify the characteristics of the other disputed stretches (such as Thompson Falls on the Clark Fork) with any precision. Reversing and remanding will permit the state courts to apply the correct segment-by-segment approach to the factual record without being artificially constrained by the notion that all of the relevant stretches, even if navigationally distinct, are too short to be considered distinct for title purposes.

3. *Montana did not establish title to non-navigable stretches by showing that those stretches could be portaged*

The Montana Supreme Court acknowledged that the Special Master in *United States* v. *Utah* had concluded that Cataract Canyon was not navigable, even though it could be said to "interrupt" two navigable segments. The state supreme court thought, however, that the State nonetheless took title to the Great Falls and other interruptions at issue in this case, because those interruptions could be portaged around—*i.e.*, commerce could continue despite the interruption, by leaving the river altogether and bypassing the falls on land.[13] Pet.

---

[13] Cataract Canyon could not be fully portaged, at least not without bypassing the canyon altogether. *Utah* Report 126-127 (although part

App. 60, 61. That reasoning was incorrect. Although portaging can establish that the *navigable* river segments connected over land by the portage are part of a single highway of commerce, portaging cannot establish that the *bypassed* segment (if that segment is too long to be a "short interruption") is navigable in fact under the test for title.

Treating portaging as a substitute for navigation would significantly alter the test for title and expand the long-held understanding of what a State takes at statehood. Indeed, *any* river segment that this Court has held non-navigable for title could be portaged in theory, with enough time and effort; it is physically possible to travel over land from the head of navigation on the Arkansas or Red River to the sources of those rivers, or to travel from above Cataract Canyon to below it. Cf. pp. 12-14, *supra*. If any portage counts—even Lewis and Clark's arduous 33-day journey around the Great Falls reach, see J.A. 375-376—then the role of navigability in determining a State's title is significantly diminished.

In other cases involving admiralty jurisdiction or the exercise of Congress's commerce power, rather than navigability for title, this Court has sometimes stated that interruptions do not defeat navigability for *those* purposes. Indeed, that is why petitioner's dams are subject to federal regulation under the Federal Power Act. But those holdings cannot be divorced from the context in which they arise.

In the FPA, Congress "broadly defined" the term "navigable waters" in a way that differs from the *Daniel Ball* test. *Union Electric*, 381 U.S. at 102. "[P]arts of

---

of the canyon had sufficient footing to allow portaging, the rest was too steep, so boats could not transit the canyon by portage).

streams" meet that definition if they "are used or suitable for use * * * in interstate or foreign commerce," or can be made so through improvement. 16 U.S.C. 796(8). And the definition expressly *also* includes "falls, shallows, or rapids compelling land carriage" that amount to "interruptions between the navigable parts of such streams or waters." *Ibid.* That expanded definition ensured that the FPA would encompass many hydropower sites. *Union Electric*, 381 U.S. at 102 n.18.

The Court applied the FPA in *Appalachian Electric Power* and concluded that its broad scope is within the scope of the federal commerce power. The case did not directly involve any obstructions requiring a portage. See 311 U.S. at 414, 416. Rather, the Court held that the commerce power extended to rivers that could be, but had not yet been, made navigable through improvements. And the Court expressly contrasted cases involving navigability for title, which "is determine * * * as of the formation of the Union * * * or the admission to statehood." *Id.* at 408. A more relevant "analogy," the Court held, was a line of admiralty cases in which navigability was found "despite the obstruction of falls, rapids, sand bars, carries or shifting currents." *Id.* at 408-409 & n.34. In *The Montello*, for example, the obstructions to navigation were removed by artificial navigation (locks and canals). 87 U.S. at 433-434. Navigation, under those cases, is still navigation within the commerce power (or the admiralty jurisdiction) even if it is difficult or treacherous or requires artificial improvements. That holding has no bearing on title to substantial river segments where navigation is impossible, such as the Great Falls reach.

For that reason, the FPC's conclusion that the Great Falls reach and petitioner's dams on the Madison River

may be regulated under the FPA does not resolve the question presented here.[14] The FPC concluded that the Missouri River was generally navigable, although the Great Falls reach had never been navigated. See *Montana Power Co.* v. *FPC*, 185 F.2d 491, 493-494 (D.C. Cir. 1950) ("evidence of actual use of the river upstream from Fort Benton to the foot of the falls, and from above the falls to Three Forks"), cert. denied, 340 U.S. 947 (1951); *id.* at 494 (travel around the falls required "the aid of a portage or 'land carriage'"); see also *The Montana Power Co.*, 8 F.P.C. 751, 753 (1949) (relevant portion of Clark Fork navigable "within the meaning of" FPA). Because the FPA encompasses both navigable-in-fact waters *and* "interrupting falls" between the "navigable parts," 16 U.S.C. 796(8), the Great Falls reach was subject to regulation under the FPA. 185 F.2d at 494. Congress's commerce power permits the FPA to regulate those interrupting falls even though they are not navigable in fact for purposes of title. See *Appalachian Elec. Power*, 311 U.S. at 409; FPC Br. in Opp. at 23 & n.20, *Montana Power Co.* v. *FPC*, 340 U.S. 947 (1951) (No. 518, O.T. 1950); see also *Union Electric*, 381 U.S. at 105-106 n.21. This Court has upheld applying the commerce power to non-navigable falls and segments in other contexts as well.[15]

---

[14] The segments at issue here may also be within the scope of other federal statutes exercising the commerce power. See U.S. Invitation Br. 15 n.5.

[15] See *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 66, 76 (1913) (government had dominion over water power of "substantially unnavigable" falls and rapids that were bypassed by canals and locks); *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 523 (1941) (flood-control dam and reservoir on Red River,

As for the Madison River, the FPC proceeded on the view that it was *not* navigable. *In re Mont. Power Co.*, 7 F.P.C. 163, 168 (1948), aff'd in part and remanded in part, 185 F.2d 491 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951). Petitioner's dams there were nonetheless subject to regulation under the commerce power, effected by the FPA, because their operation could and did affect the capacity for navigation of waters downstream that *were* conceded to be navigable (below Fort Benton). *Id.* at 190-194.

As the FPC proceedings demonstrate, the commerce power extends to "interrupting falls" connected to navigable waters, and to non-navigable waters that affect the flow of navigable waters. But neither of those principles establishes that interrupting falls are themselves navigable for title merely because they lie between navigable segments and may be portaged around. The Montana Supreme Court erred in concluding otherwise.

III. THE MONTANA SUPREME COURT ERRED IN BASING SUMMARY JUDGMENT ON POST-STATEHOOD EVIDENCE OF NAVIGABILITY WITHOUT A PROPER FOUNDATION

Navigability for title "is determined * * * as of the formation of the Union in the original states or the admission to statehood of those formed later." *Appalachian Elec. Power*, 311 U.S. at 408; accord *United States* v. *Utah*, 283 U.S. at 75; *United States* v. *Oregon*, 295 U.S. 1, 14 (1935). Because title must pass based on conditions at that time, as this Court observed in *Brewer-Elliott*, title cannot depend on a "retroactive rule for

---

previously held non-navigable for title in *Oklahoma* v. *Texas*, were within commerce power); *United States* v. *Grand River Dam Auth.*, 363 U.S. 229, 232-233 (1960).

determining navigability." 260 U.S. at 88. If a river was not navigable at statehood, its navigability today does not affect title to its riverbed.

The state supreme court misapplied that principle. Evidence of present-day boating is relevant to navigability for title only to the extent it shows that the river was navigable at the time of statehood. The state supreme court did recognize that statehood is the relevant timeframe, *e.g.*, Pet. App. 53-56, but it then held that the evidence of "present-day usage of the Madison, Clark Fork, and Missouri Rivers *demonstrates* that these rivers were [navigable] * * * at the time of statehood." *Id.* at 61-62 (emphasis added); see *id.* at 58 ("present-day recreational use is sufficient"). The summary-judgment record was insufficient to support such a holding, because it does not show beyond dispute whether boating or navigation conditions have materially changed since statehood.

A. To Support A Title Determination, Evidence Of Post-Statehood Navigation Must Be Substantially Probative Of Pre-Statehood Capacity

Showing navigability for title requires proof that the river, "in [its] ordinary condition" at the time of statehood, was navigable for commerce "in the customary modes of trade and travel on water" that existed at the time. *United States* v. *Utah*, 283 U.S. at 76. Evidence of post-statehood boating is probative for title purposes only if (1) the watercraft are similar in relevant respects to those in customary use for trade and travel at the time of statehood; and (2) the post-statehood condition of the river is not materially different from its physical condition at statehood.

Courts examining post-statehood evidence of navigability have examined whether the post-statehood craft were comparable to those in use at statehood, such as by considering their draft—that is, the depth to which their hull extends underwater—or their weight-bearing capacity. See, *e.g.*, *Alaska* v. *Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (accepting evidence of current-day use by boats whose weight-carrying capacity was equivalent to the capacity of boats in use at statehood), cert. denied, 495 U.S. 919 (1990); *Northwest Steelheaders Ass'n, Inc.* v. *Simantel*, 112 P.3d 383, 392, 393 (Or. Ct. App.) (concluding that the river segments "were susceptible to both travel and trade by craft common to [the] time" of statehood), review denied, 122 P.3d 65 (Or. 2005), cert. denied, 547 U.S. 1003 (2006). Cf. *Utah* Report 126-127 (Cataract Canyon had been navigated since statehood, but only in boats of "special construction" with airtight compartments). Thus, although proof of navigability for title need not involve navigation by a particular type of vessel, *Holt State Bank*, 270 U.S. at 56 ("whether by steamboats, sailing vessels or flatboats"), the vessels must be comparable to those in use at the time of statehood.

Courts have also examined whether the physical characteristics of a river are similar in relevant respects to its condition at statehood. In *United States* v. *Oregon*, for example, the "physical condition of the bodies of water * * * ha[d] not varied substantially, so as to affect the possibility of their use in navigation," since statehood. 295 U.S. at 18. It was therefore appropriate for the Special Master to consider evidence of later usage. See also *Ahtna*, 891 F.2d at 1405 (parties stipulated that the physical condition of the river "ha[d] remained unchanged since statehood"). By contrast, in *North Da-*

kota ex rel. Board of University & School Lands v. *United States*, 972 F.2d 235 (8th Cir. 1992), for example, the court of appeals affirmed the district court's finding that "modern day canoe use and modern day 'boatability' data are not reliable indicators of the River's navigability at statehood"—despite the State's argument that the modern day canoes had the same draft as boats used at statehood—based on the United States' evidence that the river had physically changed subsequent to statehood, at which time it was not susceptible to commercial navigation. *Id.* at 240.

B. The Montana Supreme Court Failed To Assess The Materiality Of Post-Statehood Evidence On Summary Judgment

Although present-day use "may be probative," Pet. App. 56, the Montana Supreme Court failed to examine whether in this case the State had laid a sufficient foundation for such evidence as a basis for summary judgment. *Id.* at 55. Instead, the court stated that present-day use was sufficient to show that a river was "susceptible of use" at statehood, under a "broad definition" of navigability. *Ibid.* The state court thus concluded, with respect to the Madison River, that "[t]he present-day recreational use is sufficient for purposes of 'commerce' under [*United States* v.] *Utah* and *Ahtna*." *Id.* at 58.

The state supreme court's reliance on *United States* v. *Utah* for the proposition that navigability for title may be determined based on newly discovered forms of commerce, and present-day boating without more, was misplaced. "Susceptibility of use" in the title context refers to waters that could have been navigated at statehood, but were not, for reasons unrelated to navigability, such as sparse settlement. 283 U.S. at 82. Thus, the Court

approved the admission of evidence of post-statehood navigation "as being relevant upon the issue of the *susceptibility of the rivers to use as highways of commerce at the time Utah was admitted to the Union.*" *Ibid.* (emphasis added). The multiple types of boats in use, including steamboats, were consistent with the types of boats customarily used in trade and travel at statehood and thus provided probative evidence of the rivers' navigability at statehood. See *ibid.* (noting that the Special Master gave a "full description of the size and character of boats" historically used on the rivers"). See also *Ahtna*, 891 F.2d at 1405 (concluding that "the watercraft customary at statehood could have at least supported commercial activity of the type carried on today, with minor modifications").

In this case, by contrast, the state supreme court undertook no such examination. At summary judgment, the State's evidence of present-day use consisted of statistical information about fishing activity on the rivers, J.A. 46-48, and contained no information about the types of boats in use. Contrary to petitioner's suggestion (Br. 49-52), that evidence is deficient not because the boats carry their paying passengers for recreational rather than other commercial purposes,[16] but because it may not be probative of navigation at statehood at all. Modern-day recreational boats, such as rafts, lightweight canoes, and kayaks, may be able to navigate wa-

---

[16] Even "personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation," *Appalachian Elec. Power*, 311 U.S. at 416, regardless of the reasons for the transportation. Furthermore, even if Montana's evidence of extensive commercial recreation ultimately is not probative of title, it is a further basis for concluding that the rivers are subject to regulation under the commerce power.

ters considerably shallower than those that were navigable by watercraft that existed at statehood.

Furthermore, petitioner presented expert evidence that the Madison had physically changed in relevant ways since statehood, both with respect to the nature of the river channel and the amount of flow in the river. First, petitioner's expert averred that portions of the Madison are either "anastomosing" or "braided," both of which mean that the river channel is likely to shift over time. J.A. 577-578. Indeed, "[t]hat the river appears to have been a braided river at statehood" led the expert "to conclude that significant reaches of the Madison River were not susceptible to navigation at that time." J.A. 578. Second, petitioner's expert concluded that petitioner's dams had caused significant change in the flow of the Madison River by modulating it, making it easier to navigate in both high-flow and low-flow periods. J.A. 575, 577.

The state supreme court offered no adequate basis for disregarding petitioner's evidence. The court addressed only one of the expert's two points—the discussion of the change in flow over time—and asserted that petitioner's evidence "fail[ed] to demonstrate that the Madison was not susceptible for use as a channel of commerce at the time of statehood," because the Madison would be navigable "so long as [it] was susceptible for use during portions of the year." Pet. App. 58. That does not adequately respond to petitioner's contentions, nor—especially in the absence of any foundation laid by the State—does it justify the consideration of present-day boat use. And the court failed entirely to address the evidence that navigation would have been impeded at statehood by the anastomosing or braiding of the Madison's channels. See *North Dakota*, 972 F.2d at 240

(finding river non-navigable due in part to comparable evidence).

* * * *

Summary judgment should have been denied. Montana presented evidence that each river was navigable for title at statehood, at least in part; petitioner presented evidence that some segments were not navigable for title and that Montana's evidence was not probative. The state supreme court did not resolve the resulting factual questions, but bypassed them based on erroneous application of navigability-for-title principles. This Court should correct those legal errors and remand for application of the correct standard, which may require a trial.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ETHAN G. SHENKMAN
Deputy Assistant Attorney General

WILLIAM M. JAY
Assistant to the Solicitor General

ELIZABETH ANN PETERSON
KATHERINE J. BARTON
Attorneys

SEPTEMBER 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP - 7 2011
OFFICE OF THE CLERK

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF PROFESSORS JOHN L. ALLEN, DAVID M. EMMONS, GARY E. MOULTON, THOMAS J. NOEL, CHARLES E. RANKIN, CARLOS A. SCHWANTES, AND DAVID M. WROBEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Robert R. Gasaway
Counsel of Record
Michael A. Petrino
Stephen S. Schwartz
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
robert.gasaway@kirkland.com
(202) 879-5000

Counsel for Amici Curiae

September 7, 2011

Library of Congress
Law Library

QUESTION PRESENTED

Were the upper Missouri, Clark Fork, and Madison Rivers commercially navigable at the time of Montana's statehood?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 5

ARGUMENT 7

THE RELEVANT REACHES OF THE UPPER MISSOURI, MADISON, AND CLARK FORK RIVERS WERE NOT NAVIGABLE AT THE TIME OF MONTANA'S STATEHOOD 7

A. The Journals of the Lewis & Clark Expedition, Among Other Sources, Show That the Missouri River Was Not Navigable Upstream of the Great Falls. 8

1. The Lewis & Clark expedition found the Missouri River impossible to navigate upstream of the Great Falls. 9

2. Other sources confirm that the Missouri River was not navigable upstream of the Great Falls. 12

3. The Montana Supreme Court's secondary sources evidencing navigability are not historically reliable 16

B. The Clark Fork and Madison Rivers Were Not Navigable 25

1. The Clark Fork River. 26
2. The Madison River 29
CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

In re Montana Power Co.,
7 F.P.C. 163 (1948),
aff'd sub nom.
Montana Power Co. v. FPC,
185 F.2d 491 (D.C. Cir. 1950) 23

Oklahoma v. Texas,
258 U.S. 574 (1922) 14

The Daniel Ball,
77 U.S. (10 Wall.) 557 (1870) 16

United States v. Appalachian Elec. Power Co.,
311 U.S. 377 (1940) 23, 24

United States v. Oregon,
295 U.S. 1 (1935) 16, 31

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 14, 30

United States v. Utah,
283 U.S. 64 (1931) 16, 24

Other Authorities

Allen, John Logan,
Passage Through the Garden: Lewis and Clark and the Image of the American Northwest (1975) 9, 10, 11

Bailyn, Bernard,
On the Teaching & Writing of History
(Edward Connery Lathem ed., 1994) 6, 21

Bebbington, David,
Patterns in History: A Christian Perspective on Historical Thought
(1990) 7

Emmons, David M.,
Garden in the Grasslands: Boomer Literature of the Central Great Plains (1971) 20, 21, 22

Johnson, Kirk,
Part of Denver's Past, The Rocky Says Goodbye,
N.Y. TIMES, Feb. 27, 2009 22

Leonard, Stephen J. & Noel, Thomas J.,
Denver: Mining Camp to Metropolis
(1990) 22

Rankin, Charles E.,
Type and Stereotype: Frederic E. Lockley, Pioneer Journalist,
in *Frontier and Region: Essays in Honor of Martin Ridge*
(Robert C. Ritchie & Paul Andrew Hutton eds., 1997) 20

Schwantes, Carlos A.,
The Pacific Northwest: An Interpretive History
(rev'd ed. 1996) 13, 20, 21

Starr, Kevin,
Americans and the California Dream, 1850-1915 (1973) 23

The Lewis and Clark Journals: An American Epic of Discovery, the Abridgement of the Definitive Nebraska Edition
(Gary E. Moulton ed., 2d ed. 2004) 10

Tuchman, Barbara W.,
Practicing History (1981) 19

Wrobel, David M.,
Promised Lands: Promotion, Memory and the Creation of the American West (2002) 14, 20, 21

INTEREST OF *AMICI CURIAE*[1]

Amici — Professors John L. Allen, David M. Emmons, Gary E. Moulton, Thomas J. Noel, Charles E. Rankin, Carlos A. Schwantes, and David M. Wrobel — are professors of history with particular emphasis on the history, and historiography, of the American West. All have published extensively on the West. All are concerned with the public's familiarity with and regard for history as an intellectual discipline. And all have an interest in advocating in this case on behalf of history as a profession and method, as well as on behalf of the historical record itself.

Ensuring that courts are proficient in historical reasoning and in evaluating historical sources is a matter of public concern. Much as familiarity with law is often critically important for historians, so too lawyers and judges should be able to employ historical analysis in their professional work. For these reasons, *amici* take a professional interest in the judicial use of historical methodology, particularly in cases pertaining to the American West. That unique interest, combined with the

---

[1] No counsel for a party authored any part of this brief, and no counsel or any other party or entity, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief. Professor David M. Emmons served as petitioner PPL Montana, LLC's retained and compensated expert on the history of the upper Missouri, Clark Fork, and Madison Rivers in the litigation below. In this Court, he is donating his time. The remaining *amici* have no prior involvement with this case and also are receiving no compensation for the preparation of this brief. The parties have consented to the filing of this brief.

decades' worth of professional knowledge, experience, and expertise accrued by these professors, allows them to bring now a significantly different perspective to the issues before the Court.

David M. Emmons is professor emeritus on the history faculty of the University of Montana in Missoula, Montana, where he has taught since 1967. Professor Emmons has developed and taught an historical methods course entitled "The Historians' Craft." Professor Emmons was retained and compensated as an expert witness by petitioner PPL Montana, LLC in the trial court proceedings below. He has been informed by counsel for PPL that, in the event the Court reverses the decision below and remands for trial, he may well be asked by PPL to participate in those remand proceedings (with appropriate compensation). However, Professor Emmons has *not* been compensated for the time he has spent discussing this case with other concerned historians, analyzing the historical flaws in the Montana Supreme Court's decision, and helping to prepare this brief. His motivation for joining this brief, and promoting it to fellow historians, is his concern about the consequences of the Montana courts' historically inaccurate conclusions and unprofessional historical methods.

The other professional historians who join this brief have not had any prior involvement with this case. Nor do they expect to become involved for compensation in any future case proceedings. They are all preeminent experts in Western history and deeply concerned about the Montana courts' approach to the important issues of historical method the case presents.

John L. Allen is professor emeritus at the University of Wyoming and at the University of Connecticut. He has taught geography since 1967. As an historical geographer, he has published extensively on the American West, and particularly on the Lewis and Clark expedition. Professor Allen is the author of *Passage Through the Garden: Lewis and Clark and the Image of the American Northwest*, which concerns the effect of the expedition on expectations about the geography of the North American continent. Professor Allen was a consultant for the widely-viewed PBS documentary, *Lewis and Clark: The Journey of the Corps of Discovery*, produced by Ken Burns.

Gary E. Moulton, professor emeritus at the University of Nebraska, Lincoln, taught for many years as the Thomas C. Sorenson Professor of American History. He spent much of his professional career as editor of the definitive edition of the journals of the Lewis and Clark expedition, published in thirteen volumes over nearly 20 years. Professor Moulton, too, was a historical consultant for PBS's documentary on the expedition.

Thomas J. Noel is professor of history and Director of Public History, Preservation and Colorado Studies at the University of Colorado, Denver, where he has taught since 1991. His research has included study of frontier newspapers, in Denver and elsewhere, during the booster period of expansion of the Western United States.

Charles E. Rankin teaches history at the University of Oklahoma. Since 2000 he also has served as Editor-in-Chief of the University of Oklahoma Press, a pre-eminent publisher of books

on the West. He has also served as Editor of *Montana: The Magazine of Western History* and Director of the Montana Historical Society Press.

Carlos A. Schwantes is the St. Louis Mercantile Library Professor of Transportation and the West at the University of Missouri, St. Louis, and has taught there and elsewhere for over twenty years. Professor Schwantes is a recognized expert on transportation in the American West, including steamboating on the Missouri River. Professor Schwantes has also published widely on the expansion period of the American Northwest, including Montana, in such books as *The Pacific Northwest: An Interpretive History*.

David Wrobel, formerly Chair of the History Department at the University of Nevada, Las Vegas, is currently the Merrick Chair in Western American History at the University of Oklahoma. He, too, has taught courses in historiography. As the author of *Promised Lands: Promotion, Memory, and the Creation of the American West*, Professor Wrobel is a leading authority on newspapers and other primary sources of the Western frontier.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Montana Supreme Court confronted a quintessentially historical question: Were the upper Missouri, Clark Fork, and Madison Rivers "navigable" for title purposes in 1889 when Montana became a State? As the Montana court recognized, that historical question was outcome-determinative, and it could be answered only by historical analysis. Ultimately the court failed to engage in a proper historical analysis, reached an unhistorical conclusion, and decided the case on that basis. Specifically, the court affirmed the trial court's prior summary judgment decision that the three rivers were in fact navigable at the time of Montana's statehood, and that the State therefore held the disputed title.

The professional historians joining this brief disagree with that conclusion. A better historical analysis, they believe, indicates not only that there is a question of fact regarding whether the relevant portions of the three rivers were suited for commercial navigation at the time of Montana's statehood, but even further that professional historians — evaluating historical sources in accordance with historical methods — must agree that such navigation was not possible and that none occurred. In short, the Montana Supreme Court failed in the historian's task.

The Montana Supreme Court's error was essentially twofold. *First*, the majority overlooked or ignored much of the historical evidence adduced by Petitioner PPL Montana, LLC. As Justice Rice noted in dissenting from the Montana Supreme

Court's decision and historical analysis, PPL submitted a "mountain" of evidence that the three rivers in fact were not navigable. This evidentiary mountain included *amicus* Professor Emmons's affidavit, his expert report, and accompanying exhibits. Pet. App. 100. For example, as to the upper Missouri River, Emmons and PPL relied on an array of sources including the Lewis and Clark journals, JA 743-51; records of the Army Corps of Engineers, JA 734-35; records compiled in connection with Federal Power Commission licensing proceedings in the 1940s, JA 732-33, 784; and the circumstantial inferences to be gleaned from the historical pattern of roadways linking the Missouri River to other Montana sites and waterways, JA 751-52. The court ignored that evidence altogether, as it inexplicably concluded that PPL's argument rested on three, and only three, sources. Pet. App. 56-57. No professional historian would have so cavalierly disregarded contrary evidence as persuasive as these historical materials.

Second, compounding its error of underestimating PPL's evidentiary showing, the Montana court overestimated the strength of the State's showing. At the core of any historical analysis is the critical evaluation of historical documents and other sources of information. As one historian reminds us, properly using any form of historical documentation means that "one has to be aware of the limitations and problems that are involved in using it." Bernard Bailyn, *On the Teaching & Writing of History* 47 (Edward Connery Lathem ed., 1994); *see also* David Bebbington, *Patterns in History: A Christian Perspective on*

Historical Thought 4 (1990) ("The 'textbook mentality', that an assertion is true because it is written down, is utterly alien to any historical outlook."). But the Montana Supreme Court failed to critically evaluate the principal historical sources relied on by the State by weighing their credibility and reading their words in context. In so doing, that court failed to adhere to fundamental tenets of historical analysis. The result was that the court credited sources that no professional historian would rely on, and it accorded other sources an interpretation *opposite* to one a professional historian would draw.

ARGUMENT

THE RELEVANT REACHES OF THE UPPER MISSOURI, MADISON, AND CLARK FORK RIVERS WERE NOT NAVIGABLE AT THE TIME OF MONTANA'S STATEHOOD.

The depth of the Montana Supreme Court's historical errors in finding the three rivers at issue navigable as a matter of law is most evident from reading Professor Emmons's affidavit and report, reproduced in full in the Joint Appendix. Nonetheless, even a summary description of the Montana Supreme Court's treatment of the evidence before it suffices to establish that there was, at the very least, a question of fact as to the three rivers' navigability.

A. The Journals of the Lewis & Clark Expedition, Among Other Sources, Show That the Missouri River Was Not Navigable Upstream of the Great Falls.

It is undisputed that the upper Missouri River is navigable as far upstream as Fort Benton, Montana, which is situated at the lower end of the tailing off of the large series of waterfalls known as the Great Falls. Farther upstream from Fort Benton, on the upstream side of the Great Falls, lies the city of Great Falls, Montana. Between the city of Fort Benton and the upper Missouri River's headwaters at Three Forks, Montana, lie many miles of rapids and other obstacles to navigation, including the Great Falls themselves. *See* JA 726 (map of the upper Missouri River). It is the navigability of *those* reaches of the Missouri River — the portions between Fort Benton and Three Forks — that this case concerns.

The Montana Supreme Court concluded that the State had shown that the Missouri River is navigable along its entire length — including upstream of the Great Falls and not just downstream of Fort Benton. The court based that conclusion on a purported reading of the journals of the Lewis and Clark expedition, buttressed by questionable secondary sources prepared long after the fact. Pet. App. 16-17, 57. (Significantly, the State presented barely any evidence supporting navigability of the upper Missouri River beyond what the Montana Supreme Court cited. *See, e.g.*, JA 381 (noting that the State "relies exclusively on secondary sources that by their own admission are

limited in scope and which rely on untrustworthy primary sources").)

In conducting its assessment of historical evidence, however, the Montana Supreme Court failed to analyze evidence according to historical methods and ignored or underestimated the weight of contrary evidence. The historical record, read according to the standards of the historical profession, leads in exactly the opposite direction — to a conclusion that the upper Missouri River was *not* navigable.

1. The Lewis & Clark expedition found the Missouri River impossible to navigate upstream of the Great Falls.

The Montana Supreme Court's main basis for finding that the State had proved navigability before Montana's statehood is what can only be described as a tendentious reading of the journals of the Lewis and Clark expedition. According to the Montana court, the expedition "portaged" the Great Falls, "allowing the Missouri to provide a useful channel of commerce." Pet. App. 57. In reality, the records of the Lewis and Clark expedition — edited by *amicus* Professor Moulton — show precisely the opposite.

The Lewis and Clark expedition was motivated, in part, by the dream of finding rivers "whose courses took them in the proper direction for a water communication" and whose heads could be connected by "short portages." John Logan Allen, *Passage Through the Garden: Lewis and Clark and the Image of the American Northwest* xxvi (1975); *see generally The Lewis and Clark Journals: An American Epic of Discovery, the Abridgement of the Definitive*

Nebraska Edition (Gary E. Moulton ed., 2d ed. 2004). In hopes of fulfilling that dream, Lewis and Clark travelled the Missouri River upstream by boat, mainly pirogues and canoes. Once the expedition reached the Great Falls, it found that continued travel in large boats had become impossible. The expedition then portaged around the Great Falls, a process that took *thirty-three days*. JA 746-47. The party was then forced to resort to dugout canoes for the remainder of its trip up the Missouri to its headwaters. They could no longer "navigate" the river, at least not in any way relevant for commercial use.

The dugout canoes that the expedition used after the Great Falls portage were hollowed-out tree trunks built in a matter of hours; they certainly were not boats suited for commercial operations. JA 748-49. More fundamentally, as *amicus* Professor Allen has written, easy water travel (even in such rudimentary boats) became impossible for good only a few miles upstream of the Great Falls. *See* Allen, *supra* p. 9, at 282. Although the expedition put its dugout canoes in the water after the long portage, travel on the water became increasingly difficult and dangerous, *id.* at 285, and soon afterward expedition members could only walk alongside the water, towing their little dugouts as they went. *Id.* at 286; JA 747, 748-50. Doing so required such extreme physical exertion that "the men complain[ed] of being much fortiegued [*sic*]" by labor that was "excessively great." JA 828; *see also* JA 748-50.

Accordingly, when Lewis's and Clark's journals refer to the river as navigable, they mean only that the expedition could follow its course as they

explored the then-uncharted territory toward the Pacific. JA 748. A cardinal rule of interpreting primary historical sources is that words must be read in context, in light of contemporary facts and circumstances, and according to the meanings their author had in view. Historians must read Lewis's and Clark's words as *they* meant them. JA 750. The mere fact that the exploratory expedition's canoes could be floated in parts of the Missouri River on both sides of the Great Falls does not remotely establish that the river was commercially useful upstream of the Great Falls. To the contrary, the expedition appears to have found the Missouri River useful as a waterway only *downstream* of the Falls.

The unanimous opinion of Lewis and Clark's contemporaries upon their return was that the expedition had failed to find a navigable passage past the Falls. Those highly-interested contemporaries did not consider Lewis and Clark's reported portage promising for navigation. Contemporary opinion thus disagreed with the Montana Supreme Court's conclusion that "portages" of the Great Falls "allow[ed] the Missouri to provide a useful channel of commerce" beyond the Falls. Pet. App. 57. Historians are now in agreement, furthermore, that the Lewis and Clark reports were in fact the final undoing of perennial, centuries-old, hopes for easy passage by navigable water to the Pacific Ocean. Allen, *supra* p. 9, at 328; JA 750-51.

From an historian's perspective, it is thus not only incorrect but extremely ironic to say — 200 years after the fact — that Lewis's and Clark's journals prove as a matter of law that the upper Missouri River could "provide a useful channel of

commerce." Pet. App. 57. The Montana Supreme Court's conclusion in this regard is diametrically opposed to the one trained historians have drawn.

2. Other sources confirm that the Missouri River was not navigable upstream of the Great Falls.

From the century after the Lewis and Clark expedition returned with the news that water passage to the headwaters of the Missouri River was not commercially viable, a wealth of historical evidence addresses the River's navigability. *Amicus* Professor Emmons, in his capacity as PPL's expert in the Montana trial court, reviewed all of it that could be located, ranging from accounts of exploration after Lewis and Clark, to Army Corps of Engineers studies of the late 19th and early 20th centuries, to thousands of pages of historical records from Federal Power Commission hearings during the 1940s. JA 732-36. These are the types of sources that professional historians must consider and weigh in cases such as this one, but the Montana Supreme Court ignored practically all of it. Had it been considered, this evidence would have pointed to the same conclusion as the Lewis and Clark expedition records.

By the 1860s, Montana's population had grown sufficiently that navigation of the upper Missouri, especially between Fort Benton and Helena, were it possible, would have been highly lucrative, and passengers and cargo would have taken advantage of the river as a useful highway of commerce. Fort Benton, just below the Great Falls, in fact became a significant commercial center. But not one of the roads leaving Fort Benton led upstream around the

Falls back to the river. JA 752-53. In 1858, when the Army undertook to connect the Missouri and Columbia Rivers, it built a 600-mile road from Fort Benton to Fort Walla Walla, Washington, rather than (say) an 18-mile portage road around the Great Falls and a 60-mile road from Helena to the Clark Fork of the Columbia — a far simpler project that would have accomplished almost precisely the same function *if only those rivers had been navigable.* JA 754-56. Fifteen years ago, *amicus* Professor Schwantes described the construction of the "Mullan Road" (after the engineer who headed its construction) and stated that it terminated at Fort Benton because that town was "the upper limit of steamboat navigation on the Missouri River[.]" *See* Carlos A. Schwantes, *The Pacific Northwest: An Interpretive History* 180 (rev'd ed. 1996).

In 1872, a railroad engineer proposed a portage road around the Great Falls. But even in making this proposal, the engineer conceded that the upper Missouri would only be useful for commercial navigation after "numerous improvements," and that even then it would be usable only by some sort of vessel "of small size and navigated with great caution," making the proposal all but pointless, commercially speaking. JA 760-62. As a result, although the Army Corps of Engineers reported in 1878 that three quarters of the goods shipped to Montana were destined for Helena by way of Fort Benton, they reached Helena by a direct road, not by water. JA 875; *see also* JA 753. If it were possible to continue commercial navigation upstream of the Falls after a portage, a road would surely have been built to make possible further westward progress via

water transport, but no such road was built. The natural inference is that the Great Falls were not merely an interruption in the Missouri River, but a fundamental point of demarcation — beyond which commercial navigation was impractical.

Although some logs are reported to have floated upstream of the Great Falls, it appears that they were mostly held in the water, not regularly transported over significant distances. JA 797-98. One of the more ambitious efforts reported, undertaken during high water, ended with disaster at the Great Falls. JA 798-99. And even to the extent that evidence for the occurrence of log floats rests on personal recollection, care is required as well. *See* David M. Wrobel, *Promised Lands: Promotion, Memory, and the Creation of the American West* (2002) (noting the unreliability of frontier "reminiscers").

Even if log floats could be enough to prove legal title navigability, the isolated, often futile instances contained in the historical record certainly cannot suffice to establish what might be termed "log float" navigability. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) ("The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river."); *see also Oklahoma v. Texas*, 258 U.S. 574, 587 (1922) (rejecting analysis of evidence that "emphasize[d] the exceptional conditions in times of temporary high water and . . . disregard[ed] the ordinary conditions prevailing throughout the greater part of the year").

In the late 1870s, commercial enterprises tried to *remake* the Missouri River into a navigable waterway upstream of the Great Falls by spending several thousand dollars dynamiting boulders. Ultimately, however, this effort was abandoned as impossible. JA 764. The Army Corps of Engineers resumed the effort in 1880, destroying boulders, building wing dams, and digging channels. JA 768-69. These efforts, too, were gradually abandoned, and the Army engineer in charge concluded, dejectedly, that the Missouri River upstream of the Great Falls had not been rendered fit for commercial navigation and likely never could be. JA 889 ("I do not believe the river above the falls will ever be navigated by steamboats, except perhaps at some future day one or two small pleasure boats may be placed on the river for the benefit of tourists."); *see also* JA 771.

Post-statehood evidence confirms that these private and government efforts to improve the Missouri's navigability made little real difference. The Army Corps of Engineers' improvement efforts ended in 1894, five years after Montana's statehood. JA 774. In 1916 a mining engineer traveled on the Missouri from Hauser Lake, near Helena, to Cascade in a small steel boat. On his return, he reported not only that commercial navigation of that stretch was impossible, but concurred that it could not even be made possible by further improvements. JA 857-58 ("[F]rom every standpoint, navigation would be attended by so many difficulties that such is not feasible or practicable."); *see also* JA 765-67. The Army appears to have reached the same conclusion not just once, but four times: in 1896, in 1915, in

1935, and finally in 1940, when one engineer referred to a scheme for making the upper Missouri navigable as "preposterous," "unrealistic," and "harebrained." JA 780; *see generally* JA 774-80.

At most, the historical record contains two instances of steamboat travel upstream of the Great Falls. In 1887 the *Fern* made the trip from Townsend to Great Falls at an average rate of four miles per day, carrying no freight or passengers, and never did so again. JA at 791-92. In the same year, the *Rose of Helena* did the same with difficulty, and also never attempted it again. JA 792-95. Such "occasional use of boats, sporadic and ineffective," is certainly not enough, standing alone, to establish navigability. *United States v. Oregon*, 295 U.S. 1, 23 (1935). These exceptions therefore only prove the rule that viable commercial cargo and passenger navigation of the Missouri River, upstream of the Great Falls, never occurred. *See United States v. Utah*, 283 U.S. 64, 76 (1931) (title navigability requires showing that river may be used as a "'highway[] for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water'") (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

3. The Montana Supreme Court's secondary sources evidencing navigability are not historically reliable.

Aside from its (mis)use of the journals of the Lewis and Clark expedition, the Montana Supreme Court reached its navigability conclusion largely on the strength of modern secondary sources: two unpublished reports prepared in 1974 and 1986,

respectively (the "1974 Report" and "1986 Report" — collectively, the "Reports"). Pet. App. 16-17; JA 220-23 (1986 Report); JA 294-346 (1974 Report). A professional historian would have considered these two secondary sources in accordance with the professional standards that apply to an historian's interpretation of such sources. An historian would have considered, for example, the purpose for which the Reports were produced; the time at which they were produced; the circumstances surrounding their production; and the identity, qualifications, and predispositions of their authors. An historian also would have judged these secondary sources according to their choice of, and proper use of, primary sources. The Montana Supreme Court did none of the above, and its conclusion that the Reports are credible was mistaken.

To begin with, the Montana Supreme Court misunderstood the nature of the Reports in ways that exaggerated their credibility. The 1986 Report, prepared by the Heritage Research Center in Missoula on commission for the Montana Department of State Lands, contains some discussion of the navigability of all three rivers at issue in this case (and so will be addressed throughout this brief). But the 1986 Report did not even purport to be a complete record of those rivers' navigability. Because of funding constraints, the 1986 Report's authors "focused upon generating the most information for the least possible cost," not on producing the most accurate or authoritative account of Montana's navigable waterways. JA 370-71, 205-06. Indeed, those constraints dissuaded at least one other firm from bidding for the work of preparing the

report. As the would-be bidders explained, "we do not think that we could provide the necessary document given the stated project ceiling and the stipulation that no additional costs incurred would be reimbursed." JA 371-72, 394-95.

Little primary source research is evident in the 1986 Report. Indeed, the 1986 Report drew nearly all of its citations from the earlier work, dutifully recording this dependence by describing its sources as "as cited in" or "as quoted in" the 1974 Report. JA 220-23. The 1986 Report was thus produced by cribbing almost all of its research from the earlier 1974 Report.

Insofar as the 1986 Report's authors did perform primary source research, they committed errors of their own. For example, when they turned their attention to the Clark Fork River, they cited the February 24, 1882 article from the frontier newspaper, the *Missoulian*, for the proposition that logs *were* floated down the river in that year. JA 216. Whatever the dubious merits of the newspaper itself (discussed further below), in fact the article only said that logs "*can be*" floated. JA 143 (emphasis added); *see also* Pet. App. 111; JA 374. Because the underfunded 1986 Report relied almost exclusively on the 1974 Report for its treatment of the Missouri River, JA 220-23, the State's historical case for the navigability of the Missouri River in 1889 rested, in effect, on the sole authority of the 1974 Report.

As for the 1974 Report, the Montana Supreme Court operated under a mistaken impression that the 1974 Report was prepared *by* the United States Army Corps of Engineers, Pet. App. 17, when in fact

it was prepared *for* the Corps, through the work of Alan Newell and Gary Williams. Any special authority that historians might attach to the Corps's official reports, which are researched in the field and prepared by the Corps's own experts, therefore does *not* attach to the 1974 Report.

More importantly, the Montana Supreme Court failed to perform the all-important evaluation of the 1974 Report's use of primary sources. Secondary sources like the Reports are "helpful but pernicious," because the facts they bring to light "have already been pre-selected." Barbara W. Tuchman, *Practicing History* 19 (1981). Because a secondary source based on unreliable primary sources cannot itself be credible, care in selection and evaluation of primary sources should have been the guidepost not only for the Reports' authors, but for the Montana Supreme Court's decision as to whether or not to rely on the Reports.

The 1974 Report, judged against the canons of professional historians, cannot bear the weight the Montana court placed on it below. Most of the 1974 Report describes the undisputed fact of historical navigation on the Missouri River downstream of Fort Benton. Although it also purports to describe actual use of the Missouri River upstream of Fort Benton for trade and passenger travel at the time of Montana's statehood, it overwhelmingly relies on two sources of information for that showing. *First*, the 1974 Report relies extensively on frontier-era newspapers such as the *Helena Weekly Herald* and the *Great Falls Tribune* for its conclusion that companies used the upper Missouri River for commercial boats and to float logs downstream to

Great Falls. JA 313-16. *Second*, the report relies on footnotes in Hubert Howe Bancroft's 19th century history of Montana for the proposition that miners and settlers travelled the upper Missouri River with only a short portage around the Great Falls upstream of Fort Benton. JA 313. No professional historian would treat those sources standing alone as adequate proof of an occurrence.

The place of frontier-era newspapers in historical scholarship has been much discussed, and it is a particular scholarly interest of *amici* Professors Emmons, Rankin, Schwantes, and Wrobel. *See, e.g.*, David M. Emmons, *Garden in the Grasslands: Boomer Literature of the Central Great Plains* (1971); Charles E. Rankin, *Type and Stereotype: Frederic E. Lockley, Pioneer Journalist*, in *Frontier and Region: Essays in Honor of Martin Ridge* (Robert C. Ritchie & Paul Andrew Hutton eds., 1997); Schwantes, *supra* p. 13, at 289-91; Wrobel, *supra* p. 14. It is fair to say that professional historians almost universally concur that frontier newspapers were frequently written to promote travel and settlement, and, as a result, they often subordinated considerations of factual accuracy to the seemingly more important goal of presenting glowing pictures of life on the frontier. The result was hyperbole and often outright fabrication. As explained by Professor Wrobel, these boosters "could be regarded as the used-car dealers of an earlier age . . . [and] it is important to treat these sources as reflections of the purpose of their creators rather than as accurate descriptions of places and events." Wrobel, *supra* p. 14, at 4. Accordingly, "[i]f you think of [these newspapers] as small versions of today's *New York*

Times, you're in trouble — because they weren't." Bailyn, *supra* p. 6, at 46; *see also* Wrobel, *supra* p. 14, at 5-6 ("Some boosters were great anticipators, trying to convince themselves as much as others of the promise of western places; others were bold-faced liars selling promises for financial profit and nothing more.").

It was not even difficult to become the editor of a frontier newspaper. As Professor Schwantes has shown, "[a]nyone with a modest amount of cash or a patron, a modicum of education and technical know-how, and a passion to say something could start a newspaper." Schwantes, *supra* p. 13, at 279. "A pioneer newspaper was an intensely partisan and personal operation . . . [and] [r]eaders expected a newspaper editor above all else to function as a community booster who promoted local attractions and damned all rivals." *Id.* It is no wonder that "[t]he mortality rate among" such early papers "was extremely high. Operating on high hopes and a shoestring budget, few survived longer than a year or two." *Id.* at 280.

Because frontier newspapers should always be read with a grain of salt and in light of their authorship and of their important role as promotional brochures, they should seldom be relied on as sole sources on questions of historical fact. JA 372, 735-36.

Examples from representative non-Montana frontier newspapers illustrate this point. Some newspapers claimed that rainfall on the Great Plains would increase if the ground were plowed, or if "'American' culture" were "substitut[ed] . . . for Indian[.]" *See* Emmons, *supra* p. 20, at 153; *see*

generally id. at 153-60 (discussing newspapers in Kansas and Colorado). Another reported that its State's soil produced 28-pound radishes. *See id.* at 65. Still another concluded "that Eastern moneyed investors would want Denver to have good steamboat access," and then on this basis "simply invented" news of steamboat traffic between Denver and the Gulf of Mexico. *See* Kirk Johnson, *Part of Denver's Past, The Rocky Says Goodbye*, N.Y. TIMES, Feb. 27, 2009, at A11 (article interviewing *amicus* Professor Noel); *see also* Stephen J. Leonard & Thomas J. Noel, *Denver: Mining Camp to Metropolis* 9, 11 (1990) (discussing the founder of the *Rocky Mountain News*).

The trustworthiness concerns applicable to these newspapers apply equally to Montana's frontier newspapers. The authors of the 1974 Report undoubtedly would have hesitated to count on Montana's or any other frontier newspapers for descriptions of monster radishes. For similar reasons, the 1974 Report's authors should have hesitated before crediting questionable accounts of ready commercial uses of Montana's rivers. The 1974 Report's reliance on the frontier newspapers, and the Montana Supreme Court's cheerful acceptance of that evidence, *see* Pet. App. 52 (contending that "reliance upon . . . newspaper accounts" is "well-accepted and proper"), is not historically justified.

As for the 1974 Report's other source, Bancroft, professional historians do not consider his interpretations of historical facts as reliable, absent corroboration. Rather, Bancroft's principal value is as a pointer to more credible sources.

Hubert Howe Bancroft was a wealthy businessman and avid collector and compiler of historical documents, and for that historians no doubt owe him a great debt. Bancroft's documents concerning California are especially useful, and the Bancroft Library at the University of California, Berkeley was founded on his collection. But even as to California, as the preeminent California historian Kevin Starr has observed, Bancroft was "often ludicrous and sometimes dishonest." Kevin Starr, *Americans and the California Dream, 1850-1915* 119 (1973). For other States such as Montana, Bancroft merely had his assistants review unreliable newspapers and gazettes for source material. JA 788-89. Today, no reputable historian would use Bancroft as a sole source on an important factual point of Montana history. JA 373-74, 788-89.

Bancroft was also the main source for the State's administrative authority treating the Missouri River as navigable upstream of Fort Benton for regulatory purposes. *See In re Montana Power Co.*, 7 F.P.C. 163, 172-73 (1948), *aff'd sub nom. Montana Power Co. v. FPC*, 185 F.2d 491, 493-94 (D.C. Cir. 1950). Those administrative agency proceedings, it should be noted, addressed regulatory navigability, not title navigability. Hence, because the test for regulatory navigability does not entail the same historic focus as the test for title navigability, the conclusions reached in those proceedings are not relevant to this case, even if their sources were reliable. *Compare United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (title navigability determined "as of the formation of the Union in the original states or the admission to statehood of those formed

later," while "navigability, for the purpose of the regulation of commerce, may later arise"), *with id.* at 410 (navigability determined with reference to the river as a whole), *and Utah*, 283 U.S. at 77 & n.9, 89 (title navigability determined as to particular river segments, not the river as a whole).

Against this backdrop, the 1974 Report's crucial reliance on Bancroft cannot be defended. Instead of mining Bancroft's work for primary sources, and then mining those primary sources for what *they* had to offer, the 1974 Report's authors dubiously cited Bancroft alone to show that miners and settlers travelled the Missouri River above Fort Benton by boat and that a company operated a line of boats for commercial transport with a portage around the Great Falls. JA 313.

Even if Bancroft were not of questionable veracity in general, however, he still would lack credibility on the specific point for which he was cited by the 1974 Report. Bancroft's likely source for reporting the upper Missouri steamboat line was an 1866 issue of the city of Helena's *Rocky Mountain Gazette*, yet another frontier newspaper riddled with factual errors. For example, this 1866 account dramatically understated the length of the portage required to avoid the Great Falls: The portage it described would have left the passengers stranded in the middle of the Falls, or drowned. JA 789-90. Nor were the remarkable facts the article describes — "thousands" of passengers travelling on commercial mackinaw boats — directly corroborated by any other source brought to light in the present litigation, including the voluminous reports of the Corps cataloguing the uses of the Missouri River.

Here again, an historian would not have used the Gazette's dubious reports as historical fact without demanding further corroboration.

In summary, the bulk of historical evidence shows that the Missouri River was not navigable upstream of the Great Falls at the time of Montana's statehood. The Montana Supreme Court's finding that Lewis and Clark proved otherwise rested on a misreading of the evidence of the expedition. Its finding that "many" besides Lewis and Clark had portaged the Great Falls and navigated the upper Missouri rested on the 1986 and 1974 Reports. But the 1986 Report relied on the 1974 Report, and the 1974 Report relied on primary and secondary sources that no professional historian would treat with anything other than deep skepticism. From the perspective of an historian, the Montana Supreme Court found historical "proof" where no such proof was evident.

B. The Clark Fork and Madison Rivers Were Not Navigable.

The bulk of the historical evidence in this case pertains to the upper Missouri River, but the scantier evidence related to the Clark Fork and Madison Rivers leads to the same conclusion — that no commercial navigation of those rivers was possible. In reaching the conclusion that the rivers were navigable, the Montana Supreme Court made the same errors of historical analysis as in finding commercial navigation on the upper Missouri. For the sake of completeness, *amici* succinctly discuss these two rivers below.

1. The Clark Fork River.

The Clark Fork River is a tributary of the Columbia River, flowing west through Montana into Idaho. The portions of the river at issue here are those in the area of the Thompson Falls, which are upstream of the Idaho border and downstream of Missoula. *See* JA 728 (map of the Clark Fork River). In places below Thompson Falls, there is some evidence that the Clark Fork was navigated by commercial passenger boats. JA 812. But in the area of Thompson Falls, the evidence shows the river was not navigable.

The first historical account of the Clark Fork River is that of David Thompson, an explorer and fur trader who kept a journal of canoe trips on the river starting in 1808. The Thompson journals do not indicate anything resembling a potential for commercial navigation of the river; instead they indicate that even Clark Fork canoe trips were difficult and dangerous. JA 633 (describing efforts to pass rapids); *see also* JA 809-10. When eastward-bound goods and passengers travelled upstream to Thompson Falls on the Clark Fork River, they continued their travels by road, rather than portaging the Falls. JA 57 (referring to Thompson Falls as the "upper limit of navigation); *see also* JA 812. One frontier newspaper report refers to a single steamboat in operation upstream of Thompson Falls, but another article from the same paper describes that very ship's wreck. JA 131, 135, *see also* JA 813.

Later, just as with the Missouri River, repeated reports of the Army Corps of Engineers show that the Clark Fork River was not navigable. The 600-mile Mullan Road linking the Missouri to the

Columbia bypassed not only the upper Missouri but the Clark Fork as well, giving rise to an inference that the Clark Fork, too, was not navigable. JA 813. In 1891, the Corps engineer charged with surveying the entire Clark Fork for navigability described the river as a "torrential stream" that was "utterly unnavigable, and incapable of being made navigable except at an enormous cost." JA 564-65, *see also* JA 379-80, 818. In fact, even Montanans who lived right on the Clark Fork agreed that "the idea of making the river navigable was . . . an absurdity," despite the obvious benefits that could accrue to them if the river *were* navigable (or made so). JA 565, *see also* JA 818-19. The Corps reiterated that opinion in a 1932 report, JA 357, as well as a 1940 official letter, JA 568-69. *See also* JA 819-20.

The last, and one of the most important, pieces of evidence concerning the Clark Fork is a century-old 1910 judicial decision from the federal District Court of Montana. That decision, made only two decades after Montana's statehood, applied to the Clark Fork River the test of navigability used for title purposes. Although most of the trial record has been impossible to locate, it is certain that the court concluded after a hearing that the Clark Fork "was and is a non-navigable stream incapable of carrying the products of the country in the usual manner of water transportation" and that it allocated title accordingly. S. App. 11-12.

The Montana Supreme Court, once again, did not regard this evidence as raising a question of fact, dismissing the Corps studies and the 1910 judicial decision as "conclusory." Pet. App. 57-58. But that dismissal ignores yet another critical rule of

historical analysis — the principle that primary sources must be evaluated as a whole, with consideration of how all parts relate to one another. Had the court below applied this rule, it would have noted that the Corps study of the Clark Fork River explains that it was written after an "examination" of the river, including a personal visit by the author to Missoula where he conducted interviews of "the mayor and prominent citizens engaged in various commercial and mining pursuits." JA 564-65. The 1910 decision, for its part, recites that the court reached its conclusion after an evidentiary hearing. S. App. 11. Calling the considered findings of the Corps and the court "conclusory" without reference to evidence of the methods used is as misguided as dismissing a legal brief as "conclusory" after reading only its last sentence. The Montana Supreme Court's stated basis for holding that PPL had failed to raise a question of fact as to the Clark Fork's navigability, in short, does not hold water.

The paucity of the State's affirmative case for summary judgment on the Clark Fork's navigability underscores this point. The State relied once again on the limited, underfunded 1986 Study. But the 1986 Study itself refers to Thompson Falls as the head of steamboat navigation. JA 227. Though it referred to isolated instances of boat trips on the Clark Fork, those references were drawn, once again, from unreliable frontier newspapers, and they gave no indication that the trips had serious commercial value. JA 237-38. It is all but undisputed, in short, that commercial navigation on the Clark Fork did not occur — either before or long after Montana's statehood.

The 1986 Study does report that log floats took place upstream of Thompson Falls. But the 1986 Study cribbed this conclusion, once more, from an earlier study; namely, an undated, unsigned report of unknown purpose that as a consequence should be given little weight. The log drives it suggests are improbably long, would have to have gone through many rapids, JA 815, and would appear to have been largely pointless. Idaho had no shortage of lumber at the time, and the actual lumber company records evaluated by Professor Emmons show that the dominant shipment route for western Montana lumber was not westward toward the forests of Idaho but *eastward* for use in mines. JA 816. The lumber company records Professor Emmons evaluated, showing no evidence of successful lumber drives on the Clark Fork River, are by far the more credible source. JA 816-17.

In light of the above, plus the fact that the State gave the Montana Supreme Court little or no affirmative evidence of navigability of the relevant portions of the Clark Fork River, the Montana Supreme Court's finding that the State had carried its burden to prove navigability and that PPL had not even raised a question of fact is all but inexplicable.

2. The Madison River.

The Madison River, a tributary of the Missouri, *see* JA 725 (map of the Madison River), is the smallest and least thoroughly documented of the three rivers at issue in this case. That in itself is an indication that the Madison was not used for commercial navigation, for if it had been used, historians would expect it to have received more

attention. JA 736. The historical evidence identified by *amici* confirms this common-sense implication.

For much of the Madison River's length, there is no historical evidence of navigability at all — not even the newspaper boosters who touted the imaginary navigability of the Missouri River could bring themselves to tell the same stories about the Madison. JA 801-02. The only evident historical use of the Madison River is a single log float that took place in 1913. JA 803. That drive, although touted in a contemporary newspaper report, JA 154-55 (noting that the log drive "for many years ha[d] been ridiculed and deemed by many impossible"), appears to have been a notable failure. It seems to have taken two months to move the logs only 55 miles, and many of the logs had to be abandoned at the side of the river for up to two *years*. JA 803. This Court's precedent suggests, as mentioned above, that such efforts do not show navigability. *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 698. The company that attempted this 1913 log drive folded soon after (in 1916) and no company appears to have repeated the effort. JA 803. Moreover, and quite significantly, even this failed log drive occurred after Hebgen Dam — constructed in 1912, long after Montana's statehood, and located downstream of the reach of the Madison where the drive occurred — began impounding water and raising the Madison's water levels. JA 803.

The Corps, in a 1932 study, reached exactly the same conclusion. After running through a physical description of the river (noting its steep fall through a series of narrow gorges), the Corps's final word on the river was that "[t]here never has been any

navigation on the Madison River; that commercial navigation was "entirely out of the question;" and that "improvement" for purposes of navigation "is impracticable[.]" JA 482, 495, 535; *see also* JA 806-07. The Montana Supreme Court dismissed that Corps study as "conclusory" as well, but for no better reason than its dismissal of similar evidence concerning the Clark Fork.

The State's affirmative evidence of the Madison River's navigability was based on much the same sources outlined above, the same 1986 Study, which again relied almost exclusively on a 1974 study by Newell and Williams. But as to the Madison River, those Reports have the additional weakness that they do not describe any navigation or commercial use of the Madison River. Indeed, aside from mentioning the 1913 log drive, they say little more than that trapping and settlement occurred in the *area* of the river, as well as that the river has been used for recreation and power. JA 218-20, 251-62. *See Oregon*, 295 U.S. at 20-21 (noting that trappers walking, wading, or using small boats in a river does not prove navigability). They do not even purport to show other commercial use, even by citing unreliable frontier newspapers.

* * *

In sum, judicial determinations of title navigability require historical analysis of a river's past condition and use at the moment of a territory's accession to statehood. And such analysis requires, in turn, that judges employ the methods of professional historians, including those that apply to choosing, evaluating, and drawing inferences from sources. Here, the Montana Supreme Court failed

notably in addressing the navigability of the upper Missouri, Clark Fork, and Madison Rivers, giving unwarranted credence to certain pieces of evidence, inappropriately discounting more historically robust evidence, misinterpreting the valid evidence it did credit, and finally overlooking certain key evidence altogether. The result was indefensible historical analysis, and an erroneous historical conclusion.

CONCLUSION

For these reasons, the Court should reverse the decision of the Montana Supreme Court.

Respectfully submitted,

Robert R. Gasaway
Counsel of Record
Michael A. Petrino
Stephen S. Schwartz
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
robert.gasaway@kirkland.com
(202) 879-5000

Counsel for Amici Curiae

September 7, 2011

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-218

IN THE

Supreme Court of the United States

PPL MONTANA, LLC,
Petitioner

v.

MONTANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF AMERICAN PETROLEUM INSTITUTE, AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, NATIONAL COUNCIL OF FARMER COOPERATIVES, NATIONAL MINING ASSOCIATION, PUBLIC LANDS COUNCIL, AND REAL ESTATE ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

VIRGINIA S. ALBRECHT
Counsel of Record
DEIDRE G. DUNCAN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, DC 20037
(202) 955-1500
valbrecht@hunton.com

Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

September 7, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

Of Counsel:

PETER TOLSDORF
AMERICAN PETROLEUM INSTITUTE
1220 L Street, NW
Washington, DC 20005
(202) 682-8074

NICK GOLDSTEIN
AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION
1219 28th Street, NW
Washington, DC 20007
(202) 289-4434

THOMAS J. WARD
JEFFREY B. AUGELLO
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005
(202) 266-8230

TAMARA MCCANN THIES
ASHLEY LYON
NATIONAL CATTLEMEN'S BEEF ASSOCIATION
1301 Pennsylvania Avenue, NW
Suite 300
Washington, DC 20004
(202) 347-0228

LISA Y. KELLEY
NATIONAL COUNCIL OF FARMER COOPERATIVES
50 F Street, NW
Suite 900
Washington, DC 20001
(202) 879-0811

KAREN C. BENNETT
NATIONAL MINING ASSOCIATION
101 Constitution Avenue, NW
Washington, DC 20001
(202) 463-2600

DUANE J. DESIDERIO
REAL ESTATE ROUNDTABLE
801 Pennsylvania Avenue, NW
Suite 720
Washington, DC 20004
(202) 639-8400

QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether a section of a river is navigable at the time the state joined the Union, as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE TEST FOR "NAVIGABLE WATERS" VARIES ACCORDING TO THE STATUTE AT ISSUE AND THE PURPOSE FOR WHICH THE DETERMINATION IS MADE	9
II. THE COURT LAST ADDRESSED "NAVIGABLE WATERS" FOR CWA PURPOSES IN *RAPANOS*	11
III. THE AGENCIES' POST-*RAPANOS* TRADITIONAL NAVIGABLE WATERS DETERMINATIONS HAVE NOT BEEN FAITHFUL TO *RAPANOS*	15
A. The Agencies' Case-By-Case Traditional Navigable Water Determinations Have Gone Far Beyond *Rapanos*	16
B. Now The Agencies Are Proposing Guidance That Will Codify A Recreational Use Standard For Traditional Navigable Waters Under The CWA Based On Non-CWA and Non-RHA Cases	18

TABLE OF CONTENTS—Continued

Page

IV. NAVIGABILITY DETERMINATIONS CANNOT BE BASED ON RECREATIONAL USE AND MUST BE MADE SEGMENT BY SEGMENT 22

CONCLUSION 24

APPENDIX

Glossary of Key Terms 1a

TABLE OF AUTHORITIES

CASES Page

Adams v. Montana Power Co., 528 F.2d 437 (9th Cir. 1975) 21

Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989) 19, 21, 22

Alford v. Appalachian Power Co., 951 F.2d 30 (4th Cir. 1991) 10, 23

FPL Energy Me. Hydro LLC v. FERC, 287 F.3d 1151 (D.C. Cir. 2002) 19, 20

Hardy Salt Co. v. S. Pac. Transport Co., 501 F.2d 1156 (10th Cir. 1974) 11, 14, 20

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 8, 9

LeBlanc v. Cleveland, 198 F.3d 353 (2d Cir. 1999) 23

Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs, 64 F.3d 630 (11th Cir. 1995) 23

Marks v. United States, 430 U.S. 188 (1977) 15

Miami Valley Conservancy Dist. v. Alexander, 692 F.2d 447 (6th Cir. 1982) .. 23, 24

Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617 (8th Cir. 1979) 8

Nat'l Ass'n of Home Builders v. United States, 731 F. Supp. 2d 50 (D.D.C. 2010), *appeal docketed*, No. 10-5341 (D.C. Cir. Oct. 15, 2010) 17

North Dakota v. United States, 972 F.2d 235 (9th Cir. 1992) 21

TABLE OF AUTHORITIES—Continued

Page

PPL Mont. v. State, 229 P.3d 421 (Mont. 2010) 24

Rapanos v. United States, 547 U.S. 715 (2006) ..... *passim*

Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3514 (U.S. Jun. 28, 2011) (No. 10-1062) 17

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 12, 14

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) ..... *passim*

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 13, 14, 23

United States v. Oregon, 295 U.S. 1 (1935).. 21

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 12

United States v. Utah, 283 U.S. 64 (1931)... 10, 23

Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984) 11

Utah v. United States, 403 U.S. 9 (1971)..... 10, 11

CONSTITUTION

U.S. Const. art. 1, § 8, cl. 3 Commerce Clause ..... *passim*

FEDERAL STATUTES

Clean Water Act, 33 U.S.C. § 1362(7) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Federal Power Act, 16 U.S.C. § 796(8), Act of February 4, 1887, ch. 104, 24 Stat. 379 20

Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401 *et. seq*. .....*passim*

FEDERAL REGISTER

39 Fed. Reg. 12,115 (Apr. 3, 1974)..... 14

76 Fed. Reg. 24,479 (May 2, 2011) 18

LEGISLATIVE HISTORY

118 Cong. Rec. 33,757 (1972), *reprinted in* 1 LEGIS. HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1973)..... 14

MISCELLANEOUS

Virginia S. Albrecht and Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042 (2002)..... 14

Brief for Petitioners, *Rapanos* (No. 04-1034), 2005 WL 3295630 (Dec. 2, 2005)... 13

Conan O'Brien Canoes the L.A. River (June 2009), *available at* http://www.canoekayak.com/canoe/conan-canoes-the-la-river/..... 18

TABLE OF AUTHORITIES—Continued

Page

Benjamin H. Grumbles, EPA Region 9 Assistant Administrator, EPA's Letter to Corps on Santa Cruz Traditional Navigable Water Determination (Dec. 3, 2008) 17

U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409-0002 (May 2, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0002 ..... *passim*

U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Draft Guidance on Identifying Waters Protected by the Clean Water Act, WOUS TNWs Attachment, Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies' Regulations, Docket No. EPA-HQ-OW-2011-0409-0005 (undated), *available at* http://www.regulations.gov/#!document Detail;D=EPA-HQ-OW-2011- 0409-0005 ... 19

U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007), *available at* http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/TNW_MVP-2007-1497.pdf 16

TABLE OF AUTHORITIES—Continued

Page

U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Memorandum for NWO-2007-1550 (Dec. 12, 2007), *available at* http://www.usace.army/mil/CECW/documents/cecwo/reg/cwa_guide/TNW_NWO-2007-1550.pdf..... 16

U.S. Environmental Protection Agency, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/BahLakeEPA_memo 2007-04488-.pdf..... 16

U.S. Environmental Protection Agency, Region 9, Special Case Evaluation Regarding Status of the Los Angeles River, California as a Traditional Navigable Water (July 1, 2010) *available at* http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf..... 17, 18

U.S. Army Corps of Engineers, Sacramento District, Regulatory Division, Navigable Waterways in the Sacramento District, *available at* http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/ca_waterways.html.. 24

U.S. Army Corps of Engineers, Buffalo District, Navigable Waterways in Buffalo District Where Department of the Army Permits are Required, *available at* http://www.lrb.usace.army.mil/orgs/reg/waterway_ny.pdf..... 24

TABLE OF AUTHORITIES—Continued

Page

Waters Advocacy Coalition, *et al.*, Comments in Response to the Environmental Protection Agency's and U.S. Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-3514 1

INTERESTS OF *AMICI CURIAE* [1]

This Court's determination of the proper test for navigability in a title dispute affects entities that are subject to regulation under the Clean Water Act ("CWA" or "Act"), including *amici*, who all undertake numerous CWA-regulated activities.[2]

The American Petroleum Institute ("API") is a nationwide non-profit trade association that represents over 450 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, refining, marketing, transportation, and distribution of petroleum products. The business activities of API's members are frequently subject to regulation under the CWA and related environmental statutes and regulations.

The American Road & Transportation Builders Association's ("ARTBA") membership includes public

---

[1] All parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief and *amici* paid for it. This brief was not written in whole or in part by counsel for a party to these cases, and no one other than *amici* made a monetary contribution to its preparation.

[2] Recently, *amici* and several other organizations filed extensive comments on the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (jointly, "the Agencies") Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409-0002 (May 2, 2011), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0002 ("Draft Guidance"). *See* Waters Advocacy Coalition, *et al.*, Comments in Response to the Environmental Protection Agency's and U.S. Army Corps of Engineers' Draft Guidance on Identifying Waters Protected by the Clean Water Act, Docket No. EPA-HQ-OW-2011-0409-3514 (July 29, 2011), *available at* http://www.regulations.gov/#!documentDetail;D= EPA-HQ-OW-2011-0409-3514.

agencies and private firms and organizations that own, plan, design, supply, and construct transportation projects throughout the country. ARTBA's industry generates more than $200 billion annually in United States economic activity and sustains more than 2.2 million American jobs. ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities that require compliance with the CWA. As part of the highway construction process, ARTBA members are actively involved in the restoration and preservation of wetlands. In the 39 years since the CWA's passage, ARTBA has actively worked to achieve the complementary goals of improving our nation's transportation infrastructure and protecting essential water resources. In doing so, ARTBA is proud to note the constant efforts of the transportation construction industry to minimize the effects of transportation infrastructure projects on the natural environment. If the federal regulatory scope of the CWA is unnecessarily or unintentionally expanded, the increased regulatory burdens would severely hinder efforts to both build transportation improvements and accomplish environmental objectives through mitigation.

The Foundation for Environmental and Economic Progress ("FEEP" or "Foundation") is a national coalition of large landholding companies founded in 1989 to help advance balanced federal environmental law and policy regarding the use and development of private land. The Foundation has a specific interest in federal programs that affect land use. Its members are planned community developers, as well as companies that engage in forestry, mining, and agriculture. Foundation members own significant

amounts of land in 44 states and are deeply committed to environmental stewardship of their land. Many have earned awards for cutting-edge environmentally sensitive projects. Because of the nationwide scope of their projects, Foundation members have extensive experience with the CWA, and frequently must obtain permits from the Corps. FEEP members, therefore, are keenly interested in the application of regulatory requirements to their development projects and have an important perspective because of their direct, "real-world" involvement in the administration of the CWA and its regulations. To share that perspective, the Foundation has actively participated in many agency rulemakings under the CWA.

The National Association of Home Builders ("NAHB") represents over 160,000 builder and associate members throughout the United States. Its members include individuals and firms that construct and supply single-family homes, and apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. NAHB's members are frequently subject to regulation under the CWA. NAHB, as an organization, has extensive involvement in litigating CWA issues and regularly counsels and educates members on CWA issues. NAHB is a leader in advocacy efforts, before the federal courts, Congress, and the regulatory agencies, on CWA regulatory issues.

The National Cattlemen's Beef Association ("NCBA"), initiated in 1898, is the marketing organization and trade association for America's cattle farmers and ranchers. With offices in Denver and Washington, D.C., NCBA is a consumer-focused, producer-directed organization representing the larg-

est segment of the nation's food and fiber industry. NCBA represents 147,000 of America's farmers, ranchers, and cattlemen, through direct membership and state affiliate and breed organizations, who provide much of the nation's supply of food. Its members are proud of their tradition as stewards and conservators of America's land, and good neighbors to their communities.

The National Council of Farmer Cooperatives ("NCFC") has been the voice of America's farmer cooperatives since 1929. NCFC members include 58 national, regional, and federated farmer cooperatives, which in turn are comprised of over 2,500 local cooperatives across the United States whose member-owners include a majority of our nation's more than 2 million farmers and ranchers. NCFC members also include 22 state and regional councils of cooperatives. Farmer cooperatives handle, process, and market almost every type of agricultural commodity, furnish farm supplies, and provide credit and associated financial services to their farmer members. As such, NCFC advocates on behalf of its members at the federal level to encourage a healthy public policy environment in which farmer-owned cooperative businesses operate and thrive, and provides leadership in cooperative education. In particular, NCFC supports science-based, achievable, and affordable environmental policies and initiatives, and actively works to ensure environmental laws like the CWA are implemented accordingly.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing

machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources. This includes policies under federal environmental laws like the CWA.

The Public Lands Council ("PLC") has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. PLC works to maintain a stable business environment in which livestock producers can conserve the West and feed the nation and world. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land, accounting for critical wildlife habitat and the nation's natural resources. Their water rights and the wise use of water are crucial to their livelihoods; thus, any regulation promulgated under the CWA has potential to impact them.

The Real Estate Roundtable ("Roundtable") represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending, and management firms, as well as the elected leaders of the 17 major national real estate industry trade associations. Collectively, Roundtable members hold portfolios containing over 5 billion square feet of developed property valued at over $1 trillion; over 1.5 million apartment units; and in excess of 1.3 million hotel rooms. Participating Roundtable trade associations represent more than 1.5 million people involved in virtually every aspect

of the real estate business. More information on the Roundtable can be found at www.rer.org. Real estate firms represented through the Roundtable's members frequently obtain CWA permit coverage when developing and building their projects, under both section 402 (for discharges of stormwater) and section 404 (for discharges of fill material). As a result, the fundamental question of whether a parcel contains "waters of the United States" to trigger CWA jurisdiction is of utmost importance to Roundtable members and the real estate community generally.

SUMMARY OF ARGUMENT

The legal standard for "navigable waters" varies according to the statute at issue and the purpose for which the determination is made. This case is about the legal standard for "navigable waters" for title purposes, but it has potential implications for the proper test in other contexts, including the CWA. Under this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the CWA term "navigable waters," defined as "waters of the United States," includes two types of waters—"traditional navigable waters" and nontraditional navigable waters. "Traditional navigable waters" are waters that are susceptible to use as continuous highways for transportation of goods in interstate commerce; they are the same as the "navigable water[s] of the United States" under the Rivers and Harbors Appropriation Act of 1899 ("RHA"), 33 U.S.C. §§ 401 *et seq*. Nontraditional navigable waters can be jurisdictional, based on their relationship to traditional navigable waters.[3]

---

[3] To assist the Court in sorting through the overlapping terminology, *amici* have appended a Glossary of Key Terms.

EPA and the Corps have proposed, and intend to finalize imminently, new CWA guidance. In the Draft Guidance, the Agencies rely on non-CWA and non-RHA case law to support a new "traditional navigable waters" definition that will allow them to deem a water body a "traditional navigable water" for CWA purposes if any federal court has deemed the water navigable "for any purpose" or if the water can float a kayak or canoe.

Amici urge the Court to make it clear that the Agencies may not rely on navigable waters determinations made under other statutes or for other purposes, such as title or admiralty, to support a "traditional navigable waters" determination under the CWA. Moreover, regardless of the context, navigability determinations cannot be based on a water body's susceptibility to use for recreational purposes.

ARGUMENT

In this case, the Court is asked to examine the legal standard for "navigable waters" in the context of a title dispute arising under the "equal footing" doctrine. The court below held, incorrectly, that current recreational use of one segment of a river is sufficient to determine that the entire river is navigable for title purposes. Navigability is also determinative of the extent of federal regulatory jurisdiction in statutes enacted pursuant to the Commerce Clause such as the RHA and the CWA. Nothing in this Court's jurisprudence has ever suggested that recreational use by itself could establish that a water body is a "navigable water" under the RHA or the CWA. Indeed, this Court has held consistently that the decisional principles that guide a court in making

a "navigable waters" determination vary according to the statute at issue and the purpose for which the determination is made. *See Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (holding that "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case").

The Court last addressed "navigable waters" for CWA purposes in *Rapanos*. There, five Justices rejected the notion that EPA and the Corps could assert CWA jurisdiction over any water that has "any hydrological connection" to traditional navigable waters. Instead, they premised CWA jurisdiction over nonnavigable waters on a nonnavigable water's relationship to "traditional navigable waters." 547 U.S. at 742 (Scalia, J., plurality); *id.* at 789 (Kennedy, J., concurring). In referring to "traditional . . . navigable waters," both the plurality and the concurring opinions cited *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), and its Commerce Clause progeny, signaling that they were referring to waters that are susceptible to use as continuous highways for transportation of goods in interstate commerce. These are the "navigable waters of the United States" that have been regulated since the nineteenth century under the RHA, *see Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979), and, since *Rapanos* was decided, they are referred to in the CWA context as "traditional navigable waters."

But in response to *Rapanos*, rather than give the term "navigable waters" its "traditional" meaning, the Agencies have relied on aberrant case law in non-CWA and non-RHA cases, including title cases,

to advance a new concept of "traditional navigable waters" for the CWA. Indeed, as this brief goes to the printer, the Agencies are attempting to codify a new "traditional navigable waters" standard that will allow them to deem a water body a "traditional navigable water" for CWA purposes if it has been used once for recreation (*e.g.*, to float a canoe) or if any federal court has deemed the water navigable "for any purpose," including, specifically, for title or admiralty purposes.

Against this background, *amici* write to explain the concept of traditional navigable waters in the CWA context, to ask the Court to make it clear that the legal standards for "navigable waters" are different depending on the statute at issue and the purpose of the determination, and to urge the Court to reverse the decision of the lower court and, in so doing, take care that its words not be subject to misuse to endorse the Agencies' renegade interpretation of "traditional navigable waters" under the CWA.

I. THE TEST FOR "NAVIGABLE WATERS" VARIES ACCORDING TO THE STATUTE AT ISSUE AND THE PURPOSE FOR WHICH THE DETERMINATION IS MADE.

This Court has made it clear that the legal standard for "navigable waters," which arises in admiralty and maritime cases, title actions, and cases examining federal regulatory jurisdiction under the Commerce Clause, varies depending on the statute at issue and the purpose for which a navigability determination is made. *See Kaiser Aetna*, 444 U.S. at 171-73. Each of these standards is rooted in the definition of "navigable waters of the United States" provided by this Court in the seminal case, *The Daniel Ball*, which stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. at 563.

Although *The Daniel Ball* was a case brought in admiralty, the Court also addressed Commerce Clause jurisdiction. *Id.* It is thus the starting point for discussion of navigability for admiralty, title, and Commerce Clause purposes, but over the years, each jurisprudential strand has developed its own tests. For example, present capability for commercial navigation is the test of navigability for admiralty purposes, *see Alford v. Appalachian Power Co.*, 951 F.2d 30, 32 (4th Cir. 1991), but navigability at the time a state entered the Union is the test for title purposes, *see United States v. Utah*, 283 U.S. 64, 75 (1931).

Perhaps the best illustration of the importance of context for navigability determinations is the case of the Great Salt Lake. In *Utah v. United States*, 403 U.S. 9, 10-11 (1971), this Court found that the Great

Salt Lake was a "navigable water" for title purposes because the lake was capable of being used as a highway for commerce at the time of Utah's statehood. In contrast, in *Hardy Salt Co. v. S. Pac. Transp. Co.*, 501 F.2d 1156, 1167 (10th Cir. 1974), the U.S. Court of Appeals for the Tenth Circuit found that the Great Salt Lake was not a "navigable water of the United States" within the meaning of the RHA because the landlocked, intrastate lake did not have the requisite interstate linkage to form a continued highway of interstate or foreign commerce.

Moreover, the treatment of the Great Salt Lake in CWA case law underscores the importance of context for navigability determinations. Although the Great Salt Lake is nonnavigable for RHA purposes, it does not follow that the lake is non-jurisdictional under the CWA. This is because, as discussed below, CWA jurisdiction over "navigable waters," defined as "waters of the United States," extends beyond "traditional navigable waters" to include some nontraditional navigable waters. Thus, although the Great Salt Lake is not a "navigable water of the United States" under the RHA, the Court of Appeals for the Tenth Circuit has nonetheless held that the Great Salt Lake is subject to CWA jurisdiction. *See Utah v. Marsh*, 740 F.2d 799, 803 (10th Cir. 1984). Accordingly, and as discussed further below, nowhere is the context of navigability more important than in the CWA.

II. THE COURT LAST ADDRESSED "NAVIGABLE WATERS" FOR CWA PURPOSES IN *RAPANOS*.

The CWA regulates "navigable waters," which the Act defines as "the waters of the United States." 33 U.S.C. § 1362(7). This Court has taken up the issue

of the meaning of "navigable waters," defined as "waters of the United States," in the context of the CWA three times.

Addressing the CWA definition of "navigable waters" for the first time in *United States v. Riverside Bayview Homes, Inc.*, the Court explained that by defining "navigable waters" as "the waters of the United States," Congress demonstrated its intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term," and held that CWA jurisdiction reaches wetlands that "actually abut . . . a navigable waterway." 474 U.S. 121, 133, 135 (1985).

Next, in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), the Court explained that although the Act's term "navigable waters" is broader than the traditional understanding of that term, the qualifier "navigable" is not devoid of significance and "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. 159, 172 (2001) (citations omitted). The *SWANCC* Court held that "nonnavigable, isolated, intrastate" waters were beyond the jurisdiction of the CWA. *Id.* at 171-72.

Most recently, the Court considered the meaning of "navigable waters" in the CWA context in *Rapanos*. The *Rapanos* petitioners argued that the CWA terms "navigable waters" and "waters of the United States" have the same meaning as they do in the RHA and are therefore limited to the traditional definition of *The Daniel Ball*, which required that the waters be susceptible to use as a highway for interstate or

foreign commerce. See Brief for Petitioners, *Rapanos* (No. 04-1034), 2005 WL 3295630, at *16-20 (Dec. 2, 2005); *Rapanos*, 547 U.S. at 730-31. The Court, in a four-Justice plurality and concurrence by Justice Kennedy, held that in the context of the CWA, the meaning of "navigable waters," defined as "waters of the United States," is broader than the traditional navigable waters definition of *The Daniel Ball*. *Id.* at 734, 742 (Scalia, J., plurality); *id.* at 760-61, 779 (Kennedy, J., concurring). The Act also includes waters that are not traditional navigable waters.

With regard to those waters that do not qualify as traditional navigable waters, both the plurality and concurrence premised CWA jurisdiction on the nontraditional navigable water's relationship to "traditional navigable waters." *See id.* at 742 (Scalia, J., plurality) (requiring a showing that "the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters) . . . ." *See also id.* at 779 (Kennedy, J., concurring) (requiring the "existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.").

The plurality and concurrence both cited to *The Daniel Ball*, 77 U.S. at 563, and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406-09 (1940), to explain the concept of "traditional navigable waters." *Rapanos*, 547 U.S. at 723, 734 (Scalia, J., plurality); *id.* at 760-61 (Kennedy, J., concurring). Waters satisfy the *Daniel Ball* definition if (1) they are navigable-in-fact (or capable of being rendered so) and (2) together with other waters form waterborne highways used to transport commercial goods in interstate or foreign commerce. *See The Daniel Ball*,

77 U.S. at 563. These waters are the "navigable waters of the United States" under the RHA. *See Hardy Salt Co.*, 501 F.2d at 1168 (Congress intended "navigable waters" in the 1899 RHA and its predecessor 1890 Act to have the *Daniel Ball* meaning).

Traditional navigable waters in the CWA context are the "navigable waters of the United States" under the RHA, not title or admiralty "navigable waters." Indeed, the RHA was the foundation from which Congress started when it passed the CWA. Representative John D. Dingell (D-Mich.) recognized these origins when he explained that the new CWA would go beyond the RHA and "old narrow definitions of navigability, as determined by the [C]orps." *See* 118 Cong. Rec. 33,757 (1972), *reprinted in* 1 LEGIS. HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS of 1972 at 250 (1973).[4] Likewise, the Corps's contemporaneous interpretation of the CWA reflected its RHA underpinnings. *See* 39 Fed. Reg. 12,115, 12,115 (Apr. 3, 1974) (In its 1974 regulations, the Corps based its interpretation of "navigable waters," defined as "waters of the United States," on judicial precedent interpreting "navigable waters of the United States" under the RHA.). This Court referenced the CWA's origins when it explained in *SWANCC* that "the term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172 (citing *Appalachian Elec. Power Co.*, 311 U.S. at 407-08).

---

[4] *See also* Virginia S. Albrecht and Stephen M. Nickelsburg, *Could* SWANCC *Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ELR 11042, 11044-48 (2002).

In sum, a new framework for determining jurisdiction under the CWA emerged after *Rapanos*. The statutory term "navigable waters," defined as "waters of the United States," embraces two kinds of waters—"traditional navigable waters" and "nontraditional navigable waters." Traditional navigable waters are the same as the "navigable waters of the United States" under the RHA and are per se jurisdictional under the CWA; nontraditional navigable waters can be jurisdictional based on their relationship to traditional navigable waters under both the plurality and concurrence tests.[5]

III. THE AGENCIES' POST-*RAPANOS* TRADITIONAL NAVIGABLE WATERS DETERMINATIONS HAVE NOT BEEN FAITHFUL TO *RAPANOS*.

With jurisdiction over nonnavigable waters now premised on a tie to traditional navigable waters, the Agencies proceeded after *Rapanos* to broaden the concept of traditional navigable waters beyond waters that can be used as highways for interstate commerce. The broader the definition of "traditional navigable waters," the more likely the Agencies would be able to find the requisite connection to nonnavigable waters and assert jurisdiction over them.

---

[5] Rather than following this Court's admonition in *Marks v. United States*, 430 U.S. 188, 193 (1977), to read cases decided by a plurality to produce a single holding, EPA and the Corps have interpreted *Rapanos* broadly to produce two holdings, either of which they claim they may apply to establish jurisdiction. *See, e.g.*, Draft Guidance at 2.

A. The Agencies' Case-By-Case Traditional Navigable Water Determinations Have Gone Far Beyond *Rapanos*.

Many of the Agencies' case-by-case traditional navigable waters determinations have been based on potential use by out-of-state visitors or a water body's potential to float a canoe or kayak. For example, in December 2007, EPA and the Corps designated a 150-mile segment of the Little Snake River as a traditional navigable water.[6] The segment is navigable only by kayak and canoe, and even then only rarely, and there was no indication that the segment was susceptible to use as a highway for transport of goods. Similarly, in December 2007, the Agencies deemed Boyer Lake, an isolated, wholly intrastate lake in Minnesota, a traditional navigable water based on one point of public access and speculation that some recreational fishermen who use the lake come from out of state.[7] The Agencies went even further with Bah Lakes, declaring this landlocked 70-acre water body a traditional navigable water based on the *possibility* that some out-of-state travelers could use small recreational watercraft on the lake.[8]

---

[6] EPA and Corps, Memorandum for NWO-2007-1550 (Dec. 12, 2007), *available at* http://www.usace.army/mil/CECW/Documents/cecwo/reg/cwa_guide/TNW_NWO-2007-1550.pdf.

[7] EPA and Corps, Memorandum for MVP-2007-1497-RQM (Dec. 11, 2007), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/TNW_MVP-2007-1497.pdf.

[8] EPA, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008), *available at* http://www.usace.army.mil/CECW/Documents/cecwo/reg/cwa_guide/BahLakeEPA_memo2007-04488.pdf.

In December 2008, EPA declared two reaches of the Santa Cruz River in southern Arizona to be traditional navigable waters.[9] The Santa Cruz River has no significant water flow during the dry seasons of the year; it flows primarily in direct response to precipitation and seasonal storms. Virtually all of the flows recorded in both reaches consist of sewage effluent discharged into the river from upstream sewer plants. There was no evidence that the effluent-filled reaches were susceptible to use as highways for interstate or foreign commerce. On the contrary, there were only two documented instances of recreational use of the river, and both of these small boat trips were largely unsuccessful.[10]

Most recently, in July 2010, EPA declared the entire 51-mile mainstem Los Angeles River a traditional navigable water.[11] The Los Angeles River is a

---

[9] Benjamin H. Grumbles, EPA Region 9 Assistant Administrator, EPA's Letter to Corps on Santa Cruz Traditional Navigable Water Determination (Dec. 3, 2008).

[10] Industry groups challenged the Santa Cruz determination, but the district court dismissed the case, holding that the CWA precludes judicial review of a traditional navigable water determination. *Nat'l Ass'n of Home Builders v. United States*, 731 F. Supp. 2d 50, 55 (D.D.C. 2010), *appeal docketed*, No. 10-5341 (D.C. Cir. Oct. 15, 2010). This Court recently granted certiorari to review *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3514 (U.S. Jun. 28, 2011) (No. 10-1062), on the issue of a party's ability to seek judicial review of an EPA jurisdictional determination under the CWA, so NAHB may yet get its day in court.

[11] *See* EPA, Region 9, Special Case Evaluation Regarding Status of the Los Angeles River, California as a Traditional Navigable Water (July 1, 2010), *available at* http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf.

cement-lined channel that is less than 1 foot deep and has a daily average flow of 10 cubic feet per second during the summer months. *Id.* at 27, 28. Notwithstanding the river's shallowness and low flows, EPA deemed it a traditional navigable water based largely on an experimental expedition made by a group of 12 kayakers and canoeists. *Id.* at 23. Comedian Conan O'Brien demonstrated the absurdity of this designation on *The Tonight Show* with a sketch in which he and Andy Richter attempt to canoe down the Los Angeles River in six inches of water, surrounded by concrete and graffiti.[12] As shown in the sketch, the Los Angeles River is definitely not susceptible to use as a highway for interstate or foreign commerce; the two men can barely maneuver the water body in a canoe.

B. Now The Agencies Are Proposing Guidance That Will Codify A Recreational Use Standard For Traditional Navigable Waters Under The CWA Based On Non-CWA and Non-RHA Cases.

Now, the Agencies are attempting to codify their novel take on traditional navigable waters. Rather than conduct a public rulemaking as the Court suggested in *Rapanos*, the Agencies have issued the Draft Guidance and intend to finalize and then implement this guidance as soon as possible. EPA and Corps, Notice of Draft Guidance, 76 Fed. Reg. 24,479 (May 2, 2011).

---

[12] Conan O'Brien Canoes the L.A. River (June 2009), *available at* http://www.canoekayak.com/canoe/conan-canoes-the-la-river/.

Astonishingly, the Draft Guidance states that a water body will qualify as a traditional navigable water under the CWA "[i]f the federal courts have determined that [the] water bodyis navigable-in-fact under federal law *for any purpose* . . ." Draft Guidance, WOUS TNWs Attachment, Waters that Qualify as Waters of the United States Under Section (a)(1) of the Agencies' Regulationsat 1, Docket No. EPA-HQ-OW-2011-0409-0005 (undated), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2011-0409-0005 (emphasis added). Moreover, recreational use by itself is enough for a water body to qualify as a traditional navigable water. Draft Guidance at 6 ("[W]aters will be considered traditional navigable waters if . . . [t]hey are susceptible to being used in the future for commercial navigation," which can be demonstrated by "current boating trips or canoe trips for recreation or other purposes."). And, "[a] trip taken solely for the purpose of demonstrating a waterbody can be navigated would be sufficient" to demonstrate that a water body is a traditional navigable water. *Id.* n.v.

With no RHA or CWA case law to support their inventive view of traditional navigable waters, the Agencies rely on navigable waters determinations made "for any purpose." They cite *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002), a D.C. Circuit case reviewing a Federal Energy Regulatory Commission ("FERC") navigability determination under the Federal Power Act ("FPA"), and *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), an equal footing case. These citations to non-CWA, non-RHA cases are all the more remarkable because they are squarely at odds with the position the government has taken in this case. Here, in its *amicus* brief recommending denial of certiorari, the

United States argues that the various "navigable waters" tests may not be applied interchangeably, and states that "[t]he precise legal standard and its application vary depending on the purpose for which a specific determination is being made." United States Brief *Amicus Curiae* on Petition for Writ of Certiorari at 3, May 20, 2011.

Moreover, the government's *Amicus Curiae* brief in this case argues that two cases involving the FPA are irrelevant to the navigability determination in this case because they "were not applying this Court's standards de novo but deferentially reviewing FERC's application of the FPA's statutory definition of navigability." *Id.* at 14. Yet, the Draft Guidance relies on *FPL*, a case deferentially reviewing FERC's application of the FPA definition of navigability. Draft Guidance at 6. The Agencies like *FPL* because the court affirmed FERC's determination that navigability can be established by canoe trips taken solely for the purpose of demonstrating a water body can be navigated. *See FPL*, 287 F.3d at 1154, 1158. Applying their expedient "any purpose" standard, they can use this FPA case to codify a traditional navigable waters test for CWA purposes that far overreaches anything this Court had in mind in *Rapanos*.[13]

---

[13] Moreover, an FPA case is not good authority for a CWA traditional navigable waters determination because the FPA definition of "navigable waters" has an explicit, broader meaning than the *Daniel Ball* definition used in the RHA. *See Hardy Salt Co.* 501 F.2d at 1168 (citing Federal Power Act § 3(8), 16 U.S.C. § 796(8); Act of February 4, 1887, ch. 104, 24 Stat. 379) (citing to the 1887 version of the FPA as an example of Congress giving an explicit, broader meaning to "navigable waters" than the *Daniel Ball* definition used in the RHA).

The Draft Guidance also cites *Ahtna*, a case examining a river's navigability for title purposes under the "equal footing" doctrine, to support the notion that commercial recreational boating is sufficient to establish that a water body is a traditional navigable water. Draft Guidance at 24. In *Ahtna*, the U.S. Court of Appeals for the Ninth Circuit relied on the river's present use by a fishing and sightseeing industry that employs approximately 400 people to hold that the river at issue was navigable for title purposes at the time of statehood. 891 F.2d at 1405. Of course, under the government's argument in this case—*i.e.*, that "navigable waters" tests may not be used interchangeably—a title case is not good precedent for a traditional navigable waters determination under the CWA. But the Guidance is outcome-driven.[14]

---

[14] Even for title cases, *Ahtna*'s determination that a water is navigable based on commercial recreation is incorrect. Contrary to *Ahtna*, the title cases establish that evidence of present-day commercial recreational use is not enough for a navigable waters determination under the "equal footing" doctrine. *See, e.g., United States v. Oregon*, 295 U.S. 1, 23 (1935) (waters nonnavigable for title purposes despite use by fur trappers, canoes, and row boats); *North Dakota v. United States*, 972 F.2d 235, 240 (9th Cir. 1992) (modern day canoe use and "boatability" data are not reliable indicators of a water's navigability at statehood). Reliance on recreational use as a measure of navigability is also very limited in other contexts, such as admiralty cases. *See, e.g., Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975) (portion of river used by small pleasure craft is nonnavigable for admiralty purposes).

Moreover, in *Ahtna*, the court used present-day evidence of navigability to determine navigability under the "equal footing" doctrine because the parties stipulated that the river's physical characteristics had not changed since statehood. 891 F.2d at 1405. As such, *Ahtna*'s holding is case-specific and does not

In short, the Agencies are advancing a position in the Draft Guidance that is directly contrary to this Court's precedent and to the representations the government is making to this Court. The Draft Guidance would direct agency staff to base CWA traditional navigable waters determinations on navigability determinations made for any purpose, and relies on non-CWA, non-RHA cases to support one-time recreational use as a standard for traditional navigable waters determination under the CWA.

IV. NAVIGABILITY DETERMINATIONS CANNOT BE BASED ON RECREATIONAL USE AND MUST BE MADE SEGMENT BY SEGMENT.

A water body's susceptibility to use for recreational purposes is not the proper standard for determining navigability for title purposes in this case, nor is it the appropriate standard for determining whether a water qualifies as a traditional navigable water under the CWA. For a water body to qualify as a traditional navigable water under the CWA, it must be susceptible to use as a highway for waterborne transportation of commercial goods in interstate or foreign commerce, thereby satisfying the definition from *The Daniel Ball* and its Commerce Clause progeny that this Court relied on in *Rapanos*. Evidence that a canoe or kayak can float on a water body is insufficient to meet this standard. Recreational use of a waterway may affect commerce, but the waterway does not thereby become susceptible for use as a highway for interstate or foreign commerce. *See*

---

stand for the general principle that a court may look at present-day recreational use for a navigability determination for title purposes.

Alford v. Appalachian Power Co., 951 F.2d 30, 33 (4th Cir. 1991).

Moreover, the navigability of a waterway must be determined on a section-by-section basis. As it has done for title and admiralty cases,[15] this Court has historically applied a section-by-section approach when examining navigability for purposes of determining the scope of federal regulatory jurisdiction under the commerce power. For example, in *Appalachian Elec. Power Co.*, the Court examined the navigability of a 111-mile reach of the New River to determine whether the United States had federal regulatory jurisdiction to prevent the Appalachian Electric Power Company from constructing a hydroelectric dam. 311 U.S. at 411. Courts of Appeals examining navigability for purposes of determining federal jurisdiction under the Commerce Clause have applied this Court's section-by-section approach. *See, e.g., Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 633 (11th Cir. 1995) (finding that Fisheating Creek is navigable, and is thus jurisdictional under the RHA, only for several miles from its mouth at Lake Okeechobee to Fort Center, Florida); *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447,

---

[15] *See, e.g., United States v. Utah*, 283 U.S. at 77 (approving special master's findings that portions of the Green, Grand, and Colorado Rivers were navigable such that title for those portions was vested in Utah while other portions of the Colorado and San Juan Rivers were nonnavigable such that title for those portions was vested in the United States); *LeBlanc v. Cleveland*, 198 F.3d 353, 359 (2d Cir. 1999) (finding that the Hudson River downstream of Fort Edward was a "navigable water" for purposes of admiralty jurisdiction because it was capable of supporting interstate commerce, but that the waters north of Fort Edward were nonnavigable waters because manmade dams prevented continuous boat travel).

451 (6th Cir. 1982) (finding the Great Miami River was navigable for Commerce Clause purposes from its mouth to Mile 117, but that the river was nonnavigable from Mile 117 to Mile 153).

Likewise, the Corps's navigable waters determinations for RHA purposes are also reach-by-reach. For example, the Corps determined that two segments of the Sacramento River—a 301-mile reach and a 26-mile reach—are navigable waters under the RHA.[16] In addition, the Corps designated three separate segments of the Grass River in New York as navigable waterways for purposes of the RHA.[17] Section-by-section analysis is appropriate when courts or agencies examine navigability under the CWA or RHA.

CONCLUSION

For all of the foregoing reasons, the decision of the Montana Supreme Court in *PPL Montana v. State*, 229 P.3d 421 (Mont. 2010), should be reversed. *Amici* urge the Court to make it clear that the legal standard for "navigable waters" varies depending on the statute at issue and the purpose for which a navigability determination is made and to hold that evidence of present-day recreational use is insufficient for a navigability determination for title

---

[16] *See* Corps, Sacramento District, Regulatory Division, Navigable Waterways in the Sacramento District, *available at* http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/ca_waterways.html.

[17] *See* Corps, Buffalo District, Navigable Waterways in Buffalo District Where Department of the Army Permits are Required, *available at* http://www.lrb.usace.army.mil/orgs/reg/waterway_ny.pdf.

or any purpose and that navigability of a waterway must be determined on a section-by-section basis.

Respectfully submitted,

VIRGINIA S. ALBRECHT
Counsel of Record
DEIDRE G. DUNCAN
KERRY L. MCGRATH
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., N.W.
Washington, DC 20037
(202) 955-1500
valbrecht@hunton.com

Counsel for Amici Curiae
American Petroleum Institute,
American Road &
Transportation Builders
Association,
Foundation for Environmental
and Economic Progress,
National Association of
Home Builders,
National Cattlemen's Beef
Association,
National Council of Farmer
Cooperatives,
National Mining Association,
Public Lands Council, and
Real Estate Roundtable

September 7, 2011

APPENDIX

APPENDIX

Glossary of Key Terms

"Navigable waters of the United States" under the Rivers and Harbors Act of 1899 ("RHA") – Navigable waters of the United States must satisfy the *Daniel Ball* definition: (1) they are navigable-in-fact (or capable of being rendered so) and (2) together with other waters form highways used to transport commercial goods in interstate commerce. 77 U.S. (10 Wall.) 557, 563 (1870).

"Navigable waters," defined as "waters of the United States" under the Clean Water Act ("CWA") – The CWA defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). According to *Rapanos v. United States*, the "navigable waters," defined as "waters of the United States" under the CWA, are not limited to the "navigable waters of the United States" under the RHA. 547 U.S. 715, 734 (2006) (Scalia, J., plurality); *id.* at 779 (Kennedy, J., concurring). Instead, the CWA regulates traditional navigable waters (see below) and certain nontraditional navigable waters (see below).

Traditional navigable waters – A term that emerged after this Court's decision in *Rapanos* to refer to a subset of CWA waters that satisfy the *Daniel Ball* definition and are the "navigable waters of the United States" under the RHA. The *Rapanos* Court also referred to this subset of CWA waters as "traditional interstate navigable waters," *Rapanos*, 547 U.S. at 742 (Scalia J., plurality), and "navigable waters in the traditional sense," *id.* at 779 (Kennedy, J. concurring). If a water does not qualify as a traditional navigable water, it still can be regulated under the CWA. *See* nontraditional navigable waters.

Nontraditional navigable waters – The remainder of CWA waters; after *Rapanos* these waters may be jurisdictional based on their relationship to traditional navigable waters. Waters that are not themselves traditional navigable waters and that lack the requisite relationship to traditional navigable waters are not regulable under the CWA.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV - 3 2011
OFFICE OF THE CLERK

No. 10-218

In The Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF *AMICI CURIAE* CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, BIG BLACKFOOT RIVERKEEPER, NORTH COAST RIVERS ALLIANCE, AND KLAMATH FOREST ALLIANCE IN SUPPORT OF RESPONDENT

STEPHAN C. VOLKER*
JOSHUA A.H. HARRIS
JAMEY M.B. VOLKER
M. BENJAMIN EICHENBERG
LAW OFFICES OF STEPHAN C. VOLKER
436 14th Street, Suite 1300
Oakland, California 94612
Telephone: (510) 496-0600
Facsimile: (510) 496-1366
svolker@volkerlaw.com
**Counsel of Record*
Attorneys for Amici Curiae California Sportfishing Protection Alliance, Big Blackfoot Riverkeeper, North Coast Rivers Alliance, and Klamath Forest Alliance

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. NAVIGATION 4

A. The Definition of Navigability Has Been and Should Continue to Be Broadly Construed 6

1. The Party Challenging a State's Sovereign Property Rights Bears the Burden of Proof 6

2. Commercial Use Includes All Susceptible Uses at Statehood and Should Be Liberally Construed 7

B. Navigability-in-Fact, Rather than Navigability Segment-by-Segment, Is the Correct Test 7

1. The Court's Navigability-in-Fact Test – Relied on by the Montana Supreme Court – Is More Than 100 Years Old and Its Application Has Not Changed 8

2. Under the Navigability-in-Fact Test, Courts Determine the Navigability of and Title to the Whole River, Not Just Particular Loci in Quo 10

TABLE OF CONTENTS – Continued

Page

3. Under the Navigability-in-Fact Test, Interruptions in Navigable Rivers Do Not Defeat State Title 13

4. Petitioner's Segment-by-Segment Approach Would Destroy Settled Property Rights Expectations..... 17

C. Public Policy Favors Public Ownership of All But the Most Obviously Non-Navigable Waterways..... 18

II. TAKINGS 21

III. DUE PROCESS 28

IV. PREEMPTION..... 30

CONCLUSION..... 32

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Ashwander v. TVA, 297 U.S. 288 (1936) 27

Barney v. Keokuk, 94 U.S. 324 (1876) 10

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 25

Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 12

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 26

Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930) 30

Chandler v. Florida, 449 U.S. 560 (1981) 28

Fox River Paper Co. v. Railroad Comm'n, 274 U.S. 651 (1927) 26, 30

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 26

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 5, 18

Idaho v. U.S., 533 U.S. 262 (2001) 6

Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892) 13

Jean v. Nelson, 472 U.S. 846 (1985) 27

Kaiser Aetna v. U.S., 444 U.S. 164 (1979) 24, 25

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 17, 18

TABLE OF AUTHORITIES – Continued

Page

Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs, 113 U.S. 33 (1885) 27

Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439 (1988) 27

Martin v. Waddell, 41 U.S. 367 (1842) 8

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 31

Oklahoma v. Texas, 258 U.S. 574 (1922) 12

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 5, 26

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) 9, 11

Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) 9, 21

Shively v. Bowlby, 152 U.S. 1 (1894) 13

St. Anthony Falls Water Power Co. v. Board of Water Com'rs of City of St. Paul, Minn., 168 U.S. 349 (1897) 7, 14

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al., 130 S.Ct. 2592 (2010) ..... *passim*

The Daniel Ball, 77 U.S. 557 (1870) 4, 5, 7, 9

The Montello, 87 U.S. 430 (1874) 7, 10, 14

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984) 27

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924) 26, 30

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) 7, 14

U.S. v. Cress, 243 U.S. 316 (1917) 25

U.S. v. Holt State Bank, 270 U.S. 49 (1926) 7, 9, 10

U.S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 11

U.S. v. Utah ("*Utah I*"), 283 U.S. 64 (1931) ..... *passim*

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 5

Utah v. United States ("*Utah II*"), 403 U.S. 9 (1971) 9

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 25

Whitehouse v. Illinois Central R. Co., 349 U.S. 366 (1955) 27

Wisconsin Pub. Serv. Corp. v. FPC, 147 F.2d 743 (1945) 7

STATE CASES

Brown v. Chadbourne, 31 Me. 9 (1849) 15

PPL Montana, LLC v. State of Montana, 355 Mont. 402 (2010) 10, 12, 16, 23, 31

STATE STATUTES

Mont. Code Ann. § 70-28-109 29

INTERESTS OF THE *AMICI CURIAE*[1]

Amici are environmental organizations with significant experience in studying, managing and protecting natural and developed river resources in the states of California, Oregon, and Montana. They are the California Sportfishing Protection Alliance, Big Blackfoot Riverkeeper, North Coast Rivers Alliance, and Klamath Forest Alliance (collectively, "Western Conservation Organizations"). *Amici* are not affiliated with any party to this action, and write solely to offer an environmental perspective on the significant issues of public ownership and use of the nation's waterways at stake in this dispute.

Amicus California Sportfishing Protection Alliance ("CSPA") is a non-profit public benefit corporation organized under the laws of California to preserve California's public-trust fishery resources and enforce the state and federal laws that protect them. CSPA's members use northern California rivers for sport and commercial fishing, aesthetic enjoyment, nature study, boating, and swimming, and are concerned about the adverse effect that privatization of public trust resources could have on California rivers and their fish and wildlife.

---

[1] All petitioners and respondents have consented to the filing of *amicus* briefs, in support of either party or of neither party. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

Amicus Big Blackfoot Riverkeeper ("BBRK") is a non-profit organization affiliated with the internationally acclaimed Waterkeeper Alliance, a water advocacy organization fighting for everyone's right to clean and freely accessible water. BBRK is dedicated to the protection and preservation of one of the most beautiful rivers on earth–western Montana's Big Blackfoot River, a major tributary of the Clark Fork River. BBRK's specific mission is to preserve and protect the Big Blackfoot River in its natural state, including what's on the water, in the water, under the water, and near the water, both for the public's enjoyment today and for generations to come.

Amicus North Coast Rivers Alliance ("NCRA") is an unincorporated association of conservation leaders from throughout the north coast of California engaged in the submission of comments and expert testimony on land and water resource management issues. NCRA seeks compliance by local, state and federal agencies and private industry with state and federal environmental laws. NCRA's members use California's north coast rivers for fishing, boating, swimming and scientific study, and are concerned about the proper management of public trust resources and the fish and wildlife dependent on them.

Amicus Klamath Forest Alliance ("KFA") is a non-profit public benefit corporation organized under the laws of California to promote sustainable forest ecosystems and economies in northern California and southwest Oregon through public education, advocacy and litigation. KFA's members use the mountains,

forests, lakes and rivers of the region for nature study, fishing, boating, hiking, photography, and aesthetic enjoyment. They are concerned about the adverse effects that privatization of vital public trust resources will have on the rivers of the Cascade ranges of northern California and southwest Oregon.

SUMMARY OF ARGUMENT

The Court granted certiorari to address the navigability-in-fact test as applied by the Montana Supreme Court to determine whether the Equal Footing Doctrine grants the State of Montana title to submerged riverbed lands. Public trust principles have traditionally granted citizens of the United States the right to enjoy fisheries, conduct commerce, and transport people and goods along its navigable waters. The public's use and enjoyment of navigable waters are an essential attribute of statehood under the United States Constitution.

Public trust lands are provided with additional protections extending beyond commerce, navigation, and fisheries. Western Conservation Organizations believe that the public trust lands in their respective states also provide protection for a variety of public values, including ecosystem and fisheries protection and public recreation. It is of the utmost importance to these values that a stable, rational, and comprehensive scheme of property law apply to the entirety of the riverbeds in question. This scheme is already in

place through state ownership of the riverbeds under navigable waterways.

Highly fragmented ownership of riverbeds would lead to poor resource management and have a significant negative impact on the public trust resources that Western Conservation Organizations monitor and protect. Contrary to petitioner's contentions, the Montana Supreme Court correctly construed the navigability-in-fact test as it has been construed for hundreds of years. Any departure from the precedent represented by the Supreme Court of Montana's decision represents a major threat to settled property interests and public trust resources throughout the United States, and especially in the West. Nor is it proper to raise arguments regarding judicial takings, due process, and preemption at this stage when such arguments were waived by petitioner and, moreover, have no rational bearing on the facts currently before the Court.

ARGUMENT

I. NAVIGATION

This case affords this Court an opportunity to reaffirm nearly two centuries of jurisprudence according respect and deference to state ownership of rivers that were susceptible to commerce and travel at the moment of statehood. As this Court observed in the seminal case of *The Daniel Ball*,

> The test for title navigability has been consistently described as including the following: [R]ivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id., 77 U.S. 557, 563 (1870). The public's rights to own and utilize navigable rivers in all but the original 13 states are protected by the Equal Footing Doctrine, which holds that all lands underlying navigable waters should be considered "sovereign lands" of these states and that state ownership of them is "considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). These rights are "conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). State ownership of such lands is "infused with a public trust the State itself is bound to respect." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283-86 (1997).

Here petitioner asks this Court to eliminate state ownership of multiple segments of the Missouri, Madison, and Clark Fork rivers in Montana so that it can avoid paying the state for petitioner's private use of the state's sovereign lands. In so doing, petitioner asks the Court to depart from centuries of settled

jurisprudence and impose a very narrow reading of the term "navigability" that requires onerous segment-by-segment analyses of each river's navigability. Petitioner's request that the Court rewrite the long-standing rules defining state ownership of lands underlying navigable waters should be denied, as discussed below.

A. The Definition of Navigability Has Been and Should Continue to Be Broadly Construed

1. The Party Challenging a State's Sovereign Property Rights Bears the Burden of Proof

Petitioner argues that Montana must affirmatively demonstrate navigability. If it does not do so, according to petitioner, the riverbed must be deemed non-navigable and therefore subject to private ownership. Petitioner, however, ignores the well established presumption that favors state ownership. As the Court has explained, "[a] court deciding a question of title to the bed of navigable water must . . . begin with a *strong presumption* against defeat of a State's title." *Idaho v. U.S.*, 533 U.S. 262, 272-73 (2001), citation omitted, emphasis added.

2. Commercial Use Includes All Susceptible Uses at Statehood and Should be Liberally Construed

Susceptibility for commercial use is a well established test for navigability. *The Daniel Ball*, *supra*, 77 U.S. at 563, *U.S. v. Utah* ("*Utah I*"), 283 U.S. 64, 76 (1931); *U.S. v. Holt State Bank*, 270 U.S. 49, 56 (1926). This test allows and considers post-statehood evidence that shows susceptibility. *Utah I*, 283 U.S. at 82. Furthermore, the form or mode that such commerce takes is irrelevant, so long as the river is susceptible of being used as a highway for commerce. *Id.* at 76; *see also*, *St. Anthony Falls Water Power Co. v. Board of Water Com'rs of City of St. Paul, Minn.*, 168 U.S. 349, 359 (1897) (floating logs suffice); *The Montello*, 87 U.S. 430, 441 (1874) (lumber rafts suffice); *Wisconsin Pub. Serv. Corp. v. FPC*, 147 F.2d 743, 746 (1945) (same); *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940) (recreational boat use suffices).

B. Navigability-in-Fact, Rather than Navigability Segment-by-Segment, Is the Correct Test

Petitioner asks the Court to "confirm the controlling federal test for determining navigability for title purposes," but instead it argues for the creation of a new and *incorrect* test. Petitioner's Brief ("Pet'r Brief") at 33. Petitioner would have the Court adopt an unprecedented "segment-by-segment approach" under which (1) courts may only determine

navigability with respect to particular "loc[i] in quo," as opposed to the entire waterway, and (2) obstructions to navigation would require that rivers be split into navigable and non-navigable sections as short as 4.35 miles, with the states losing title to *all* non-navigable portions. Pet'r Brief at 41. Not only would adoption of such an extreme test require that the Court depart from its long-established navigability test, it would eviscerate settled expectations regarding title to and rights to use the beds under navigable waters and substantially impair the ability of states to manage their waterways for the good of the public and the environment. The Court should reject petitioner's attempt to upend the Court's bedrock jurisprudence on state sovereignty and the public trust. Instead, the Court should affirm that the Montana Supreme Court relied on the proper navigability-in-fact test for determining title to submerged lands.

1. The Court's Navigability-in-Fact Test – Relied on by the Montana Supreme Court – Is More Than 100 Years Old and Its Application Has Not Changed

After the American Revolution, each of the original 13 states succeeded to the "absolute right to all of their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell*, 41 U.S. 367, 410 (1842). And as early as 1845, the Court held that, upon admission to the Union, each new state

would receive the same trust ownership of lands beneath navigable waters. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). Soon thereafter, the Court established a test for the navigability of non-tidal rivers that it has adhered to since in determining state ownership of submerged lands – the "navigability-in-fact" test. In *The Daniel Ball*, more fully quoted above, the Court held that non-tidal rivers "are navigable-in-fact when they are used . . . as highways for commerce." *Id.*, 77 U.S. at 563.

Since *The Daniel Ball*, the Court has consistently held that this "navigable-in-fact" test is the correct measure in determining state ownership of submerged lands. *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 488-89 (1988); *Utah v. United States* ("*Utah II*"), 403 U.S. 9, 10-11 (1971); *Utah I*, 283 U.S. at 76 (1931); *Holt State Bank*, 270 U.S. at 56. The test is traditionally applied to the *entire* intrastate reach of a given waterway. Furthermore, it is applied liberally in favor of finding navigability and thus state ownership:

> [T]he true test of the navigability of a stream *does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation*. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. . . . *Indeed there are but few of our fresh-water rivers which did*

> *not originally present serious obstructions to an uninterrupted navigation.*

The Montello, 87 U.S. at 441 (emphasis added).

Petitioner claims that *The Montello* is inapplicable for determining title navigability because it "addressed *regulatory* navigability," and thus that the Montana Supreme Court erred "by placing undue emphasis" on the case. Pet'r Brief at 42. Petitioner is wrong. The Court has repeatedly applied the principles laid down in *The Montello* to determine state title to submerged lands. *Utah I*, 283 at 76; *Holt State Bank*, 270 U.S. at 56; *Barney v. Keokuk*, 94 U.S. 324, 337 (1876). The Montana Supreme Court therefore correctly applied the navigability-in-fact test as described in *The Montello* in determining that the Montana reaches of the Madison, Clark Fork and Missouri Rivers were navigable at the time of statehood. *PPL Montana, LLC v. State of Montana*, 355 Mont. 402, 446-47, 449 (2010).

2. Under the Navigability-in-Fact Test, Courts Determine the Navigability of and Title to the Whole River, Not Just Particular Loci in Quo

Petitioner argues that the Montana Supreme Court should not have determined the navigability of and title to the full reaches of the Madison, Clark Fork and Missouri Rivers in Montana. Instead, petitioner contends that the court should have used a "segment-by-segment approach" to determine

"navigability [*only*] at the 'locus in quo,'" *i.e.*, the sites of the various projects operated by petitioner on the three rivers. Pet'r Brief at 41. According to petitioner, "title navigability depends on the navigability not of the river as a whole but of the particular river segment at issue." Pet'r Brief at 33. Petitioner is wrong.

"The question of whether a body of water is navigable is answered waterway by waterway, not inch by inch." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 490 (1988) (O'Connor, J., dissenting). Answering this question requires "determin[ing] upon the evidence, how far navigability extends" along the waterway, but it does *not* allow for segment-by-segment determinations. *Utah I*, 283 U.S. at 77; *see also*, *U.S. v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (even where it is generally accepted that a river is navigable, it must still be determined "at what particular place between its mouth and its source navigability ceases"). Thus, in *Utah I*, the Court reviewed the navigability of the Colorado, Green, Grand, and San Juan rivers over their *entire* reaches in Utah. *Id.* at 73-74, 90.

Petitioner misreads *Utah I* as supporting the proposition that courts may make navigability determinations on river segments as short as 4.35 miles. The issue in *Utah I* was not whether a 4.35 mile section of the Colorado River was navigable by itself. Rather, the issue with respect to that 4.35 mile stretch was the location of "the exact point at which navigability may be deemed to end [along the

Colorado River], in the approach to Cataract Canyon." *Utah I*, 283 U.S. at 90.

Petitioner's reliance on *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922) and *Oklahoma v. Texas*, 258 U.S. 574 (1922) to support its "locus in quo" approach likewise fails. Pet'r Brief at 38-39. Neither of these cases involves non-navigable segments *within* a navigable river. Rather, the issue in both cases was whether the riverbeds at issue were located above or below the font of river navigability. In *Brewer-Elliott*, the Court determined that the river beds at issue were located in the non-navigable upper reaches of the Arkansas River above "the head of navigation[, which] is and was the mouth of the Grand River." 260 U.S. at 86. In *Oklahoma*, the Court addressed the similar issue of "how far up the [Red River] navigability extended," and found that the beds at issue were located in the non-navigable reaches of the river above the head of navigation. 258 U.S. at 584.

In sum, the Montana Supreme Court was correct in determining navigability for title with respect to the *entire* Montana reaches of the Madison, Clark Fork and Missouri rivers. *PPL Montana, LLC*, 355 Mont. at 449.

3. Under the Navigability-in-Fact Test, Interruptions in Navigable Rivers Do Not Defeat State Title

Petitioner argues that "the Montana Supreme Court [improperly] rejected 'a piecemeal classification of navigability – with some stretches declared navigable and others declared non-navigable.'" Pet'r Brief at 40 (quoting *PPL Montana, LLC*, 355 Mont. at 441). Petitioner contends that interruptions of navigability in the middle of navigable rivers defeat state title to those obstructed regions. Petitioner is wrong again.

The Court has made clear that "the navigable waters and the soils under them . . . *shall not be disposed of piecemeal to individuals as private property*, but shall be held for the purpose of being ultimately administered and dealt with for the public benefit by the State." *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894). Petitioner's suggested "segment-by-segment" approach would directly contravene this mandate and violate the Public Trust Doctrine by allowing private parties to take ownership of the beds under all river segments that were non-navigable at statehood. With alternating sections of public and private ownership, the "people of the State[s] [would be prevented from] enjoy[ing] the navigation of the waters, carry[ing] on commerce over them, and hav[ing] liberty of fishing therein *freed from the obstruction or interference of private parties*." *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452 (1892).

The Court has heretofore protected the public's rights in the navigable waters and the lands underneath them by rejecting the "segment-by-segment" approach proffered by petitioner, and holding instead that state title to the beds of navigable rivers extends to obstructed areas encompassed within them. As the Court stated in *The Montello*:

> Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.

87 U.S. at 443; *see also*, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 409 n.34 (1940) ("[t]here has never been doubt that the navigability referred to in [*Utah I* and *The Montello*] was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents"); *St. Anthony Falls Water Power Co. v. Board of Water Commissioners*, 168 U.S. 349, 359 (holding that the Mississippi River was navigable in fact throughout the stretch that includes St. Anthony Falls, even though "the river at this point was not navigable at ordinary stage of

water for half a mile below [the falls . . . and] was not navigable immediately above the falls"); *Brown v. Chadbourne*, 31 Me. 9, 23 (1849) (holding that a river is navigable in fact despite "rocks falls and other obstructions" and that a "rigid and severe" test of navigability "would annihilate the public character of all our fresh rivers, for many miles of their course").

Petitioner cites *Utah I* as "exemplif[ying] the segment-by-segment approach" because it "dealt separately with stretches within [the specific river sections at issue] that had distinct topographical characteristics." Pet'r Brief at 36-37. Yet of the four rivers whose navigability the Court determined in *Utah I*, the lone river "segment" that the Court addressed separately from the rest of the river was the 36- to 40-mile Cataract Canyon stretch on the Colorado River. The only reason the Court analyzed the Cataract Canyon segment separately was because it presented the anomalous case of being so long and forbidding as to preclude all potential commercial passage, *including by portage*. Indeed, as the United States admits, "Cataract Canyon could not be fully portaged, at least not without bypassing the canyon altogether." United States' Brief ("U.S. Brief") at 23-24 (citing Report of the Special Master at 126-27, *Utah II*, 283 U.S. 64 (No. 14, Original)).

Here, by contrast, Montana adduced evidence of the navigability of the *entire* reach of the Missouri, Clark Fork and Madison rivers in Montana, because the entirety of those reaches was susceptible of river-borne commerce, including portages, at the moment

of statehood. *PPL Montana, LLC*, 355 Mont. at 439. There is no evidence of anything but "short interruption[s] of navigability" on the three rivers. *Utah I*, at 77. For example, the primary river segment petitioner highlights as being non-navigable at statehood is the 17-mile Great Falls Reach of the Missouri River. Pet'r Brief at 40, 42. Yet not only is that stretch *less than half as long* as the portion of the Colorado River deemed non-navigable in *Utah I* (Cataract Canyon), it *was successfully portaged decades prior to statehood* by the Lewis and Clark expedition, thus providing an uninterrupted highway for commerce. *PPL Montana, LLC*, 355 Mont. at 440. By contrast, and distinguishing the present case from *Utah I*, Cataract Canyon was impassable *even by portage*.

The Court's precedents and the evidence here make clear that the Montana Supreme Court's "whole-river" navigability determination for the Montana sections of the Missouri, Clark Fork and Madison rivers was entirely correct despite the putative existence of non-navigable stretches on those rivers at statehood. The Court should not now veer from the long-established rule that interruptions in navigable rivers do not defeat state title. Instead, it should reject petitioner's attempts to eviscerate these bedrock principles of state sovereignty and thereby protect the public trust.

4. Petitioner's Segment-by-Segment Approach Would Destroy Settled Property Rights Expectations

Petitioner and the United States both claim that the "inconsistent outcomes that would inevitably arise [from a whole-river approach to determining navigability for title purposes] would dramatically undermine 'the special need for certainty and predictability where land titles are concerned.'" Pet'r Brief at 36 (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979)); U.S. Brief at 18 (also quoting *Leo Sheep*, 440 U.S. at 687-88). Petitioner and the United States have it backwards. As noted, the Court and other courts throughout the United States have consistently applied a whole-river, navigability-in-fact approach since at least the 1800s. Yet petitioner and the United States *have not identified a single "inconsistent outcome"* that has arisen from the application of the traditional navigability-in-fact test over that period of more than 100 years.

To the contrary, and as discussed below, it is basic common sense that certainty and predictability regarding the title to a riverbed are much greater where a court determines the navigability of the entire river expanse in a single ruling rather than determining the navigability of bits and pieces of the river over the course of hundreds of years. Indeed, it is for precisely this reason that the Court granted certiorari in *Leo Sheep*, where it recognized the benefit of clarifying "property rights in 150 million acres of land in the Western United States" in one fell

swoop. 440 U.S. at 678. So too here, determining navigability of a river in unitary fashion assures that commerce and recreation will be protected throughout the river's length. As highways of commerce, rivers must be accessible from the beginning to the end of the passage used for public transport. Otherwise, piecemeal privatization of tiny segments would defeat the fundamental purpose of the river – to provide public access from one end of the waterway to the other.

C. Public Policy Favors Public Ownership of All But the Most Obviously Non-Navigable Waterways

The Court's decision in this case could have far reaching effects on state ownership of riverbeds across the nation and consequently on the public's access to and use of the nation's rivers for fishing, boating, recreating, and for commerce. The public's rights to access its state's river system and to use and enjoy the public trust resources therein are fundamental and ancient rights, with roots reaching back to English common law and the Magna Carta. *Idaho*, 521 U.S. at 284. Any significant limitation on these rights thus would violate centuries of established public rights.

As discussed above, the Court has historically applied a broad interpretation of the term "navigability" and a presumption of state ownership of navigable waterways. *Idaho*, 521 U.S. at 283-86

(establishing a "strong presumption of state ownership" to protect states' "sovereign interests"). This presumption ensures that each state's citizens will not be stripped of their long-standing rights to use and enjoy public trust resources in navigable rivers.

A ruling adopting petitioner's narrow, piecemeal reading of "navigability" would directly threaten the public's ancient public trust rights. Such a ruling would likely spark the filing of a plethora of lawsuits by private parties looking to lay claim to riverbed resources. Not only would these speculative lawsuits instantly destabilize settled expectations, they would clog the federal court system for decades with heavily fact-dependent disputes involving thousands of river segments and potentially millions of affected landowners and users. Moreover, if successful, these suits would permanently eliminate the public's right to use and enjoyment of waterways that had been previously considered public property. For these reasons, petitioner's restrictive test of navigability should be rejected. The Court should reaffirm its longstanding and consistently broad definition of title navigability in continued recognition of the historic public ownership of all watercourses that are susceptible of use by the public.

Similarly, a ruling that courts must determine on a case-by-case basis whether small segments of otherwise navigable rivers are in fact non-navigable would destroy long-settled expectations held by state governments and the public. As with a narrow

interpretation of "navigability," a strict segment-by-segment rule would encourage private parties to file a multitude of lawsuits seeking to establish private ownership of short river segments that had always been considered state-owned lands. If successful, the resulting segmentation of ownership would result in disruption to the public's ability to access the entirety of the river. Additionally, segmentation of ownership would make it more difficult for states to protect the public's interests in maintaining the water quality and habitat of downstream sections of rivers and render river management excessively complicated. Accordingly, the Court should rule that under the Equal Footing Doctrine, the western states received unitary ownership of navigable rivers, including short sections that, as here, were susceptible to portages that allowed commerce to continue around obstructions that did not impede the overall navigability of the river.

Further, a broad interpretation of navigability, including a unitary test for the river as a whole, guarantees that the western states are truly on equal footing with the original 13 states in respect of riverbed ownership. Under petitioner's theories, mountainous western states like Montana, with rivers often disrupted by navigational barriers such as rapids and waterfalls, would be significantly disadvantaged. Their sovereign rights to the beds of navigable rivers would be diminished by frequent interruptions in ownership. States with less rugged terrain like nearby Nebraska, on the other hand,

would own more extensive and comprehensive rights to their river systems. Nebraskans would thus enjoy a higher level of public access to and protection of their waterways than would Montanans. The Equal Footing Doctrine, however, requires that all states receive the same rights of sovereign ownership over navigable rivers as was attained by the original 13 colonies. *Pollard v. Hagan*, *supra*, 44 U.S. at 228-29. These rights should not be dependent on the states' topography.

The Court should resist petitioner's call to create a new riverbed ownership regime that significantly restricts state ownership of navigable rivers and the public's attendant rights to use of those rivers. Such a system is anathema to the Equal Footing Doctrine and would violate centuries-old public rights.

II. TAKINGS

Several *amici* supporting petitioner raise the specter of a judicial taking of private property for public use without compensation under the Fifth Amendment to the United States Constitution as an argument for overturning the Montana Supreme Court's decision here. There is, quite simply, no basis on the facts currently before the Court for contending that petitioner's Fifth Amendment rights have been violated. Petitioner, for instance, chose not to pursue a takings argument, presumably because such an argument is refuted by the facts. The Court's plurality opinion in *Stop the Beach Renourishment,*

Inc. v. Florida Department of Environmental Protection, 130 S.Ct. 2592 (2010) suggesting that a judicial takings rationale might apply in a sharply different context, has led *amici* to stretch the facts of the present case in the hope of obtaining a favorable ruling. *Amici*'s facile invocation of this inchoate doctrine demonstrates the dangers of this avenue for the Court's jurisprudence: warranted under the facts of a particular case *or not*, private property owners will rush to federal courts to challenge adverse state court decisions of every stripe and color.

The Takings Clause of the Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation," a proposition which necessarily presupposes the existence of private property. Put simply, absent private property, there can be no taking. *See, e.g., Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, *supra*, 130 S.Ct. at 2612 ("The Takings Clause only protects property rights as they are established under state law") (plurality opinion, unanimous concurrence with Part IV). Ignoring the threshold barrier that no private property has been shown to have existed here, several *amici* supporting petitioner have nonetheless asserted that the Montana Supreme Court's reasoned analysis of title to public trust lands under the Equal Footing Doctrine constitutes a "judicial taking." Creekside Coalition, *et al.*, *Amicus Curiae* Brief, at 27-29; Mountain States Legal Foundation, *et al.*, *Amicus Curiae* Brief, at 10-22 (sections addressing

certainty of title); Montana Farm Bureau Federation, *et al.*, *Amicus Curiae* Brief, at 26-33 (labeling the Montana Supreme Court's ruling a "redefinition of property rights" and calling that Court's arguments to the contrary "effete"); and Montana Water Resources Association, *et al.*, *Amicus Curiae* Brief, at 36. These arguments not only put the cart before the horse,[2] they also ask the Court to reach well beyond the necessities of the current case to announce sweeping new rules, rules which are not based on the facts of any particular case in controversy. *See Stop the Beach Renourishment*, 130 S.Ct. at 2615 (Kennedy, J., concurring in judgment and dissenting in part).

As explained by the majority of the briefings in the present case, *PPL Montana, LLC v. State of Montana* is a straightforward dispute over title to public trust riverbed lands. Nowhere in petitioner's merits brief does there appear the claim that the Montana Supreme Court's action constitutes a taking. If the Court finds that the riverbed in question did not at statehood become public trust lands under

---

[2] *Amici* Montana Farm Bureau Federation, *et al.*, for example, fret about the Montana Supreme Court's disregard for "established property rights" without any acknowledgment that as far as the Montana Supreme Court is concerned there is no private interest in the riverbeds in question. Montana Farm Bureau Federation, *et al.*, *Amicus Curiae* Brief, at 31. Somehow, though the Montana Supreme Court squarely addressed the question of navigability *at statehood*, *Amici* Montana Farm Bureau Federation, *et al.*, proceed under the theory that a retroactive rule on navigability has been established. *Id.* at 32.

the Equal Footing Doctrine, then petitioner's private property rights would remain wholly intact and no takings analysis would be appropriate. If the Court finds that Montana's determinations of navigability for title purposes have been correct under the Equal Footing Doctrine, then petitioner has no private property interest to be taken. In other words, "insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right." *Stop the Beach Renourishment*, 130 S.Ct. at 2609. In either case recognizing a claim that petitioner itself has not pled in its merits brief would waste the Court's time or worse, make mischief as an advisory opinion detached from the facts of the case.

Amici Creekside Coalition, *et al.*, present *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979) as an analogous case where "government action declaring non-navigable private property to be navigable" constitutes a taking. *Amici* Creekside Coalition, *et al.*, *Amicus Curiae* Brief, at 28. But the cart is before the horse again: the core issue in the present case concerns the test for navigability, which once determined makes any subsequent discussion of the Fifth Amendment moot. It was undisputed in *Kaiser Aetna* that Kuapa Pond, from which a navigable marina was constructed, was *non-navigable* at the time of Hawaii's statehood. *Id.* at 167 ("Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government"). Moreover, *Kaiser Aetna* concerned a federal right to

navigation, not a state claim to title. *Id.* at 170. Consequently *Kaiser Aetna* has no application to the case at bar.

Even were there the potential for a private property interest to exist despite the Montana Supreme Court's determination that the rivers at issue were navigable for title purposes at statehood, such claims should be governed by state law. Property interests in general are defined by state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). State law is particularly relevant where flowing waters and the lands beneath them are concerned: "states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks." *U.S. v. Cress*, 243 U.S. 316, 319 (1917). Therefore, private property rights would only exist in the present case to the extent they have been granted by state law. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("a mere unilateral expectation or an abstract need is not a property interest entitled to protection"). Justice Scalia acknowledged in *Stop the Beach Renourishment*, 130 S.Ct. at 2608, that "[a] property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but *accept the determination of the state*

court."[3] *Id.*, emphasis added. The Montana Supreme Court's ruling that no private interest in the riverbed can exist under the laws of the state of Montana thus disposes of *amici*'s takings contention.

Principles of federalism militate strongly against federal courts adopting the role of watchdogs over state property rulings. *Amici* Montana Water Resources Coalition, *et al.*, makes the counterintuitive argument that principles of federalism actually *demand* that federal courts strip the states of final authority over property. The Montana Water Resources Coalition contends, without support, that federalism is "a two-way street," and that as such the power of state courts to rule on state property law must be checked by federal power. *Amici* Montana Water Resources Coalition, *et al.*, *Amicus Curiae* Brief, at 35-36. The philosophical underpinnings of

---

[3] This Court has consistently upheld the power of state courts to finally determine property rights under state law. *See, e.g., Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) (the mere fact of reversal of a prior ruling does not take private property); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930) (state courts are free to interpret the common law of property in accordance with changing ideas and conditions); *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932) (the U.S. Constitution has no say in whether new rules of state property law can be applied prospectively); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 379 (1977) (states can formulate and modify rules of riparian ownership as they see fit); *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 657 (1927) (the U.S. Constitution does not protect property found by a state court to be nonexistent).

our national government, the federal Constitution and the writings of the Court, however, advise the opposite.[4] The Founding Fathers understood that power over "the lives, liberties and properties" of the people, as well as "the internal order, improvement, and prosperity of the State," should be reserved for individual state governments. The Federalist No. 45, at 292-93 (Clinton Rossiter ed., 1961). This philosophy is

---

[4] This Court has long exercised judicial restraint where it is not actually necessary to address constitutional claims based on the facts before the Court. *See, e.g., Whitehouse v. Illinois Central R. Co.*, 349 U.S. 366, 372-73 (1955) (involving hypothetical injuries and claimants who at the time were not parties to the proceedings; *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988) (First Amendment Establishment Clause determinations were necessary to the decisions and relief granted below, overcoming the Court's strong preference for judicial restraint on constitutional issues); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984) (determining that it was unnecessary to address equal protection claims under the U.S. Constitution in light of the independent sufficiency of state law grounds for the result in question); *Jean v. Nelson*, 472 U.S. 846, 854 (1985) immigration statutes and U.S. Immigration and Naturalization regulations should be addressed before tackling potentially related equal protection claims under the U.S. Constitution); *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring in the judgment) (the Court should avoid advisory opinions and proceed with great caution when ruling on constitutional questions, such as the power to overrule legislative enactments); *Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs*, 113 U.S. 33, 39 (1885) (two rules should serve as guides to wise judgment: "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied").

reflected in both the Tenth Amendment to the United States Constitution and the Guarantee Clause contained in Article IV. *See, e.g., Chandler v. Florida*, 449 U.S. 560, 579-80 (1981) (the Court generally respects the power of individual states to declare and interpret their own law).

For all of these reasons, this Court should resist *amici*'s unwarranted and improvident invitation for judicial activism under the guise of a "judicial takings" analysis.

III. DUE PROCESS

Hand in hand with the judicial takings argument pursued by some *amici* supporting petitioner is their argument under the Fourteenth Amendment to the U.S. Constitution that private property has been taken by the Montana Supreme Court without due process of law. Ostensibly invoking the concern for certain due process rights expressed by Justice Kennedy in *Stop the Beach Renourishment*, 130 S.Ct. at 2614, *Amici* Creekside Coalition, *et al.*, Montana Farm Bureau Association, *et al.*, and Mountain States Legal Foundation, *et al.*, take the opportunity to load on yet another aspect of constitutional private property protection never asserted by the petitioner. *Amici* Creekside Coalition, *et al.*, *Amicus Curiae* Brief, at 27; *Amici* Montana Farm Bureau Association, *et al.*, *Amicus Curiae* Brief, at 31-33; *Amici* Mountain States Legal Foundation, *et al.*, *Amicus Curiae* Brief, at 10, 13, and 26. This Court should recognize the danger to

established state property doctrines posed by the *amici*'s pursuit of such jurisprudence, and reject *amici*'s invitation to enter their darkened alleyway. The moment a constitutional basis for challenging the property determinations of state courts is established, the rush of private litigants to federal court will be overwhelming. Such a result would fly in the face of the Court's settled practice of granting deference to local courts with local expertise in disposing of cases involving private property.

The Montana Supreme Court's ruling is only binding on parties to that ruling; those parties have certainly received sufficient notice and opportunity for a public hearing. Mont. Code Ann. § 70-28-109. In addition, the navigability of and title to Montana's riverbeds has been settled for a very long time and the present case in no way purports to determine any property interests but those of the present parties. Any procedural due process claim is thus empty.

Furthermore, an established property right – absent here – is also necessary to the invocation of a due process claim. There is no need to proceed with a due process analysis because the very determination that petitioner *lacks* property rights completely disposes of the issue. Justice Kennedy's solicitude for "a judicial decision . . . that eliminates an established property right" is thus controlling here. *Stop the Beach Renourishment*, 130 S.Ct. at 2614.

Even were the Court to proceed under a due process theory, the inquiry would end at the beginning because states possess the authority to modify or overrule prior property law decisions without violating the Constitution. In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924), for instance, the Court declined to overrule the Oklahoma Supreme Court on a point of state property law, stating that "the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law." *See also*, *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 657 (1927) (it is for state courts "to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent"); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 541 (1930) (the Supreme Court "will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court"). In light of this deference, it is inappropriate for *amici* to raise, much less for this Court to indulge, in a due process analysis.

IV. PREEMPTION

Amici Edison Electric Institute, *et al.*, persists in raising the issue of preemption, stating that "[t]he

Montana Supreme Court's decision undercuts a foundational policy of the [Federal Power Act]." Edison Electric Institute, *et al.*, *Amicus Curiae* Brief, at 17. But objections that do not appear in the parties' briefs at the certiorari stage are deemed waived. *See* Supreme Court Rule 15.2; *cf. Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Therefore this argument is waived as a matter of law.

Furthermore, the Montana Supreme Court exhaustively covered the arguments for federal preemption and found that there was no basis whatsoever for the claim that state ownership of public trust riverbed lands frustrated federal law. *PPL Montana, LLC v. State of Montana*, 355 Mont. at 449. Montana is exerting no regulatory authority that would interfere with any federal statute. Rather, Montana is merely requesting that private corporations pay for the use of state-owned, public trust lands. The core of the Montana Supreme Court's decision is clearly and properly compensatory, not regulatory. *Id.*

CONCLUSION

For the foregoing reasons, the well-reasoned ruling of the Montana Supreme Court should be upheld in all of its particulars.

Respectfully submitted,

STEPHAN C. VOLKER*
JOSHUA A.H. HARRIS
JAMEY M.B. VOLKER
M. BENJAMIN EICHENBERG
LAW OFFICES OF STEPHAN C. VOLKER
436 14th Street, Suite 1300
Oakland, California 94612
Telephone: (510) 496-0600
**Counsel of Record*
Attorneys for Amici Curiae
California Sportfishing Protection Alliance, Big Blackfoot Riverkeeper, North Coast Rivers Alliance, and Klamath Forest Alliance

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-218

SEP 7 - 2011
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

PPL MONTANA, LLC,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Writ of Certiorari
to the Supreme Court of Montana

BRIEF OF THE CREEKSIDE COALITION, COLORADO CATTLEMEN'S ASSOCIATION, COLORADO FARM BUREAU, AND DUDE RANCHERS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CHARLES B. WHITE
PETROS & WHITE, LLC
1999 Broadway
Suite 3200
Denver, Colorado 80202
(303) 825-1980

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

September 7, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COURT SHOULD REVERSE THE ERRONOUS DECISION BELOW TO PROTECT LANDOWNER RELIANCE INTERESTS AND THE STABILITY OF RIVERBED TITLES 5

A. The Decision Misunderstands This Court's Cases On Navigability-For-Title 5

B. The Decision Defies This Court's Warning Against State Abuse Of Navigability Determinations 10

C. The Decision Calls Into Question Titles To Both Federal And Private Lands 11

II. REVERSAL IS NECESSARY TO PROTECT VESTED PRIVATE PROPERTY INTERESTS IN COLORADO AND ELSEWHERE 14

A. The Colorado Supreme Court Long Has Understood That All Colorado Rivers Were Non-Navigable At Statehood 14

B. Colorado Property Owners Hold Title To Submerged Lands Under Non-Navigable Rivers And Enjoy Certain Exclusive Rights To Use The Streambeds 17

C. This Court Long Has Sought To Preserve Reliance Interests And Stability Of Titles 24

D. The Montana Supreme Court's Erroneous Decision In Effect Takes Private Property Without Just Compensation 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

American Land Co. v. Zeiss, 219 U.S. 47 (1911)..... 27

Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604 (1978) 20

Board of County Comm'rs v. Park County Sportsmen's Ranch, LLP, 45 P.3d 693 (Colo. 2002) 19, 20

Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 7, 11

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935)..... 20

City of Denver v. Pearce, 22 P. 774 (Colo. 1889) 18

College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) 24

Colorado v. New Mexico, 459 U.S. 176 (1982) 19

Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1, 535 P.2d 200 (Colo. 1975)..... 4

Doolittle's Lessee v. Bryan, 55 U.S. (14 How.) 563 (1853) 26, 27

German Ditch & Reservoir Co., In re, 139 P. 2 (Colo. 1913) 15

Hall v. Brannan Sand & Gravel Co., 405 P.2d 749 (Colo. 1965) 15

Hanlon v. Hobson, 51 P. 433 (Colo. 1897)..... 18

Hardin v. Jordan, 140 U.S. 371 (1891)..... 18

Hartman v. Tresise, 84 P. 685 (Colo. 1905).....18, 24

Hughes v. Washington, 389 U.S. 290 (1967)..... 29

Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U.S. 196 (1886)..... 27

Kaiser Aetna v. United States, 444 U.S. 164 (1979).....28, 29

Leo Sheep Co. v. United States, 440 U.S. 668 (1979).....25, 26

Louisiana v. Garfield, 211 U.S. 70 (1908)..... 27

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)..... 29

More v. Johnson, 568 P.2d 437 (Colo. 1977)..... 18

Oklahoma v. Texas, 258 U.S. 574 (1922).....10, 16

Oregon ex rel. Div. of State Lands v. Riverfront Prot. Ass'n, 672 F.2d 792 (9th Cir. 1982)..... 7

People v. Emmert, 597 P.2d 1025 (Colo. 1979).....15, 17, 24

Peralta v. United States, 70 U.S. (3 Wall.) 434 (1866)..... 3

Platte Water Co. v. Northern Colorado Irrigation Co., 21 P. 711 (Colo. 1889)..... 16

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845)..... 5

Smith v. Town of Fowler, 333 P.2d 1034 (Colo. 1959)..... 15

Spratt v. Helena Power Transmission Co., 94 P. 631 (Mont. 1908)..... 12

Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994)..... 29

Stockman v. Leddy, 129 P. 220 (Colo. 1912) 4, 14, 15

Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010) 27

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871) 6

The Montello, 87 U.S. (20 Wall.) 430 (1874) 6

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) 16

United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982) 4, 15

United States v. District Ct. in & for the County of Eagle, 458 P.2d 760 (Colo. 1969), *aff'd*, 401 U.S. 520 (1971) 15

United States v. New Mexico, 438 U.S. 696 (1978) 12-13, 14

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 6

United States v. Utah, 283 U.S. 64 (1931) 5, 6, 7, 8, 9, 10

Utah v. United States:

304 F.2d 23 (10th Cir. 1962) 7

403 U.S. 9 (1971) 8

Webb's Fabulous Pharms., Inc. v. Beckwith, 449 U.S. 155 (1980) 29

CONSTITUTIONS, STATUTES, REGULATIONS, AND RULES

U.S. Const.:

Art. I, § 8, cl. 3 (Commerce Clause) 16, 28

Amend. V:

Due Process Clause..... 27

Takings Clause..... 27

Amend. XIV (Due Process Clause)..... 27

Colo. Const. 19

Art. 16, § 6 20

Desert Land Act of 1877, 43 U.S.C. § 321 *et seq.* 20

Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* 20

43 U.S.C. § 1761 20

Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C. § 403.....16, 28

Submerged Lands Act, 43 U.S.C. § 1301 *et seq.* 5

43 U.S.C. § 1311(a)..... 5

Union Pacific Act of 1862, ch. 120, 12 Stat. 489..... 25

30 U.S.C. § 51..... 20

30 U.S.C. § 52..... 20

43 U.S.C. § 661..... 20

Colo. Rev. Stat. § 37-92-103(4) 23

33 C.F.R.:

§ 329.4 16

§ 329.9(b) 17

§ 329.16(b) 17

Sup. Ct. R.:

Rule 37.3(a) 1

Rule 37.6 1

ADMINISTRATIVE MATERIALS

Colorado Div. of Wildlife, *Managing Forested Lands for Wildlife* (Robert L. Hoover & Dale L. Willis eds., 1984) 22

General Services Administration, *Inventory Report on Real Property Owned by the United States Throughout the World as of June 30, 1974* (May 30, 1975) 13

U.S. Army Corps of Engineers, *at* http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/co_waterways.html 17

OTHER MATERIALS

Michael F. Browning, *Private Means to Enhance Public Streams*, 33 Colo. Law. 69 (Apr. 2004) 22

Colorado Cattlemen's Association, *at* http://www.coloradocattle.org 1

Colorado Farm Bureau, *at* http://www.colorado farmbureau.com 2

Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53 (2010) 15

Creekside Coalition, *at* http://www.thecreekside coalition.com 1

Dude Ranchers' Association, *at* http://www.dude ranch.org 2

Paul W. Gates, *History of Public Land Law Development* (1968) 25

Stephanie Simon, *In This Political Battle, a River Runs Through It — Colorado Rafters, Anglers Square Off Over Use of Streams Through Private Land*, Wall St. J., Apr. 8, 2010, at A1 22

Reed Watson, *Stream Access Across the West*, PERC Reports, Spring 2009, at 8, *available at* http://www.perc.org/files/PRspring09.pdf 22

INTEREST OF *AMICI CURIAE*[1]

It long has been settled in Colorado that title to riverbeds belongs to the riparian landowner — not the State of Colorado. *Amici* each have an interest in preserving that status quo and preserving the long-settled reliance interests of riparian landowners.

The Creekside Coalition[2] is a Colorado non-profit corporation formed in 1994. Creekside receives support from hundreds of donors including landowners, wildlife experts, ranch managers, biologists, fishermen, farmers, river recreationists, outfitters, and conservationists who have long acted in reliance on settled Colorado law concerning title to riverbeds. Creekside seeks to protect Colorado's riparian environments and habitat on private property for economic and non-economic activities, including farming, ranching, water storage and diversion, fishing, hunting, and fish and wildlife habitat improvement.

The Colorado Cattlemen's Association[3] is a Colorado non-profit corporation whose mission is to promote the interests of Colorado's beef industry and protect Colorado's land, water, and forage resources. Founded in 1867, it is the Nation's oldest state

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief. Letters reflecting their consent are on file with the Clerk.

[2] *See* http://www.thecreeksidecoalition.com.

[3] *See* http://www.coloradocattle.org.

cattlemen's association and has more than 12,000 members, many of whom have worked the same private and public land for generations, own the beds of rivers and streams, and rely for their livelihood on riverbed water diversion and storage structures.

The Colorado Farm Bureau[4] is a Colorado non-profit corporation founded in 1919, with membership of more than 23,000 farmers, ranchers, and landowners. The Farm Bureau is dedicated to helping family farmers and ranchers stay on their land and continue to produce food, fiber, and fuel. The ownership and control of riparian land and water rights is essential to the viability of its members' operations.

The Dude Ranchers' Association[5] is a non-profit corporation originally formed in 1926, with more than 100 members in Colorado and other western States. The association supports its members in providing high-quality traditional western ranch vacations and seeks to preserve and protect the natural environment. Many of those members own riparian property and offer fishing and other water-based recreational activities to their guests.

Amici and other similarly situated landowners and water users rely on their lawful ability in Colorado to protect their economic and non-economic property interests through long-settled private property rights under which riparian landowners hold title to the beds of non-navigable rivers. *Amici* have a vital interest in reversal of the Montana Supreme Court's decision, which threatens to upset long-established titles to riverbeds, not only in Montana but also in Colorado and other western States in which numer-

---

[4] *See* http://www.coloradofarmbureau.com.

[5] *See* http://www.duderanch.org.

ous rivers long have been considered non-navigable. *Amici* bring a unique and important Colorado-based perspective to the issues raised by petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court long has recognized that "[t]he right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions." *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 439 (1866). The Montana Supreme Court's decision radically upsets the stability of title to submerged lands under rivers that, for more than a century, were understood to be non-navigable when Montana attained statehood. Private and public riparian property owners, including the federal government, have acted in reliance on their secure ownership of riverbeds in using their riparian lands.

I. The Montana court distorted this Court's navigability-for-title test by ruling that Montana had held title to the riverbeds at issue since 1889. The court sanctioned Montana's rental charges to petitioner for the use of riverbeds amounting to $41 million in retroactive liability, and many millions more in future fees. Despite significant and extensive obstructions to navigability at statehood well documented in the record below, the Montana court erroneously held that hundreds of miles of three Montana rivers then were commercially navigable.

Remarkably, the Montana court did so by granting summary judgment to Montana — the party with the burden of proof on navigability — in effect weighing the evidence to adopt Montana's evidence, reject petitioner's evidence, and avoid a trial on the merits. If the court's erroneous decision is not reversed, the implications will be grave and enormous for riparian

landowners across the country. The Department of the Interior's Bureau of Land Management also concluded that the federal government's ownership of riverbeds could be placed at risk.

II. No Colorado river has been held to have been navigable at the time of statehood. In a 1912 decision, the Colorado Supreme Court observed that, when Colorado with its rugged terrain became a State in 1876, "the natural streams of this state [we]re, in fact, nonnavigable within its territorial limits." *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912), *overruled in part on other grounds by Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1*, 535 P.2d 200 (Colo. 1975) (en banc), and *overruled in part on other grounds by United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982) (en banc). Ownership by riparian landowners of non-navigable riverbeds long has been recognized in Colorado since statehood. If the Montana Supreme Court's exceedingly loose navigability standard were affirmed, however, then other States, including Colorado, could be emboldened to challenge riverbed titles, upsetting numerous and longstanding settled expectations and reliance interests.

For 135 years, the owners and users of riparian land in Colorado have depended for their livelihood on their settled titles to riverbeds. Farmers, ranchers, public and private water utilities, power companies, ski areas, and other commercial and industrial interests have constructed water storage and diversion facilities on their own lands, or under easements and licenses on the lands of others, to meet ever-increasing water demands in the arid West. Riparian landowners and conservation interests have installed structures in riverbeds to improve in-stream habitats

for fish. Those facilities, and the right to control access to the stream, are the lifeblood of dude ranches, fishing clubs, and other businesses catering to anglers. Local governments have installed kayak courses in the stream channel to enhance recreational opportunities for their residents and visitors, which create revenues for local economies. In each case, the owners of the lands and facilities have relied on the established title to the riverbed as the basis for making investments that increased the value and utility of riparian lands.

ARGUMENT

I. THE COURT SHOULD REVERSE THE ERRONOUS DECISION BELOW TO PROTECT LANDOWNER RELIANCE INTERESTS AND THE STABILITY OF RIVERBED TITLES

A. The Decision Misunderstands This Court's Cases On Navigability-for-Title

Through application of the "equal footing" doctrine, *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845), this Court has held that who holds title to submerged lands under particular reaches of a river depends on whether those reaches were "navigable in fact" at the time the State joined the Union. *United States v. Utah*, 283 U.S. 64, 76 (1931) (internal quotation marks omitted). If the reaches at issue in this case were "then navigable" when Montana became a State in 1889, title to the beds of those rivers vested in Montana. *Id.* at 75. If those reaches were not "then navigable," however, "title to the river beds remained in the United States" or any private grantees. *Id.*; *see also* 43 U.S.C. § 1311(a) (Submerged Lands Act of 1953).

Navigability for title purposes "is a federal question," not one of state law. *Utah*, 283 U.S. at 75.

This Court's precedents provide that rivers are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *see Utah*, 283 U.S. at 76. However, "[i]t is not . . . every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." *The Montello*, 87 U.S. (20 Wall.) 430, 442 (1874) (internal quotation marks omitted). And "[t]he mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river." *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899).

This Court repeatedly has assessed navigability on a section-by-section basis and has not relied on general determinations that a river is navigable as a whole. Thus, "[e]ven where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, *how far* navigability extends." *Utah*, 283 U.S. at 77 (emphasis added); *see Rio Grande Dam & Irrigation*, 174 U.S. at 698 (inquiring "at what particular place between [a river's] mouth and its source navigability ceases").

In *Utah*, this Court evaluated the navigability of several "long reaches with particular characteristics of navigability or nonnavigability." 283 U.S. at 77. One of those "long reaches" was a 4.35-mile portion

of a larger, 40-mile stretch of the Colorado River in Utah, the entire length of which the special master found to have been non-navigable at statehood. *See id.* at 79-80. This Court concluded that the smaller 4.35-mile portion was navigable in fact, emphasizing that the evidence showed that "4.2 miles of this stretch . . . are . . . quiet water." *Id.* at 89. As the analysis in *Utah* makes clear, this Court has declined to make categorical pronouncements of the navigability of entire rivers, recognizing that navigable and non-navigable reaches may coexist in the same river. *See also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922) (holding that "the Arkansas [River] is and was not navigable at the place where the river bed lots, here in controversy, are").[6]

The Montana Supreme Court's decision erred by failing to assess navigability of the Missouri, Madison, and Clark Fork Rivers in Montana on a section-by-section basis. In particular, the state supreme court declared a 17-mile stretch of indisputably non-navigable rapids and falls at Great Falls, Montana, to be "merely a short interruption in the use of the Missouri as a channel for useful commerce." Pet. App. 61; *see also* Pet. Br. 8-9 (discussing a grueling 33-day portage around Great Falls by the Lewis and Clark expedition). In *Utah*, however, this Court found the 4.35-mile stretch at issue to be sufficiently

---

[6] Lower courts likewise have assessed navigability on a section-by-section basis. *See, e.g., Oregon ex rel. Div. of State Lands v. Riverfront Prot. Ass'n*, 672 F.2d 792, 793 (9th Cir. 1982) (assessing navigability of "the McKenzie River between river mile 37 and its confluence with the Willamette River"); *Utah v. United States*, 304 F.2d 23, 26 (10th Cir. 1962) (concluding that "the part of the river in question was in fact and in law non-navigable at the time Utah was admitted into the Union").

"long" to warrant independent analysis of navigability and made clear that "[t]he question here [was] not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise non-navigable." 283 U.S. at 77 (footnote omitted). As the dissent concluded, the Montana court's characterization of extensive non-navigable stretches of the rivers at issue as unduly "short" was "[d]isturbing." Pet. App. 99 (Rice, J., dissenting); *see also* Pet. Br. 33-49.

The Montana court erred further in accepting present-day recreational uses on the Madison River as conclusive evidence of navigability at the time of statehood. *See* Pet. App. 55-56. Although this Court has suggested that post-statehood uses can be probative of a river's susceptibility for navigation at statehood, *see Utah*, 283 U.S. at 83, it has done so only where river conditions have not changed materially and the prevailing river traffic is indicative of the type of commerce existing at statehood. *See Utah v. United States*, 403 U.S. 9, 11-12 (1971) (relying on use of boats to transport cattle and sheep in the 1880s only because the water conditions at the time Utah attained statehood in 1896 had not changed materially).

The Montana court found that present-day use by "commercial fishing guides and their clients" demonstrated navigability of the Madison River at statehood. Pet. App. 18-19; *see also id.* at 26, 58. As petitioner explains, however, that analysis "improperly equates recreational and commercial use." Pet. Br. 49; *see id.* at 49-52. Before finding navigability in fact, this Court has required that a river have been conducive to "commercial utilization on a large scale." *Utah*, 283 U.S. at 83. No record evidence,

however, suggests that modern-day guided recreational fishing involves travel on waterways sufficiently extensive to show that the Madison River in 1889 (or ever) was a suitable highway for large-scale commerce. This Court additionally has required that such large-scale commerce was or could have been "conducted in the customary modes of trade and travel on water" at the time of statehood. *Id.* at 76 (internal quotation marks omitted). But Montana's evidence of modern-day fishing from watercraft makes no distinction between vessels constructed of modern materials, such as fiberglass drift boats and PVC-coated nylon inflatable rafts used by river guides today, and heavier, much less maneuverable wooden boats in use in the 19th century. *See* JA46-49, 262, 940-47; Pet. App. 18-19, 58, 143. Nor did Montana establish that recreational commerce of the type displayed in present times was in evidence at the time of statehood.

The Montana court also erred in rejecting evidence from petitioner's expert fluvial geomorphologist[7] showing that conditions on the Madison River have changed significantly. Petitioner's expert concluded that current river conditions are not relevant to establish that the Madison River was susceptible to navigation at the time of statehood, because dams subsequently have been constructed and the location and condition of river channels otherwise had changed. *See* Pet. App. 103 (Rice, J., dissenting); *see also* Pet. Br. 18. The court rejected that expert evidence as insufficient to create even a triable issue of fact. *See* Pet. App. 57-58. The court likewise disregarded a 1931 Army Corps of Engineers study

---

[7] Fluvial geomorphology is the study of the physical characteristics of rivers and how they change over time. *See* Pet. Br. 14.

concluding that "the Madison river has never been historically navigated and that commercial navigation on this river was 'entirely out of the question,'" again concluding that such evidence failed to create a triable issue of fact. *Id.* at 56.

B. The Decision Defies This Court's Warning Against State Abuse Of Navigability Determinations

The Montana court made its sweeping ruling by granting summary judgment to Montana — the party with the burden of proof on navigability — and ignoring the significant evidence introduced by petitioner that both demonstrated non-navigability of the rivers at issue and cast serious doubt on the veracity of the evidence accepted by the Montana court. *See* Pet. App. 101-17 (Rice, J., dissenting) (conducting extensive review of the overwhelming evidence of non-navigability and finding it troubling that the majority had "depriv[ed] [petitioner] of the right to trial by the improper entry of summary judgment"). This Court's decisions concerning navigability for title typically have been based on a trial record of extensive factfinding. *See, e.g., Utah*, 283 U.S. at 72 (referring to "voluminous evidence" taken by Special Master Charles Warren); *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922) ("The evidence . . . is voluminous and in some respects conflicting.").

The Montana court's decision, if affirmed, would authorize a radical departure from the Court's historical practice. It would give other state courts license to perform a one-sided weighing of the evidence on summary judgment, picking and choosing the evidence that will lead to a finding of navigability and title in the home State, and rejecting any conflicting evidence calling navigability into question. As the

dissent explained below, "[petitioner] has satisfied its burden [on summary judgment] to produce substantial evidence that the disputed reaches of the rivers were, at the time of statehood, non-navigable. The Court's decision to the contrary makes one wonder just what evidence the Court would have considered sufficient for [petitioner] to defeat summary judgment in this case." Pet. App. 117 (Rice, J., dissenting).

This Court long has guarded against such abuse of the navigability-for-title test, cautioning in 1922 that "[s]ome states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control." *Brewer-Elliott*, 260 U.S. at 89. The Court plainly was concerned about protecting the reliance interests and stability of titles in property underlying non-navigable waters that is held by riparian landowners, including the federal government. This Court pointedly cautioned that "[i]t is not for a state by courts or legislature, in dealing with the general subject of beds of streams to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law and grant or would enlarge what actually passed to the state, at the time of her admission." *Id.* at 88.

C. The Decision Calls Into Question Titles To Both Federal And Private Lands

Montana has done precisely what this Court has warned cannot be done, by adopting a retroactive rule that stands to upset title to millions of acres of land in rivers long thought to be non-navigable. Until the start of this case, Montana had never notified petitioner that the State considered itself to hold

title to the riverbeds underlying petitioner's dams and reservoirs. *See* Pet. App. 4; Pet. Br. 4. All but one of the nine dams at issue in this case were built between 1891 and 1930, not long after Montana became a State in 1889. In 1908, the Montana Supreme Court observed that one of the dams built by a predecessor of petitioner was "an immense structure of steel and concrete, built across the Missouri river, and about 70 feet high." *Spratt v. Helena Power Transmission Co.*, 94 P. 631, 633 (Mont. 1908) (Hauser Dam). Yet Montana waited nearly a century to assert an ownership interest in the riverbeds under petitioner's dams — a claim that must be rejected under a proper application of this Court's navigability-for-title test.

In 1986, a river study commissioned by Montana and relied on by the court below concluded that 37 Montana rivers, most of which long had been thought to be non-navigable, were in fact navigable. As petitioner and the dissenting opinion explain, that study was deeply flawed and is entirely unreliable. *See* Pet. Br. 6-7; Pet. App. 105-06.

In 1988, the Department of the Interior's Bureau of Land Management ("BLM") wrote to Montana's Department of State Lands ("DSL") concerning the dramatic upheaval in land titles that Montana's late assertion would cause. BLM explained that, "as the agency responsible for protecting and managing some 8 million acres of federally-owned surface and all of the federally-owned minerals within the state, [BLM] does not agree with the DSL's determination of the navigability of these waterways." Pet'r Supp. Br. App. 2 (U.S. filed May 31, 2011).[8] BLM reasoned

---

[8] The federal government owns a significant portion of the land in western States. *See United States v. New Mexico*, 438

that "the United States only recognizes portions of [three rivers] within the State of Montana as being navigable for title related purposes" and asserted that the decision could impact "hundreds of mineral leases on [federal] lands to which the state now claims ownership" if it were decided that title to those federal lands instead were held by Montana. *Id.* In the same way, easements for water storage and diversion projects on federal lands could be jeopardized.[9] And federal land management plans for national forests, wilderness, and other sensitive areas also could be placed at risk by such a decision.

BLM additionally observed, with respect to private landowners, that any assertion by Montana of title to riverbeds long considered non-navigable "will have a disquieting effect on the title to thousands of parcels of private land through which these streams pass," because "[c]urrent owners' titles generally encompass complete legal subdivisions with no exceptions for the stream bed which might traverse the subdivision." *Id.*

The considerable record developed by petitioner in the trial court and the erroneous application by the state supreme court of this Court's governing principles compel reversal of the judgment below.

U.S. 696, 699 n.3 (1978) ("The percentage of federally owned land (*excluding* Indian reservations and other trust properties) in the Western States ranges from 29.5% of the land in the State of Washington to 86.5% of the land in the State of Nevada, an average of about 46%.") (citing General Services Administration, *Inventory Report on Real Property Owned by the United States Throughout the World as of June 30, 1974*, at 17, 34, & App. 1, table 4 (May 30, 1975)).

[9] Petitioner claims that it is now being double-charged by both the United States and the State of Montana for the use of lands to which both claim title. *See* Pet'r Supp. Br. 6.

II. REVERSAL IS NECESSARY TO PROTECT VESTED PRIVATE PROPERTY INTERESTS IN COLORADO AND ELSEWHERE

Thousands of property owners in Colorado — including members and supporters of *amici*, municipalities, water districts, and the federal government — hold title to lands abutting Colorado rivers and streams that include the submerged riverbeds. If the decision below is allowed to stand, a dark cloud will encumber those titles with the specter of litigation for decades to come, upsetting private property rights in Colorado long thought to have been beyond dispute. This Court should reverse the Montana court's judgment to preserve the reliance interests of property owners in Colorado, as well as in all other States in which property owners on non-navigable waters are similarly put at risk by the Montana court's erroneous decision.

A. The Colorado Supreme Court Long Has Understood That All Colorado Rivers Were Non-Navigable At Statehood

1. No court has held that any river in Colorado was navigable in fact at statehood. Accordingly, title to submerged riverbeds always has been understood to vest in the riparian landowner — not the State of Colorado. In 1912, the Colorado Supreme Court expressed the contemporary understanding that, at the time Colorado attained statehood and adopted its constitution in 1876, "the natural streams of this state are, in fact, nonnavigable within its territorial limits." *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912).[10]

---

[10] *Stockman* was overruled on other grounds to the extent it might have suggested that the United States could not reserve

A year later, the Colorado Supreme Court reiterated that "[t]he natural streams of the state are nonnavigable within its limits," explaining that "it is proper to take judicial notice of conditions existing at the time of [statehood]." *In re German Ditch & Reservoir Co.*, 139 P. 2, 9 (Colo. 1913). More recently, the Colorado Supreme Court cited *Stockman* for the same proposition in a case in which the parties agreed that a particular river was non-navigable, consistent with the long-held understanding in Colorado. *See People v. Emmert*, 597 P.2d 1025, 1026 (Colo. 1979) (en banc).[11]

Other Colorado cases likewise have noted in passing that particular rivers were non-navigable in fact. *See United States v. District Ct. in & for the County of Eagle*, 458 P.2d 760, 762 (Colo. 1969) (en banc) (Eagle River), *aff'd*, 401 U.S. 520 (1971); *Hall v. Brannan Sand & Gravel Co.*, 405 P.2d 749, 750 (Colo. 1965) (South Platte River); *Smith v. Town of Fowler*, 333 P.2d 1034, 1036 (Colo. 1959) (en banc) (Arkansas River). In 1889, the Colorado Supreme Court thought the matter so well-settled that it

---

for federal use certain "unappropriated non-navigable waters on federal lands." *United States v. City & County of Denver ex rel. Bd. of Water Comm'rs*, 656 P.2d 1, 17 (Colo. 1982) (en banc); *see id.* (discussing doctrine of "federal reserved water rights" set out by this Court "in several cases throughout the past one hundred years"); *New Mexico*, 438 U.S. at 700 ("many of the contours of what has come to be called the 'implied-reservation-of-water doctrine' remain unspecified").

[11] *See also* Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology L.Q. 53, 76 (2010) ("[r]elying on the federal test of navigability, the Colorado Supreme Court [in *Stockman*] has declared almost all streams in Colorado to be non-navigable").

observed in passing that "[i]t is scarcely necessary to add that the South Platte river is not navigable in Colorado." *Platte Water Co. v. Northern Colorado Irrigation Co.*, 21 P. 711, 713 (Colo. 1889).

This Court likewise has taken judicial notice of well-known facts concerning non-navigability, referring in one case to the "Platte and other large western streams known to be unnavigable." *Oklahoma v. Texas*, 258 U.S. at 585. To *amici*'s knowledge, the State of Colorado never has asserted that any Colorado river is navigable for title purposes.

2. The Army Corps of Engineers assesses "navigable water[s] of the United States" for purposes of its permitting jurisdiction under section 10 of the Rivers and Harbors Appropriation Act of 1899. 33 U.S.C. § 403. Unlike navigability for title, however, navigability for purposes of such Commerce Clause regulation may arise *following* statehood and may be based on *subsequent* improvements such as the erection of dams, dredging, channels, canals, or other means of engineering and construction. Thus, "[a]lthough navigability to fix ownership of the river bed or riparian rights is determined . . . as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may *later* arise." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (emphasis added; footnotes omitted). An Army Corps of Engineers' regulation therefore provides that, for purposes of Rivers and Harbors Act jurisdiction, "[n]avigable waters of the United States are those waters that . . . are presently used, or have been used in the past, or may be *susceptible* for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (emphasis added); *see*

id. § 329.9(b) (navigability can arise "by reasonable improvement").

Even allowing for subsequent improvements to create navigability for regulatory purposes, the Army Corps of Engineers has classified only two Colorado water bodies as navigable: the Navajo Reservoir, which was created by a dam and lies primarily in New Mexico but partially in Colorado; and the Colorado River downstream of Grand Junction, Colorado, a 39-mile stretch between Grand Junction and the Colorado-Utah border that lies below multiple dams built since Colorado attained statehood.[12] The Army Corps of Engineers' decisions to classify only two water bodies in Colorado as navigable since 1899 (presumably based on post-statehood improvements) is persuasive additional support for the Colorado Supreme Court's conclusion in 1912 that Colorado rivers were not navigable in fact at the time of statehood.

B. Colorado Property Owners Hold Title To Submerged Lands Under Non-Navigable Rivers And Enjoy Certain Exclusive Rights To Use The Streambeds

1. "It is the general rule of property law recognized in Colorado that the land underlying non-navigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands." *Emmert*, 597 P.2d at 1027. This rule consistently has been applied in Colorado over the 135

---

[12] *See* http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/co_waterways.html (setting out two navigable Colorado waterways). Army Corps of Engineers regulations provide that omission from the Corps' list of navigable waters "should not be taken as an indication that the waterbody is not navigable." 33 C.F.R. § 329.16(b).

years since statehood.[13] As this Court observed in 1891, state common law throughout the Nation typically has provided that "all grants bounded upon a river not navigable by the common law entitle the grantee to all islands lying between the main-land and the center thread of the current." *Hardin v. Jordan*, 140 U.S. 371, 384 (1891).

If allowed to stand, the Montana Supreme Court's erroneous application of this Court's navigability-for-title test could call into question thousands of land titles to riverbeds in Colorado and other States. The Montana court's interpretation of that test as being "very liberally construed" in favor of finding navigability and thus state ownership, Pet. App. 54, could be asserted as grounds to overturn the Colorado Supreme Court's determination that Colorado's rivers and streams were not navigable at statehood.

2. If Montana were successful, the State of Colorado could seek to assert ownership over numerous stretches of riverbeds long thought to be owned by private landowners or the United States. Colorado could attempt to use its suddenly discovered riverbed ownership to enforce rights against riparian landowners. The result would be a destabilizing and radical transfer of property rights from landowners to the State of Colorado, threatening to strip property

---

[13] *See, e.g., City of Denver v. Pearce*, 22 P. 774, 776 (Colo. 1889) (presumption that a land grant "carried the boundary to the thread of the stream"); *Hanlon v. Hobson*, 51 P. 433, 435 (Colo. 1897) ("[W]here, . . . in a deed conveying lands, a nonnavigable river itself is named as a monument, the grant extends to its center, and the thread of the stream is its true boundary."); *Hartman v. Tresise*, 84 P. 685, 687 (Colo. 1905) ("the owner of lands along a nonnavigable fresh water stream, as an incident of such ownership, owns the bed of the stream"); *More v. Johnson*, 568 P.2d 437, 439 (Colo. 1977) (en banc) (same).

owners of a range of rights on which they have relied since Colorado gained statehood 135 years ago.

First, as Montana has done in this case, Colorado could seek to extract revenues from the use or occupancy of the stream beds by current owners or their licensees, or to exclude them from use altogether. Members and supporters of *amici*, like other Colorado property owners, make substantial economic and non-economic use of their submerged lands. They could stand to lose those valuable rights if the Montana court's decision is allowed to create a billowing wave of challenges to long-settled submerged land titles across the western States — piecemeal litigation that might endure for decades as navigability is asserted over numerous rivers or portions thereof.

Second, that uncertainty for existing submerged lands titles also could affect the ability to exercise adjudicated water rights in Colorado. The right to use the beds and banks of rivers under established land titles in Colorado is an essential aspect of the development of appropriative water rights under the Colorado Constitution.[14]

---

[14] In Colorado, although "all water in the state is a public resource dedicated to the beneficial use of public and private agencies, as prescribed by law," "the beds of non-navigable streams in Colorado are not held by the state under a public trust theory." *Board of County Comm'rs v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 704, 709 n.29 (Colo. 2002) (en banc). Water diversion rights in Colorado (as distinguished from ownership of riverbeds and the use of the waters above them for activities such as fishing) are decided based on the "prior appropriation doctrine, recognized in most of the Western States," pursuant to which "water rights are acquired by diverting water and applying it for a beneficial purpose." *Colorado v. New Mexico*, 459 U.S. 176, 179 n.4 (1982). Colorado's state constitution, ratified in 1876, adopts the doctrine of

The appropriation of water for irrigation, domestic, municipal, industrial, and other beneficial uses outside of the river channel requires diversion or control of water by means of dams, reservoirs, ditches, headgates, pumps, and pipelines that are placed on submerged riverbeds. Water users in Colorado, including the farmers and ranchers who are members of *amici*, municipal water utilities, and federal government agencies, have installed and operate structures and facilities ranging from simple irrigation ditches to major public water supply reservoirs and federal reclamation facilities.

Whether those structures are located on land owned by the appropriator or another party who has granted an easement for access,[15] the constitutionally protected right of *amici* and thousands of other Coloradans to use water depends on access to the bed and banks of the stream. The continued use of those structures depends in turn on the stability of land titles that have formed the basis for water development projects since the original adoption and

---

prior appropriation. *See* Colo. Const. art. 16, § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."). In the Desert Land Act of 1877, Congress acquiesced in the doctrine of prior appropriation for western lands, which initially were owned by the United States prior to statehood. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155-56 (1935); *Board of County Comm'rs*, 45 P.3d at 708.

[15] In many cases, those structures were built on federal lands pursuant to congressional grants and federal easements. *See, e.g.*, 30 U.S.C. §§ 51, 52; 43 U.S.C. § 661; *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 611-12 (1978). The Federal Land Policy and Management Act of 1976 repealed such prior authorizations, subject to existing rights, and provided for the issuance of new rights-of-way for water projects by the Departments of Agriculture and Interior. *See* 43 U.S.C. § 1761.

congressional recognition of the prior appropriation doctrine.

Third, riparian landowners benefit from operating or leasing rights to others to conduct recreational businesses on their private river and streambeds. Those recreational businesses, exemplified by the members of the Dude Ranchers' Association, include fishing, hunting, horseback riding, and boating, and involve exclusive use of the riverbeds, for example, by wading into the river for fly fishing, hunting waterfowl, or launching boats. Property is bought and sold on the basis of its stream access and riverbed ownership and use rights, and the right to control access to the stream often contributes substantially to its market value. If title is found to have vested at statehood in the State of Colorado, however — contrary to the settled assumption that riparian owners in Colorado hold title to the riverbeds — then a vital economic underpinning for those businesses and property uses will have been demolished. Moreover, because private landowners pay property taxes on the submerged lands to which they currently have record title and the assessed value of the overall parcel is based on market transactions, a sudden conversion to state ownership would deprive local governments of a much-needed source of revenue.

Fourth, unsettling title to Colorado riverbeds would affect a range of conservation and other environmental interests. Aquatic managers recognize the value of physical modification of the beds and banks of streams to preserve and improve watersheds by stabilizing streams, reducing erosion, and providing habitat for fish and other aquatic species. Such modifications are placed on the riverbeds and banks owned or controlled by *amici* and other ripar-

ian landowners, often using configurations of native materials such as rocks, logs, grass mats, and trees. In many cases, state and federal government agencies have provided support for stream improvements initiated by private landowners.

Water diverted from streams also supports important habitats such as stream-side and floodplain vegetation, fisheries, and wildlife communities. Because riparian habitat represents just 3% of Colorado's land area and is required to support approximately 80% of Colorado's wildlife species, the State of Colorado has recognized that it is critically important to protect and promote riparian habitat.[16] Ownership of the riverbeds, and the associated right to exclude others from undoing conservation efforts on one's property, adds to the value and utility of riparian lands and the effectiveness of those conservation efforts.[17]

---

[16] *See* Colorado Div. of Wildlife, *Managing Forested Lands for Wildlife* 267, 349-56 (Robert L. Hoover & Dale L. Willis eds., 1984).

[17] *See, e.g.*, Reed Watson, *Stream Access Across the West*, PERC Reports, Spring 2009, at 8, 11, *available at* http://www.perc.org/files/PRspring09.pdf (describing "large-scale, privately funded stream restorations in Colorado" as being "too numerous to list"; explaining that such projects likely would not occur "[i]f every angler in Colorado held access to th[e] stream"; and describing one large project that resulted in "downstream neighbors restor[ing] an additional 16 miles of" the stream); Stephanie Simon, *In This Political Battle, a River Runs Through It — Colorado Rafters, Anglers Square Off Over Use of Streams Through Private Land*, Wall St. J., Apr. 8, 2010, at A1 (discussing Colorado dude ranch that spent funds "to reshape [a] stretch of the riverbed into a haven for trout"); Michael F. Browning, *Private Means to Enhance Public Streams*, 33 Colo. Law. 69, 69 (Apr. 2004) ("[a]n increasing number of Colorado landowners and conservation organizations are recontouring

Landowners likewise have entered into agreements with the State of Colorado's Water Conservation Board that allow diversions from a stream to supply water to ponds, wetlands, sloughs, and channels that provide fish and wildlife habitat. They have granted conservation easements, through which a commitment to protect the conservation values of property, including water resources and habitat-related storage and diversion facilities, is exchanged for certain tax incentives. Colorado law also allows public agencies such as counties, municipalities, and water districts to install structures on riverbeds that control in-stream flows at particular times of year to enhance non-motorized recreational uses such as kayaking and other whitewater sports. *See* Colo. Rev. Stat. § 37-92-103(4). Many such structures have been built in waterways in Colorado that have become increasingly popular sites for recreational boating for certain members of *amici* and other Colorado residents and tourists. The title to those submerged lands often is owned by private parties or local or federal government agencies.

These actions were taken in reliance on the fact that property owners in Colorado hold title to the riverbeds on their riparian lands. If riparian landowners suddenly were regarded as trespassers on state lands, or required to pay rent to the State to maintain riparian and streambed structures, it would cause financial hardship for those currently maintaining them and would create a serious disincentive for voluntary private protection of riparian lands and waters.

---

and reconfiguring stream beds throughout the state" "to enhance fish populations, quality, and habitat").

3. Interference with the foregoing uses necessarily implicates the exclusionary rights that Colorado landowners enjoy. As this Court has explained, "[t]he hallmark of a protected property interest is the right to exclude others. That is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (internal quotation marks omitted). The valuable property right to exclude should not be jeopardized by a sudden and dramatic loosening of the navigability-for-title test.

In Colorado, "the owner of lands along a non-navigable fresh water stream, as an incident of such ownership, owns the bed of the stream, and the exclusive right of fishery therein to the middle thereof." *Hartman*, 84 P. at 687 (holding that fishermen could not wade into privately owned riverbeds without permission). Thus, in Colorado, "the ownership of the bed of a non-navigable stream vests in the owner the exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions and regulations." *Emmert*, 597 P.2d at 1027 (citing *Hartman* and affirming trespass conviction of rafters who "touched the riverbed" of private property).

C. This Court Long Has Sought To Preserve Reliance Interests And Stability Of Titles

In numerous cases, this Court has declined to interpret land patents or laws affecting private property in a way that would upset long-settled reliance interests. The Court has endeavored to minimize litigation over titles on which landowners had depended for long periods. Those precedents by analogy support the principle here that the navigability-

for-title test — particularly at this point in the Nation's history, when all but four States were admitted more than a century ago[18] — should be construed and applied to preserve long-held reliance interests based on the historic non-navigability of many western rivers. The Montana Supreme Court's reliance on present-day river conditions and emerging recreational uses that did not exist at statehood creates a particularly dangerous threat to settled land titles.

In *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), this Court construed federal land grants, designed to subsidize construction of the transcontinental railroad, in a way that protected private property interests against government intrusion more than a century after the United States had granted the lands. In the Union Pacific Act of 1862, Congress granted public land to the Union Pacific Railroad for each mile of track laid. In addition, "[l]and surrounding the railway right-of-way was divided into 'checkerboard' blocks," with odd-numbered lots granted for free to Union Pacific and even-numbered lots reserved by the United States for later sale or federal use. *Id.* at 672.[19] Union Pacific subsequently sold some of its odd-numbered lots to a sheep ranch, and the checkerboard configuration made access

---

[18] Arizona and New Mexico were admitted in 1912, and Alaska and Hawaii were admitted in 1959.

[19] The stated rationale, and an interesting historical note, was that "'the price of the reserved sections was doubled so that it could be argued, as the *Congressional Globe* shows *ad infinitum*, that by giving half the land away and thereby making possible construction of the . . . railroad, the government would recover from the reserved sections as much as it would have received from the whole.'" *Leo Sheep*, 440 U.S. at 673 (quoting Paul W. Gates, *History of Public Land Law Development* 345-46 (1968)).

impossible to certain even-numbered lots, which contained a federal reservoir used by the public for hunting and fishing, without some intrusion on private ranchland. *See id.* at 677-78. The United States built a public access road extending to the reservoir in part on the private ranchland. *Id.* at 678. The court of appeals held that the original grants to Union Pacific "implicitly reserved an easement to pass over the odd-numbered sections in order to reach the even-numbered sections that were held by the Government." *Id.*

This Court unanimously reversed. It emphasized that the issue "affect[ed] property rights in 150 million acres of land in the Western United States." *Id.* The Court reasoned that "[t]his Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." *Id.* at 687-88. The Court forcefully declined "to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago." *Id.* at 681-82. It concluded that the federal government could intrude only by exercising "the power of eminent domain" and paying just compensation for the taking of private property. *Id.* at 680.

Earlier cases from this Court similarly avoided a "sharp or stringent construction" of federal statutes that "might have the effect of unsettling titles to land to an extent the court may not be able to anticipate." *Doolittle's Lessee v. Bryan*, 55 U.S. (14 How.) 563, 567 (1853). This Court deemed it the better course to "be even astute in avoiding a construction which

may be productive of much litigation and insecurity of titles." *Id.*; *see also Louisiana v. Garfield*, 211 U.S. 70, 74-76 (1908) (construing congressional acts granting territory to the State of Louisiana in 1849 and the State of Arkansas in 1850 to avoid "a great number of titles to a very large amount of land [from being] disturbed"); *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U.S. 196, 207-08 (1886) (adopting construction of land patents that protected reliance interests and rejecting construction that "would disturb titles derived from such patents, and lead to greater confusion and litigation"). In all events, this Court has safeguarded the view that "the general welfare of society is involved in the security of the titles to real estate." *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911).

D. The Montana Supreme Court's Erroneous Decision In Effect Takes Private Property Without Just Compensation

The Montana Supreme Court's reinvention of the navigability-for-title test functionally operates as a judicial taking without just compensation. Four Justices of this Court have concluded that claims alleging impermissible judicial takings are cognizable under the Fifth Amendment's Takings Clause, reasoning that, "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2601-10 (2010) (plurality op.). Two other Justices in that case concluded that the Due Process Clause similarly prohibits destruction of property rights. *See id.* at 2614 (Kennedy, J., concur-

ring in part and concurring in the judgment) ("It is . . . natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.").

This Court has held that government action declaring non-navigable private property to be navigable in a way that affects significant property rights is an impermissible taking absent payment of just compensation. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), private property owners dredged a non-navigable fishpond to create a marina and connected it to navigable waters in Hawaii that, in turn, emptied into the Pacific. The Army Corps of Engineers determined that the marina thereby had become a navigable water of the United States subject to the Corps' permitting jurisdiction under the Rivers and Harbors Act, and also was subject to a public right of access. *See id.* at 168.

Although this Court agreed that the Corps had permitting jurisdiction concerning navigability pursuant to the Commerce Clause, the Court held that "it does not follow that the pond is also subject to a public right of access." *Id.* at 172-73. The Court explained that it "has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Id.* at 172. In rejecting a public right of access, the Court "h[e]ld that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the

Government cannot take without compensation." *Id.* at 179-80 (footnote omitted).[20]

Here, however, no just compensation would be forthcoming if the Montana decision were affirmed. The gravamen of such a holding would be that the rivers at issue *always* belonged to the State. By its very nature, a conclusion as sweeping as the state supreme court's leaves numerous title holders to riverbeds with questionable titles even though their deeds and chain of title stretch back to Montana statehood in 1889. Such a consequence would be doubly pernicious, as it would strip submerged landowners of valuable property rights with no just compensation remedy in return.

CONCLUSION

The Court should reverse the judgment of the Montana Supreme Court.

---

[20] *See also, e.g., Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (state, "by *ipse dixit*, may not transform private property into public property without compensation"); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) ("[N]o private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."); *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting from denial of certiorari) ("'[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.'") (quoting *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring)).

Respectfully submitted,

CHARLES B. WHITE
PETROS & WHITE, LLC
1999 Broadway
Suite 3200
Denver, Colorado 80202
(303) 825-1980

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

September 7, 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, NATIONAL HYDROPOWER ASSOCIATION, NORTHWEST HYDROELECTRIC ASSOCIATION, ELECTRIC POWER SUPPLY ASSOCIATION, AND PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON IN SUPPORT OF PETITIONER

MICHAEL A. SWIGER
Counsel of Record
SHARON L. WHITE
VAN NESS FELDMAN, P.C.
1050 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D.C. 20007
(202) 298-1800
mas@vnf.com

Counsel for Amici Curiae

September 7, 2011 (Of Counsel Listing On Inside Cover)

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress
Law Library

24

EDWARD H. COMER
HENRI D. BARTHOLOMOT
EDISON ELECTRIC INSTITUTE
701 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004
Counsel for Edison Electric Institute

JAMES H. HANCOCK JR.
BALCH & BINGHAM LLP
1710 SIXTH AVENUE NORTH
BIRMINGHAM, AL 35203
Counsel for National Hydropower Association

JEFFREY A. LEAHEY
NATIONAL HYDROPOWER ASSOCIATION
1 MASSACHUSETTS AVENUE, N.W., SUITE 850
WASHINGTON, D.C. 20001

MATTHEW A. LOVE
VAN NESS FELDMAN, P.C.
719 SECOND AVENUE, SUITE 1150
SEATTLE, WA 98104
Counsel for Northwest Hydroelectric Association

NANCY BAGOT
Vice President of Regulatory Affairs
ELECTRIC POWER SUPPLY ASSOCIATION
1401 NEW YORK AVE, NW, SUITE 1100
WASHINGTON, D.C. 20005

ANNE SPANGLER
General Counsel
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY
2320 CALIFORNIA STREET
EVERETT, WA 98201

QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF HYDROPOWER AND UTILITY *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE COURT SHOULD REAFFIRM THE PROPER TEST UNDER FEDERAL LAW FOR DETERMINING NAVIGABILITY FOR TITLE 6

II. THE SUPREME COURT OF MONTANA'S RETROACTIVE NAVIGABILITY DETERMINATION AND ASSESSMENT OF RENTS THREATENS SETTLED EXPECTATIONS OF HYDROPOWER PROJECT AND OTHER RIPARIAN FACILITY OWNERS 13

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Arkansas River Rights Comm. v. Echubby Lake Hunting Club,
126 S.W.3d 738 (Ark. App. 2003) 9

Brewer-Elliott Oil & Gas Co. v. United States,
260 U.S. 77 (1922) 7

City of Seattle v. FERC,
883 F.2d 1084 (D.C. Cir. 1989) 17

First Iowa Hydro-Electric Cooperative v. F.P.C.,
328 U.S. 152 (1946) 16

North Dakota v. United States,
972 F.2d 235 (8th Cir. 1992) 9

Pacific Gas & Electric Co. v. FERC,
720 F.2d 78 (D.C. Cir. 1983) 17

Pollard v. Hagan,
44 U.S. (3 How.) 212 (1845) 6

PPL Montana, LLC v. Montana,
119 P.3d 421 (Mont. 2009) 7

Shively v. Bowlby,
152 U.S. 1 (1894) 6

The Daniel Ball v. United States,
77 U.S. (10 Wall.) 557 (1870) 7

United States v. Appalachian Electric Power Co.,
311 U.S. 377 (1940) 9, 11

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 7

United States v. Utah,
283 U.S. 64 (1931) 6, 7, 8, 9, 10, 11

Constitutional Provisions

U.S. Const., art. I, § 8 12

U.S. Const., art. IV, § 3, cl. 2 12

Statutes

American Recovery and Reinvestment Tax Act,
§ 1603, Pub. L. No. 111-5, 123 Stat. 115, 364
(2009) 15

Clean Water Act, 33 U.S.C. §§ 1251-1387
(2006) 12
§ 401, 33 U.S.C. § 1341 ..... 20, 21

Energy Policy Act of 2005, Pub. L. No. 109-58, 119
Stat. 594 15

Federal Power Act, 16 U.S.C. §§ 791-823 (2006) . 16
§ 4(e), 16 U.S.C. § 797(e) 16, 21
§ 6, 16 U.S.C. § 799 17
§ 10(a)(1), 16 U.S.C. § 803(a)(1) 16
§ 10(e)(1), 16 U.S.C. § 803(e)(1) 17, 18
§ 15, 16 U.S.C. § 808 ..... 16, 17
§ 17(a), 16 U.S.C. § 810(a) 18
§ 23(b), 16 U.S.C. § 817 16

§ 27, 16 U.S.C. § 821 20
§ 28, 16 U.S.C. § 822 17

571 Iowa Admin. Code § 18.2 (2008) 19

Miscellaneous

Electric Power Research Institute, *Assessment of Waterpower Potential and Development Needs* at vii (2006), *available at* http://www.aaas.org/spp/cstc/docs/07_06_1ERPI_report.pdf 15

Federal Energy Regulatory Commission, *Annual Report 2008* at 18, *available at* http://www.ferc.gov/about/strat-docs/annual_rep.asp 14

Federal Energy Regulatory Commission, *Complete list of Issued Licenses available at* http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls 21

Navigant Consulting, *Job Creation Opportunities in Hydropower* (2009), *available at* http://www.hydro.org/wp-content/uploads/2010/12/NHA_JobsStudy_FinalReport.pdf ... 15

Press Release, Montana Attorney General Steve Bullock, *Bullock Calls Supreme Court's PPL Decision "A Victory for Generations of Montanans"* (Mar. 30, 2010), *available at* http://www.doj.mt.gov/news/releases2010/20100330.asp 19

U.S. Bureau of Reclamation, *Reclamation – Managing Water in the West – Hydroelectric Power* at 13 (July 2005), *available at* www.usbr.gov/power/edu/pamphlet.pdf 14

U.S. Department of Energy, *Feasibility Assessment of the Water Energy Resources of the United States for New Low Power and Small Hydro Classes of Hydroelectric Plants* at 21-24, 35, DOE-ID-11263 (2006), *available at* http:www1.eere.energy.gov/windandhydro/pdfs/doewater-11263.pdf 15

U.S. Department of Energy, *Obama Administration Announces up to $32 Million Initiative to Expand Hydropower* (June 30, 2009 press release), *available at* http://apps1.eere.energy.gov/news/progress_alerts.cfm/pa_id=195 15

U.S. Energy Information Administration, *Renewable Energy Consumption and Electricity Preliminary Statistics 2009* at 4 & Table 3 (Aug. 2010), *available at* http://www.eia.gov/fuelrenewable.html 13

INTERESTS OF HYDROPOWER AND UTILITY *AMICI CURIAE*

The Edison Electric Institute ("EEI"), National Hydropower Association ("NHA"), Northwest Hydroelectric Association ("NWHA"), Electric Power Supply Association ("EPSA"), and the Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") (together "Hydropower and Utility *Amici*") represent electric utilities and hydropower project owners and operators from across the nation, as well as others who rely on such projects and other riparian facilities that may be affected by the Court's decision in this case.[1] In particular:

EEI is the trade association of U.S. shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. Its U.S. members represent approximately 70 percent of the U.S. electric power industry and generate 60 percent of the electricity produced by U.S. generators. In providing these services, many EEI members rely on hydropower, and many own and operate hydropower projects licensed by the Federal Energy Regulatory Commission ("FERC"). In fact, EEI members comprise the largest group of FERC hydropower project license holders. EEI members also own and operate other electric generation and transmission facilities, located

---

[1] Pursuant to Rule 37.6, EEI, NHA, NWHA, EPSA, and Snohomish state that no counsel for either party to this case authored this brief in whole or in part, and no person other than *amici* and their members made monetary contributions to preparation and submission of this brief. The parties have consented to the filing of this brief in letters on file with the clerk's office.

on or near rivers, that could be affected by the outcome of this case.

NHA is a non-profit national association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new hydrokinetic technologies. NHA seeks to secure hydropower's place as a clean, renewable and reliable energy source that serves national environmental and energy policy objectives. NHA's membership consists of more than 180 organizations including public power utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, and environmental and engineering consultants and attorneys.

NWHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has 75 members from all segments of the industry. NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

EPSA is a national trade association representing competitive electric power suppliers, including independent power producers, merchant generators, and power marketers. EPSA's members include companies that are involved in competitive electric markets, as well as various state and regional groups that represent the competitive power industry in their respective regions of the country. EPSA's members have significant financial investments in electric generation and electricity marketing operations in the

United States. EPSA's organizational mission is the promotion of a favorable market environment for the competitive electric industry.

Snohomish is a municipal corporation of the State of Washington, formed by a majority vote of the people in 1936 for the purpose of providing electric and/or water utility service. Snohomish is the second largest consumer-owned electric utility in Washington State and has experienced rapid growth within its service territory in recent years. Snohomish owns and operates several hydropower projects in Washington State, including the FERC-licensed 112 megawatt (MW) Jackson Hydroelectric Project, and is in the process of developing and assessing several additional small hydropower sites in the next five to ten years. If fully developed, the collective energy output could serve tens of thousands of Snohomish customers. Snohomish is also a member of NHA.

As representatives of developers, owners, and operators of hydropower and other riparian facilities that could be subjected to substantial retroactive, current, and future land rent demands by Montana and other states that might follow Montana's lead, Hydropower and Utility *Amici* are deeply concerned about the ramifications of the Montana Supreme Court's decision. As Petitioner explains, this case involves Montana state court litigation resulting from claims made by the State of Montana seeking to require Petitioner to pay a portion of its revenues as "rent" and "back rent" for use of the streambeds under certain of PPL Montana's dams and reservoirs. The case focuses on two hydropower projects—Thompson Falls (P-1869) and Missouri-Madison (P-2188)—with facilities on the Missouri, Madison, and Clark Fork

Rivers. The two projects include one storage dam and nine dams with generating facilities that have a combined capacity of approximately 350 MW. Nine of the ten dams were built before 1931. The tenth was built in 1958. The projects were initially licensed by FERC in 1949 (P-1869) and 1956 (P-2188), and later issued renewed, long-term licenses by FERC. Montana never raised title issues in those licensing proceedings. In 1999, four years before these proceedings commenced, the Montana Power Company, an in-state utility, transferred the dams to PPL Montana, an out-of-state owner that sells power at wholesale. The total acreage upon which PPL Montana has been ordered to pay rent to the State is approximately 5,600 acres. This acreage includes all areas within the FERC-established project boundaries that formed the streambed prior to construction of the dams.

Only after the sale to the out-of-state owner did the State of Montana lay claim to the ownership of the original beds and banks of the entire Madison, Missouri, and Clark Fork Rivers, retroactively asserting many decades after the dams were constructed that it owns those lands in trust for the people of Montana, even though the relevant portions of those rivers have historically been understood to have been non-navigable for title purposes at the time of Montana's statehood in 1889. The State's claim of ownership, which had not been asserted prior to when the dams were built nor during FERC license proceedings, was confirmed by a divided decision of the Montana Supreme Court interpreting federal title navigability law and asserting ownership (and the concomitant right to charge rent for past, present, and future occupation) of the riverbeds.

Hydropower and Utility *Amici* agree with PPL Montana that the Montana Supreme Court's decision conflicts with the decisions of this Court and other courts. The *Amici* fear that if the State court's decision is not corrected, the decision has the potential of being adopted by other states, thereby imposing even more substantial and disruptive burdens on the nation's hydropower and other infrastructure. The decision also has the potential to disturb settled expectations of property ownership for hydropower project and other riparian infrastructure owners across the country.

SUMMARY OF ARGUMENT

The Montana Supreme Court erred in its interpretation of the test for navigability for title for three reasons. First, in clear violation of Supreme Court precedent, the Montana Supreme Court ignored evidence demonstrating non-navigability of the rivers in question on a section-by-section basis. Second, the court erred in considering evidence of present-day navigability when such evidence is irrelevant to the determination of navigability at the time Montana entered the union. Third, the court erred in liberally construing the navigability for title test and applying navigability for federal regulatory and admiralty jurisdiction tests that the law unmistakably shows are fundamentally different from the navigability for title test. Hydropower and Utility *Amici* are deeply concerned that the Montana Supreme Court's precedent, if not corrected, will encourage other states to retroactively claim substantial rents and back rents for submerged lands under hydroelectric dam and other riparian facility owners.

Hydropower licensees must be able to reasonably evaluate the economic viability of their projects before investing in them. The unanticipated charges that could result from widespread application of the Montana Supreme Court's holdings could undermine existing investment in and maintenance of renewable hydroelectric resources and discourage future investment in such resources. The navigability for title test has been misconstrued by the Montana Supreme Court and must now be clarified to prevent Montana and other states from disrupting long-held understandings of property ownership in order to raise additional income for the state.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THE PROPER TEST UNDER FEDERAL LAW FOR DETERMINING NAVIGABILITY FOR TITLE.

The Montana Supreme Court's decision on navigability is inconsistent with this Court's precedents and fails to apply the proper test for who holds title to submerged lands. Under the "equal footing" doctrine, title to the beds of rivers within a State vested in the State when it was admitted to the Union if the rivers were "then navigable." *United States v. Utah*, 283 U.S. 64, 75 (1931); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223, 229 (1845); and *Shively v. Bowlby*, 152 U.S. 1, 27-28 (1894). If the rivers were not "then navigable," "title to the river beds remained in the United States." *Utah*, 283 U.S. at 75. This Court's precedents establish that the proper test for navigability is whether the relevant stretches of the rivers were "navigable in fact" when Montana joined the Union in 1889—that is, whether

the river stretches were used, or susceptible to use, "as highways for commerce, over which trade and travel" could "be conducted in the customary modes of trade and travel on water." *Id.* at 76 (citing *The Daniel Ball v. United States*, 77 U.S. (10 Wall.) 557, 563 (1870)).

The Montana Supreme Court's navigability analysis contravenes this Court's precedents in important ways. First, it failed to consider navigability on a section-by-section basis. Instead it concluded that the rivers at issue are generally navigable notwithstanding facts demonstrating that significant stretches where PPL Montana's hydropower projects are located were not navigable when Montana joined the Union. Yet over a century ago, in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899), this Court indicated that the navigability of a waterway for title purposes must be determined on a section-by-section basis. The Court has since reaffirmed that, when determining navigability for title, a fact-intensive, section-by-section analysis is required. *Utah*, 283 U.S. at 77 & n.9; *see also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922). In contrast, the Montana Supreme Court concluded that "so long as *the river* itself was used, or susceptible of being used, as a channel of commerce at the time of statehood," no further inquiry was required. *PPL Montana, LLC v. Montana*, 119 P.3d 421, 446 (Mont. 2009) (emphasis added), Pet. App. 53.[2] As Justice Rice's dissenting opinion (joined by Judge Salvagni) pointed out, the river-as-a-whole approach adopted by the Montana

---

[2] Citations for *PPL Montana* hereinafter made to Petitioner's Appendix.

Supreme Court majority cannot be reconciled with this Court's decisions. Pet. App. 96.

Montana argues that the Montana Supreme Court did not look at the river as a whole, but instead looked at the river segments that interrupted navigation and held these "relatively short" sections should nevertheless be regarded as navigable. Montana Brief in Opposition (Oct. 1, 2010) at 18. Montana also contends that the state court's characterization of these "relatively short" sections does not conflict with *Utah*. As noted above, Justice Rice's dissent disagreed with this conclusion, stating that: "Disturbing to me is that the Court is declaring, as a matter of law, that the reaches claimed by PPL to be non-navigable are simply too 'short' to matter" and "mere 'negligible parts'" of the rivers as a whole. *See* Pet. App. 99. Like Justice Rice, the Hydropower and Utility *Amici* are equally disturbed that the Montana Supreme Court rejected PPL's evidence of non-navigability regarding these river segments, and declined to undertake a fact-intensive analysis as required by *Utah*. *Utah*, 283 U.S. at 87. The precedent on this issue offers no definitive means for determining how long a segment must be in order to warrant a separate analysis of its navigability. Nevertheless, the broader conclusion from *Utah* is that segments of a river that are not deemed to be "short interruptions" or "negligible parts" can be deemed non-navigable upon sufficient evidence. *See id.* at 77. PPL Montana argued that the relevant river segments were long enough not to be deemed "short interruptions" and presented sufficient evidence of non-navigability at least to survive summary judgment on this issue.

Second, the Montana Supreme Court's reliance on *present-day* navigability conflicts with this Court's

decisions and those of other courts. This Court's decisions have applied a rigorous approach to navigability that ties evidence of navigability to the state's precise date of admission to the Union, while noting that some post-admission evidence of actual navigation can be "relevant" to the river's "susceptibility" to use as a highway of commerce at the time of admission. *Utah*, 283 U.S. at 82. As Justice Rice framed it in his dissenting opinion: "Consequently, because Montana entered the Union on November 8, 1889, the courts must apply the navigability for title test at that time, a factual question about which PPL submitted substantial evidence and attacked the State's case for its failure to do so." Pet. App. 96. Several lower courts have concluded that post-statehood evidence of navigability is generally an unreliable indicator of a waterway's condition at statehood. *See North Dakota v. United States*, 972 F.2d 235, 240 (8th Cir. 1992) (rejecting evidence of modern-day recreational canoe use); and *Arkansas River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 (Ark. App. 2003) ("present-day navigability" may be relevant to navigability for Commerce Clause purposes but not for title purposes). This is particularly true where, as here, the condition of the rivers is known to have changed substantially, in part due to dam construction, as demonstrated by the affidavit and offer of proof for Dr. Schumm. *See* Pet. App. 102-03. This Court has recognized that, for Commerce Clause purposes, non-navigable status may change, in contrast to the determination of navigability to fix ownership of riverbeds, which is determined at the time of admission to statehood. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940). Yet the Montana Supreme Court's decision

turns this jurisprudence on its head by concluding: (1) that evidence of present-day recreational use "is sufficient for purposes of 'commerce'" to establish navigability for title (Pet. App. 58); (2) that this Court in *Utah* "embraced the notion that emerging and newly-discovered forms of commerce can be retroactively applied to considerations of navigability" for title (Pet. App. 55); and (3) that the concept of navigability for title is to be "very liberally construed." Pet. App. 54.

Montana contends that the Montana Supreme Court "correctly applied the federal navigability for title test to the particular facts" in this case. Montana Brief in Opposition (Oct. 1, 2010) at 17. On the contrary, there is no attempt in the Montana Supreme Court's opinion to reconcile its analysis with the precedents relating to navigability for title purposes. More significantly, however, the Montana Supreme Court's consideration of present-day use of the rivers—if left unchecked by this Court—will create an uncertainty in the law of navigability for property owners and future litigants. To the extent that *Utah* suggests that some evidence of navigation after the date of statehood is relevant for "the issue of the susceptibility of the rivers to use as highways of commerce at the time," *Utah*, 283 U.S. at 82, this case is distinguishable because *Utah* involved "limited historical facts put in evidence by the Government" and lacked a "comprehensive investigation into the history of these regions." *Id.* at 81. Here, PPL Montana submitted "a mountain—over 500 pages—of affidavits and exhibits" demonstrating that these reaches were non-navigable at statehood. *See* Pet. App. 100. Thus, there was ample evidence of non-navigability at the time of statehood in this case,

making evidence of present-day usage unnecessary and irrelevant.

Third, the Montana Supreme Court failed to recognize that the test of navigability for title is different from the test of navigability for federal regulation and admiralty jurisdiction. As Justice Rice noted in his dissent: "While th[e] 'navigability for title' test has similarities to navigability as determined for exercise of the federal government's Commerce Clause power, the two tests are nonetheless different—a factual distinction which the District Court failed to make when relying upon commerce cases . . . ." Pet. App. 94. The two tests differ in a number of ways. For example, navigability for title requires that navigability in fact exist at the time the state is admitted into the Union. In addition, navigability must exist in the river's ordinary condition. *See Utah*, 283 U.S. at 75-76. Navigability for federal jurisdiction, on the other hand, looks more broadly at whether the river could be made navigable after reasonable artificial improvements. *See Appalachian Electric,* 311 U.S. at 408 ("The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic."). Such improvements can occur any time after the state is admitted to the Union, making the river navigable for federal jurisdiction purposes. *Id.* ("Although navigability to fix ownership of the river bed or riparian rights is determined . . . as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable."). In

addition, the navigability for title test is based on principles grounded in the Property Clause, U.S. Const., art. IV, § 3, cl. 2, not the Commerce Clause which is the basis for regulatory jurisdiction. U.S. Const., art. I, § 8. Thus, waterways that qualify under the Commerce Clause test for navigability may nevertheless fail the test for navigability for title.

The Montana Supreme Court's decision has clouded this distinction between the test for navigability for title and the test for navigability for federal and admiralty jurisdiction. Maintaining the distinction would not disrupt settled precedent on "navigability" in the context of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (2006), or in FERC's determination of navigability for federal jurisdiction over hydropower projects, because those tests are different from the test for navigability for title. The concern here is that the Montana Supreme Court's misinterpretation of the distinctive test for navigability for title has far-reaching consequences for property owners in Montana and across the country.

As a result of its iconoclastic approach to the question of navigability for title, the Montana Supreme Court determined that the historical and expert evidence amassed by PPL Montana showing non-navigability at the time of statehood—including a 1910 federal court decree, and 1891 and 1898 reports from the Army Corps of Engineers to Congress—was simply irrelevant, and granted summary judgment for the State.[3] This radical departure from the traditional,

---

[3] Hydropower and Utility *Amici* are particularly troubled that the state district court reached its conclusion on summary judgment,

fact-intensive, section-by-section, historical inquiry into navigability employed by this Court and other courts warrants reversal in this case.

II. THE SUPREME COURT OF MONTANA'S RETROACTIVE NAVIGABILITY DETERMINATION AND ASSESSMENT OF RENTS THREATENS SETTLED EXPECTATIONS OF HYDROPOWER PROJECT AND OTHER RIPARIAN FACILITY OWNERS.

Hydropower projects are an important source of electric power, accounting for seven percent of national electric production and more than 66 percent of the country's renewable electric energy in 2009.[4] Hydroelectric dams impound water in a reservoir or divert water for release through the project's turbines for the production of electricity. Yet hydropower projects do more than simply generate electricity. The projects help maintain the national electric system's stability, speed recovery when the electric grid is disrupted, and provide valuable base load and peaking power—thereby avoiding the need for additional power

---

despite voluminous evidence provided by PPL Montana demonstrating that the issue of navigability of the river sections involved in the case were in profound dispute. Such use of summary judgment, upheld by the state supreme court, strikes us as highly inappropriate.

[4] U.S. Energy Information Administration, Renewable Energy Consumption and Electricity Preliminary Statistics 2009 at 4 & Table 3 (Aug. 2010), available at http://www.eia.gov/fuelrenewable.html.

plants that rely on coal, natural gas, oil, nuclear, and other fuels.

In many states, utilities are required to meet certain percentages of electricity demand with renewable resources. These can include hydropower. Moreover, hydropower is particularly well suited to integrate other renewable resources such as wind and solar power into the grid.[5] Specifically, through the release of water stored in impoundments, hydropower projects can backstop such intermittent sources of renewable power, providing electricity when those sources are not able to generate it.

Hydropower projects also provide energy to manufacturing facilities that own and operate such projects, helping to keep our country's manufacturing base competitive in world markets. In addition to electricity production and associated ancillary benefits, the nation's hydropower projects "provide public benefits such as managed water supply, recreation, economic development and flood control while minimizing adverse impacts on environmental resources."[6]

In addition, the U.S. Department of Energy recognizes continued hydropower development as "clearly part of the solution [to the energy crisis] and

---

[5] U.S. Bureau of Reclamation, *Reclamation – Managing Water in the West – Hydroelectric Power* at 13 (July 2005), *available at* www.usbr.gov/power/edu/pamphlet.pdf.

[6] Federal Energy Regulatory Commission, *Annual Report 2008* at 18, *available at* http://www.ferc.gov/about/strat-docs/annual_rep.asp.

represents a major opportunity to create more clean energy jobs," and that "[i]nvesting in our existing hydropower infrastructure will strengthen our economy, reduce pollution and help us toward energy independence."[7] Recent studies have concluded that by 2025, the nation's hydropower capacity has the potential to nearly double from current levels of approximately 80,000 MW, with a substantial associated increase in jobs.[8] Congress has recently promoted the development of hydropower projects through economic incentives.[9] Such future development of hydropower, which is vital to the interests of this country, depends on the cost of project development remaining competitive with other energy sources, and on investor confidence in predictability of future costs.

---

[7] U.S. Department of Energy, *Obama Administration Announces up to $32 Million Initiative to Expand Hydropower* (June 30, 2009 press release), *available at* http://apps1.eere.energy.gov/news/progress_alerts.cfm/pa_id=195.

[8] U.S. Department of Energy, *Feasibility Assessment of the Water Energy Resources of the United States for New Low Power and Small Hydro Classes of Hydroelectric Plants* at 21-24, 35, DOE-ID-11263 (2006), *available at* http://www1.eere.energy.gov/windandhydro/pdfs/doewater-11263.pdf; Electric Power Research Institute, *Assessment of Waterpower Potential and Development Needs* at vii (2007), *available at* http://www.aaas.org/spp/cstc/docs/07_06_1ERPI_report.pdf; Navigant Consulting, *Job Creation Opportunities in Hydropower*, Executive Summary at 16 (2009), *available at* http://www.hydro.org/wp-content/uploads/2010/12/NHA_JobsStudy_FinalReport.pdf.

[9] *See, e.g.*, American Recovery and Reinvestment Tax Act, § 1603, Pub. L. No. 111-5, 123 Stat. 115, 364 (2009); Energy Policy Act of 2005 § 242, Pub. L. No. 109-58, 119 Stat. 594, 677.

Almost all non-federally-owned hydropower projects are subject to the Federal Power Act's ("FPA") comprehensive regulatory and licensing framework. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 1920) in order "to secure a comprehensive development of national resources." *First Iowa Hydro-Elec. Coop. v. F.P.C.*, 328 U.S. 152, 180-81 (1946). Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric projects.[10] *See* §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, and 817 (2006). In carrying out its statutory responsibilities, FERC is required to consider all the factors affecting the public interest in the comprehensive development of a waterway, including power development, navigation, water supply, recreation, and appropriate conditions to protect the environment. §§ 10(a)(1), 4(e), 16 U.S.C. §§ 803(a)(1), 797(e).

The Federal Water Power Act of 1920 was enacted in the early 20th Century because Congress recognized that the federal government lacked the resources to construct hydroelectric dams on all of the nation's rivers. The statute was the result of years of legislative effort to find a licensing regime that would encourage non-federal investment by permitting investors to realize the fruits of their investments subject to federal oversight. To attract the enormous amount of capital required to develop the nation's hydropower potential, Congress included safeguards in

---

[10] Federally operated projects, such as those operated by the Tennessee Valley Authority, Army Corps of Engineers, and the Bureau of Reclamation, are not licensed by FERC.

the FPA to help ensure positive returns on investments. For example, FPA § 15 requires that licenses be issued on reasonable terms. 16 U.S.C. § 808(a)(1). Under FPA § 6, FERC is authorized to issue licenses with terms of up to 50 years and is prohibited from amending licenses, once they are accepted, without the consent of the licensee. 16 U.S.C. § 799; *Pacific Gas & Elec. Co. v. FERC*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). FPA § 28 restricts the authority of Congress to alter the terms of a license, or otherwise impair the rights of the licensee, once a license has been issued. 16 U.S.C. § 822.

The Montana Supreme Court's decision undercuts a foundational policy of the FPA "favoring the protection of licensees' expectations." *City of Seattle v. FERC*, 883 F.2d 1084, 1088 (D.C. Cir. 1989). The FPA does contemplate that landowners (including states) will be compensated for use of their lands by licensees—generally through a one-time, up-front fee to pay for fee title or a permanent easement as to non-federal lands. The underlying assumption of the statute is that the prospective licensee has the opportunity at the outset of construction or licensing—before investment commitments are made—to evaluate and negotiate whatever land rights may be necessary for the operation of the project. Here, however, more than 120 years after statehood, the State has retroactively asserted ownership over lands PPL's predecessor believed it had lawfully acquired from private riparian landowners at the time the projects were built, and additionally over lands PPL believed were owned by the United States. As to the latter, moreover, because the United States has not disclaimed its interest, PPL has paid and must continue to pay annual charges to FERC under Section

10(e) of the FPA, 16 U.S.C. § 803(e)(1), for occupying lands the United States believes are federal lands—and now is being asked to pay back rent as well as future rent to the State for the same land—although if the Montana Supreme Court is correct, the United States has no right to such payments. And this is on top of 37.5 percent of the FERC annual charges being returned to Montana under the FPA's federal land use fees formula! *See* 16 U.S.C. § 810(a).

The rent that Montana seeks to assess retroactively is considerable. Indeed, under the State's valuation methodology, PPL Montana must pay to the State 50 percent of the net revenues from hydroelectric generation multiplied by the State's percentage ownership of overall project lands.[11] Pet. App. 42. The back rent charge for the projects alone was almost $41 million, plus nearly $8 million in interest, and the State will continue to take a substantial portion of the project revenues going forward. Pet. App. 1, 45, 81.

In these times of intense pressures on state government budgets, Hydropower and Utility *Amici* are concerned that the Montana Supreme Court's precedent may encourage other states to follow suit in

---

[11] Hydropower and Utility *Amici* are very troubled by the use of a "50 percent of revenues" test for land rent. Such a radical departure from traditional measures of fair market value of land, based on sales and rent of comparable land, and the nature of the burden imposed by a rental use, elevates land as one factor in the production of hydropower to a disproportionate importance. Charging a percent of a project's net revenue also will impede investment in and retention of hydropower facilities and again will unduly burden electric customers.

assessing substantial present, future, and back rents on hydroelectric dam and other riparian facility owners.[12] Not only would this unsettle licensee and facility owner investment expectations and be a burden on electric consumers, but it would also be a substantial disincentive to investment in new and existing hydropower projects and other infrastructure, contrary to national policies encouraging hydroelectric development as a clean, reliable, renewable, and emissions-free source of domestic energy and investment to repair and replace the nation's aging infrastructure.

If the Court does not reverse the Montana Supreme Court's decision, even states with constitutional and statutory provisions providing for access to navigable waters and easements across navigable waters may assess retroactive rents on hydroelectric dam and other riparian facility owners. In fact, a number of states have statutory provisions allowing rental charges for the use of state-owned beds of navigable waters. *See, e.g.*, 571 Iowa Admin. Code § 18.2 (2008), providing for rental fees for the commercial and industrial use of state-owned riverbeds. And other

---

[12] Hydropower and Utility *Amici* also are concerned that the State here is seeking rent for use of riverbeds just by "out of state" hydropower project owners, while assuring in-state ranching and farming interests that they will not be similarly burdened. Press Release, Montana Attorney General Steve Bullock, *Bullock Calls Supreme Court's PPL Decision "A Victory for Generations of Montanans"* (Mar. 30, 2010), *available at* http://www.doj.mt.gov/news/releases2010/20100330.asp. This certainly raises concerns about fairness and equity, if not constitutional concerns about uneven application of state assessments to in-state and out-of-state interests.

states may adopt such provisions in response to the Montana Supreme Court's decision, if upheld by this Court. If the test for navigability for title is broadened, those portions of rivers previously understood to be owned by hydroelectric dam and other riparian facility owners may be found to be owned by states that can then charge rental fees to these owners, which would result in increased costs to customers. This would change the financial calculus for hydroelectric dam operators and could cause certain projects to become uneconomic, potentially leading licensees to surrender their operating licenses.

Further, it is not necessary for the state to retain title to the bed and banks of the rivers for the state's environmental interests to be protected. Environmental interests are certainly protected if ownership of riverbeds remains in federal hands, as federal agencies manage federal lands and resources to protect such interests under the auspices of federal environmental statutes such as the CWA and the National Environmental Policy Act. Environmental interests are also protected if ownership of riverbeds remains in the hands of non-federal parties for two significant reasons. First, non-federal entities using the waters of state rivers generally must have or obtain water rights, particularly in western states such as Montana, and the states retain the authority to control and appropriate water and water rights under Section 27 of the FPA. 16 U.S.C. § 821. Second, all non-federal entities using the water of state rivers for purposes that may result in a discharge into navigable waters must obtain a water quality certification under Section 401 of the CWA. 33 U.S.C. § 1341. Under Section 401(d) of the CWA, the state water quality agencies have the authority to attach

mandatory water quality conditions to their 401 certification, which attach to the FERC license. *Id.* § 1341(d). Therefore, Montana's environmental interests in these waters are protected. If the State's environmental interests were of concern, the State could have and should have asserted its title interests long before this litigation.

There are over 1,000 FERC-licensed projects in 32 states,[13] many of which are located on rivers that similarly might be subject to retroactive claims of state ownership under the Montana Supreme Court's approach to determining navigability at the time of statehood. Hydropower and Utility *Amici* are concerned that a state requirement that hydropower project owners pay back, present, and future rents for occupying beds and banks to which they thought they had acquired title or easements years or even decades earlier, or which they believed were federal lands and thus lawfully occupied pursuant to Section 4(e) of the FPA, 16 U.S.C. § 797(e), throws a dark cloud over licensees' certainty of investment—to say nothing of the unfairness of such licensees being "double-billed" by states and federal land agencies for the right to occupy the streambeds. To encourage investment in and maintenance of these important infrastructure projects, licensees and license applicants must be able to make reasonably accurate evaluations of the economic risks associated with investments in hydropower facilities at the time they are built, licensed, and relicensed. Hydropower and Utility

---

[13] Federal Energy Regulatory Commission, *Complete List of Issued Licenses* available at http://www.ferc.gov/industries/hydropower/gen-info/licensing/licenses.xls.

Amici are concerned about the disruption and harm to both the electric utility and hydropower industries and their customers that will likely occur if states can impose multi-million dollar retroactive assessments on long-standing hydropower facilities that, for decades, have not been subject to such assessments. We are further concerned that the specter of such assessments will create a disincentive to invest in needed refurbishments of aging hydro infrastructure or in new hydropower facilities.

Furthermore, other riparian land uses, including electric generation and transmission facilities that rely on rivers, are potentially at risk as a result of Montana's new assertion— more than 120 years after statehood—that it owns the riverbeds at issue in this case. The threat of riverbed occupancy fees being assessed against owners of other riparian facilities would similarly upset settled land and facility ownership rights, undercut investments already made in reliance on those settled rights, and inhibit future investment.

The tens of millions of dollars in fees that Montana proposes to collect from PPL Montana alone, as well as the flood of other such fees on electric facilities that the Montana Supreme Court's decision may unleash in other states that are hungry for new sources of revenue, will ultimately be borne by electric consumers. Such unexpected increased expenses are especially unwelcome now because electric ratepayers already face substantial burdens to pay for new electric generation and delivery infrastructure that utilities nationwide will need to construct in coming decades. This new infrastructure is needed to accommodate growth in demand for electricity,

increased use of renewable energy, increasingly rigorous environmental standards, and replacement and upgrades of existing electric generation and delivery infrastructure. Unexpected new expenses are also particularly difficult now given the tenuous condition of our economy, with many customers struggling to pay their bills.

Finally, it is important for the standards for adjudication of the status of rivers as to navigability for title purposes at the time of statehood to remain settled, clear, and consistent. Reversing the Montana Supreme Court's determination will prevent similar future state claims of land ownership under dams and reservoirs and other riparian facilities from undermining long-settled ownership rights and the prospects for existing or future hydropower and other infrastructure investments.

CONCLUSION

For the reasons set forth above, Hydropower and Utility *Amici* respectfully request the Court to reverse the Supreme Court of Montana's decision in *PPL Montana* and remand the case for proceedings consistent with this Court's findings and precedent.

Respectfully submitted,

MICHAEL A. SWIGER
Counsel of Record
SHARON L. WHITE
VAN NESS FELDMAN, P.C.
1050 THOMAS JEFFERSON
STREET, N.W.
WASHINGTON, D.C. 20007
(202) 298-1800
Counsel for Amici Curiae

(Of Counsel Listing On Inside Cover)

September 7, 2011

AMICUS CURIAE BRIEF

RECEIVED
AND
FILED

No. 10-218

Supreme Court, U.S.
FILED
SEP - 6 2011
OFFICE OF THE CLERK

In The Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER BY FREEPORT-MCMORAN CORPORATION, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT AND SALT RIVER VALLEY WATER USERS' ASSOCIATION

L. WILLIAM STAUDENMAIER
Counsel of Record
ANDREW M. JACOBS
SNELL & WILMER, L.L.P.
400 E. Van Buren Street
Suite 1900
Phoenix, Arizona 85004
(602) 382-6000
wstaudenmaier@swlaw.com
Counsel for Freeport-McMoRan Corp.

JOHN B. WELDON
MARK A. MCGINNIS
SALMON, LEWIS & WELDON, P.L.C.
2850 E. Camelback Road
Suite 200
Phoenix, Arizona 85016
(602) 801-9060
mam@slwplc.com
Counsel for Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association

September 6, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

I. FREEPORT-MCMORAN CORPORATION 2

A. Freeport's Interests in Arizona 2

B. Freeport's Interests in Colorado 4

C. Freeport's Interests in New Mexico 5

II. SALT RIVER PROJECT 6

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. THE TEST OF NAVIGABILITY FOR TITLE IS FEDERAL AND REQUIRES CAREFUL ANALYSIS OF ALL RELEVANT FACTS BEFORE A COURT DETERMINES NAVIGABILITY 11

II. THE NAVIGABILITY FOR TITLE TEST SHOULD BE APPLIED IN A MANNER THAT REFLECTS CONDITIONS IN THE WESTERN UNITED STATES 14

III. MANY STATE COURTS HAVE NOT PROPERLY AND UNIFORMLY APPLIED THE FEDERAL TEST OF NAVIGABILITY FOR TITLE 18

A. Arizona's Courts Have Repeatedly Invalidated Legislative Efforts to Conclusively Resolve Navigability in Arizona 19

TABLE OF CONTENTS – Continued

Page

B. The Arizona Court of Appeals Has Rejected a "Particularized Assessment" of Navigability by the Administrative Agency Created Specifically to Make That Determination 22

IV. THE "LIBERALLY CONSTRUED" STANDARD APPLIED BY THE MONTANA SUPREME COURT IS INCONSISTENT WITH THIS COURT'S DECISIONS ON THE NAVIGABILITY FOR TITLE TEST 26

V. THE MONTANA SUPREME COURT'S REFUSAL TO CONDUCT A SECTION-BY-SECTION ANALYSIS IN DETERMINING NAVIGABILITY CONTRAVENES THIS COURT'S PRECEDENTS AND WOULD RESULT IN VAST OVERREACHING ON STREAMS THAT ARE ONLY PARTIALLY NAVIGABLE 29

VI. THE MONTANA SUPREME COURT'S CONSIDERATION OF MODERN MODES OF TRANSPORTATION ON WATER IMPROPERLY ANALYZES CURRENT CONDITIONS RATHER THAN CONDITIONS AS THEY EXISTED ON THE DATE MONTANA WAS ADMITTED TO THE UNION 32

CONCLUSION 38

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989) 34

Alaska v. United States, 213 F.3d 1092 (9th Cir. 2000) 34, 35

Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987), *aff'd*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) 34

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 14

Ball v. James, 451 U.S. 355 (1981) 8

Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967) 33

Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892) 20

Martin v. Waddell, 16 Pet. 367, 10 L.Ed. 997 (1842) 32

Oklahoma v. Texas, 258 U.S. 574 (1922) 12, 13, 17

Pollard's Lessee v. Hagan, 3 How. 212, 11 L.Ed. 565 (1845) 9, 32

Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 557, 38 L.Ed. 331 (1892) 33

The Daniel Ball, 10 Wall. 557 (1870) 1, 11, 33, 34

The Montello, 20 Wall. 430 (1874) 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Champlin Refining Co., 156 F.2d 769 (10th Cir. 1946), *aff'd*, 331 U.S. 788, *reh'g denied*, 331 U.S. 869 (1947) 33

United States v. Oregon, 295 U.S. 1 (1935) 12

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 6, 13

United States v. Utah, 283 U.S. 64 (1931) ..... *passim*

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 35

Utah v. United States, 394 U.S. 89, 89 S.Ct. 761, 22 L.Ed.2d 99 (1969) 33

Utah v. United States, 403 U.S. 9 (1971) ..... *passim*

STATE CASES

Andersen v. Schenk, 353 Mont. 424, 220 P.3d 675 (2009) 14

Arizona Cntr. for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (1991) ... *passim*

Arizona Water Co. v. Arizona Dept. of Water Resources, 208 Ariz. 147, 91 P.3d 990 (2004) 25

Bingenheimer v. Diamond Iron Mining Co., 237 Minn. 332, 54 N.W.2d 912 (1952) 34

Calmat of Arizona v. Miller, 172 Ariz. 300, 836 P.2d 1010 (App. 1992), *vacated on other grounds by Calmat of Arizona v. Miller*, 176 Ariz. 190, 859 P.2d 1323 (1993) 19

TABLE OF AUTHORITIES – Continued

Page

Defenders of Wildlife v. Hull, 199 Ariz. 411, 18 P.3d 722 (2001) ..... *passim*

Land Dept. v. O'Toole, 154 Ariz. 43, 739 P.2d 1360 (1987) 3, 19, 20

Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968) 15, 19

Parks v. Cooper, 2004 S.D. 27, 676 N.W.2d 823 (2004) 33

PPL Montana LLC v. State of Montana, 355 Mont. 402, 229 P.3d 421 (2010) ..... *passim*

State of Arizona v. Arizona Navigable Stream Adjudication Commission, 220 Ariz. 230, 229 P.3d 242 (2010) ..... *passim*

Uhlmann v. Wren, 97 Ariz. 366, 401 P.2d 113 (1965) 8

FEDERAL STATUTES

Act of June 17, 1902, c. 1093, 32 Stat. 388 7

43 U.S.C. §§ 371 to 600 7

OTHER AUTHORITIES

ANSAC, http://www.azstreambeds.com (last visited Sept. 2, 2011 ..... 22, 23

Ariz. Const., art. IX, § 7 ..... 20, 21

Memorial of the Legislature of Arizona, 38th Cong., 2d Sess., Misc. Doc. No. 17 (January 25, 1865) 19

INTERESTS OF AMICI CURIAE

Amici Curiae participating in this brief are Freeport-McMoRan Corporation ("Freeport"), a New York corporation with extensive mining operations and landholdings in Arizona, Colorado and New Mexico, and the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association (collectively, "SRP" as further described below), which operate a large federal Reclamation project delivering waters of the Salt and Verde Rivers to irrigators, municipalities and other water users in and near Phoenix, Arizona.[1] The interests of each Amicus are described in greater detail below.

Amici are concerned that the decision of the Montana Supreme Court in this case, if it is allowed to stand, will pose a grave threat to their long-established property rights in lands underlying numerous watercourses that have never been "highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 10 Wall. 557, 563 (1870). Furthermore, the opinion below also threatens

---

[1] This brief is filed with the consent of both parties, which consents are on file with the Clerk of this Court. Pursuant to Rule 37.6, Amici disclose that no counsel for either party in this case authored any portion of this amicus brief, nor did any such counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amici made any such monetary contribution.

to interfere with the rights of Amici, and numerous other surface water appropriators throughout the western United States, to impound and divert water for beneficial use consistent with the laws of the states in which they operate. Accordingly, Amici submit this brief in support of Petitioner PPL Montana LLC ("PPL Montana") and urge this Court to reverse the decision of the Montana Supreme Court and remand the case with clear instructions regarding the proper federal test of navigability for title purposes.

I. FREEPORT-MCMORAN CORPORATION

Freeport owns and operates a variety of mining facilities in Arizona, New Mexico and Colorado. As a necessary component of these mining operations, Freeport also owns and operates various facilities (*e.g.*, dams, reservoirs, water diversion structures, etc.) in or adjacent to streambeds in each of these states. In addition, Freeport owns farm and ranch lands that rely on surface water diversions for irrigation and cattle grazing and for related ranch operations. Finally, Freeport cooperates with federal agencies to manage riparian lands it owns to ensure protection of habitat for endangered species. Freeport's operations and interests in each of these states are described in greater detail below.

A. Freeport's Interests in Arizona

In Arizona, Freeport owns and operates multiple mining facilities located adjacent to or on both sides

of watercourses. In 2010, these operations employed approximately 7,000 people and generated approximately $1.2 billion in direct economic impact in Arizona, including approximately $220 million in tax payments to state and local governments. For many years, Freeport, like all other private property owners in Arizona, believed it held clear title to the beds and banks of the streams that traverse or border its operations because the streams were considered to be non-navigable.

Beginning in 1985, however, these long-held assumptions regarding title were clouded due to actions by the State of Arizona, which began to claim title to streambeds in the state on the basis of the federal navigability for title doctrine. *See Land Dept. v. O'Toole*, 154 Ariz. 43, 44, 739 P.2d 1360, 1361 (App. 1987). Since that time, a continuous cloud has been cast on the title to Freeport's ownership of riparian property, as well as on the title to thousands of other riparian parcels throughout the state. *Id.* at 45, 739 P.2d at 1362 ("This case concerns a potential cloud on the title of many parcels of land. The State claims that hundreds of millions, if not billions, of dollars' worth of land in Arizona's most populous county are at issue.") In the face of these threats to its vital property interests, Freeport has been actively involved in litigation and administrative proceedings regarding the navigability of streams throughout Arizona for more than fifteen years. *See, e.g., Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.3d 722 (App. 2001) *reconsideration denied* (May 8, 2001); *State of Arizona*

v. Arizona Navigable Stream Adjudication Commission, 224 Ariz. 230, 229 P.3d 242 (App. 2010), *review denied* (Feb. 8, 2011) (hereafter, "*State v. ANSAC*"). Unfortunately, as will be described in greater detail below, this litigation continues to this day with no end in sight.

B. Freeport's Interests in Colorado

In Colorado, Freeport owns and operates the Climax and Henderson Mines. In 2010, Freeport employed approximately 650 people and generated approximately $152 million in direct economic impact in Colorado, including approximately $35 million in state and local tax payments. At these mines, Freeport operates multiple surface water diversions on Ten Mile Creek and the Williams Fork River, which are tributaries of the Colorado River.

Colorado is a semi-arid state where most streams originate in the Rocky Mountains and fall rapidly through steep canyons to either the east or west. While some of these streams are tributaries to larger rivers, such as the Missouri, Mississippi and Colorado, they have never been considered navigable waterways or highways for commerce. Instead, for more than 150 years, these streams have been impounded and diverted to provide vital water supplies for agricultural, mining, municipal, industrial and other beneficial purposes throughout the state.

In Colorado, the federal test of navigability for title has been largely dormant. Despite the relatively quiet nature of this issue in Colorado, Freeport is concerned that the precedent set by the Montana Supreme Court in this case may be a strong temptation for the Colorado State Land Board and Colorado's state courts to assert navigability as a convenient means to claim title to, and exact rental payments for, streambeds that have long been considered private property in Colorado.

C. Freeport's Interests in New Mexico

In New Mexico, Freeport owns several mining operations, as well as irrigated agricultural lands where surface waters are diverted and impounded for beneficial use. In 2010, Freeport employed approximately 950 people and generated approximately $145 million in direct economic impact in New Mexico, including approximately $22 million in state and local tax payments. In addition, Freeport voluntarily cooperates with federal agencies to manage property adjacent to the Gila River to protect the riparian corridor and preserve habitat for endangered species. Freeport's operations require that water be diverted through facilities constructed in and across the beds of streams that have long been considered non-navigable. Ownership and control of its river diversion facilities is indispensable to the success of Freeport's operations in New Mexico.

Much as in Colorado, the navigability for title doctrine has long been dormant in New Mexico. This may, perhaps, result from the fact that in 1899, this Court approved a lower court's taking of judicial notice that the Rio Grande, the largest stream in the State of New Mexico, is non-navigable throughout the state. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899) ("Obviously, the Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water."). While such a conclusion by this Court regarding the largest stream in New Mexico might suggest a similar outcome for all other watercourses in the state, the Montana Supreme Court's decision in this case would create uncertainty regarding the status of streams in New Mexico. As such, it is a cause for concern regarding the potential for similar actions to occur in New Mexico.

II. SALT RIVER PROJECT

The terms "Salt River Project" or "SRP" refer collectively to the Salt River Project Agricultural Improvement and Power District ("District") and the Salt River Valley Water Users' Association ("Association"). The District is an Arizona agricultural improvement district established pursuant to Title 48, Chapter 17, of the Arizona Revised Statutes. It is a political subdivision of the State of Arizona. The Association is an Arizona territorial corporation. Pursuant to a 1917 agreement with the United States, the District and

the Association operate the Salt River Federal Reclamation Project ("Project").

SRP has demonstrated a substantial interest in the law relating to the public trust doctrine and the legal standards for determining whether a watercourse is navigable for title purposes. For more than twenty years, SRP has been a participant in numerous administrative and judicial proceedings in Arizona to determine the navigability of various watercourses. *See, e.g., State v. ANSAC*, 224 Ariz. at 230, 229 P.3d at 242; *Defenders of Wildlife*, 199 Ariz. at 411, 18 P.3d at 722; *Arizona Cntr. for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158 (App. 1991), *review dismissed* (Oct. 6, 1992). Currently, cases are pending with respect to the navigability of at least six Arizona watercourses–the Lower Salt, Upper Salt, San Pedro, Santa Cruz, Verde, and Gila Rivers.

SRP has participated in these Arizona actions to protect its interests in the beds of the affected watercourses and the waters that flow therein. The Project was constructed by the United States Reclamation Service (now the Bureau of Reclamation). The keystone of the Project is Roosevelt Dam on the Salt River, one of the first dams constructed pursuant to the Federal Reclamation Act of 1902. *See* Act of June 17, 1902, c. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371 to 600). The lake behind Roosevelt Dam began to fill in 1908, and construction on the dam was completed in 1911. The United States operated the Project for the first several years after construction of Roosevelt Dam was completed and to this day

retains legal title to the Project facilities. *Ball v. James*, 451 U.S. 355, 358 (1981). The care, operation, and maintenance of the Project facilities were transferred to the Association in 1917. *Id.*; *see also Uhlmann v. Wren*, 97 Ariz. 366, 373, 401 P.2d 113, 119 (1965). The United States subsequently constructed five other Reclamation dams on the Salt and Verde Rivers (Stewart Mountain, Horse Mesa and Mormon Flat Dams on the Salt River and Horseshoe and Bartlett Dams on the Verde River).[2] Each of those dams is a Project facility that SRP operates and in which it has a significant interest.

Although the United States holds legal title to the Project facilities and the lands beneath them, the United States holds that title on behalf of the Association and its shareholders. SRP, acting on its own behalf and on behalf of the Association shareholders, holds an equitable possessory interest in the Project facilities and lands and continues to operate and maintain the facilities.

In addition, SRP possesses habitat mitigation lands along the San Pedro, Verde, Upper Salt and Upper Gila Rivers. A finding of navigability for any of these watercourses could affect SRP's ability to manage these lands for habitat protection.

---

[2] SRP also operates another Reclamation facility, C.C. Cragin Dam and Reservoir, on Clear Creek in the Little Colorado River watershed in northern Arizona.

The Montana Supreme Court has erroneously applied the law relating to navigability in a manner such that, if it were similarly applied in Arizona, could have grave consequences for the interests of SRP and the Association shareholders in Arizona's watercourses and flowing waters. A determination that the watercourses on which the Project facilities are located were navigable when Arizona became a state on February 14, 1912, could adversely affect SRP's ability to protect those interests and to conduct its operations.

SUMMARY OF ARGUMENT

In the case below, the Montana Supreme Court affirmed a trial court's grant of summary judgment in favor of the State of Montana on the issue of whether specific reaches of three rivers were navigable when Montana became a state in 1889. *See PPL Montana LLC v. State of Montana*, 355 Mont. 402, 229 P.3d 421 (2010). Based on this holding, the court concluded that the State of Montana, not PPL Montana, held title to the beds of the rivers under the federal test of navigability for title and the equal footing doctrine.[3]

[3] The federal test of navigability for title is discussed in greater detail below. The equal footing doctrine holds that as new states are admitted to the Union, they take title to the beds of all navigable waters within the new states on an "equal footing" with the original 13 states, which took title to the beds of navigable waters at the inception of our Nation. *See Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

The court then approved the lower court's order requiring PPL Montana to pay more than $40 million in damages to the state for past occupancy, by dams and reservoirs, of the riverbeds in question. *Id.* at 461, ¶171, 229 P.3d at 461.

The Montana Supreme Court approved the trial court's summary judgment ruling despite the fact that PPL Montana had presented detailed admissible evidence, in the form of expert witness affidavits, technical reports and other documents contesting the navigable status of each of the river reaches at issue in the case. As Justice Rice of the Montana Supreme Court noted in his dissent, the majority opinion erred in two fundamental ways, first "in its analysis of the law governing title navigability," and second by failing to "properly apply the tenets of summary judgment by disregarding genuine material factual issues." *Id.* at 461-62, ¶174, 229 P.3d at 461.

Unless this Court corrects these errors, the opinion below may have grave negative consequences not only for Amici, and not only in Arizona, Colorado and New Mexico, but potentially throughout the western United States. By misapplying this Court's test of navigability for title, the Montana Supreme Court threatens to undermine the property rights of landowners and political subdivisions across the West. To preclude this possibility, Amici urge this Court to reverse the judgment of the Montana Supreme Court and return this case with instructions to determine the navigability of the rivers in question in a manner

consistent with this Court's long history of jurisprudence on the issue of navigability for title.

ARGUMENT

I. THE TEST OF NAVIGABILITY FOR TITLE IS FEDERAL AND REQUIRES CAREFUL ANALYSIS OF ALL RELEVANT FACTS BEFORE A COURT DETERMINES NAVIGABILITY.

As this Court is aware, the test of navigability for title purposes is a federal test that has been applied for more than 150 years, largely through decisions rendered by this Court. The original, and still frequently quoted, test of navigability is found in *The Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

10 Wall. at 563. Although *The Daniel Ball* was an admiralty case, its statement of the test for navigability has long been applied as the appropriate federal test of navigability for title. *See, e.g., Utah v. United States*, 403 U.S. 9 (1971); *United States v. Oregon*,

295 U.S. 1 (1935); *United States v. Utah*, 283 U.S. 64 (1931).

The navigability cases decided by this Court have applied this test in a consistent manner, requiring a detailed factual analysis of historical information to establish the fact of navigability. Where insufficient facts are presented to support navigability, the Court has held the rivers in question non-navigable. For example, in *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Court considered "voluminous" evidence concerning the Red River, which forms a portion of the border between Oklahoma and Texas. *Id.* at 586. As the Court noted, "a large part" of the evidence it considered "deals directly with the physical characteristics of the river, comes from informed sources and is well in point." *Id.* Based on this evidence, the Court stated:

> We regard it as obvious that in the western half of the state the river is not susceptible of being used in its natural and ordinary condition as a highway for commerce, and there is no evidence that in fact it ever was so used.
>
> * * *
>
> While the evidence relating to the part of the river in the eastern half of the state is not so conclusive against navigability as that relating to the western section, we think it establishes that trade and travel neither do nor can move over that part of the river, in its natural and ordinary condition, according to the modes of trade and travel customary on water; in other words, that it is neither used,

> or susceptible of being used, in its natural and ordinary condition as a highway for commerce. Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability.

Id. at 588, 591.

Other examples abound, but the key factor in all cases, whether a river was determined to be navigable or non-navigable, is that the Court has carefully weighed all evidence presented before making a navigability determination.[4] In light of this consistent approach, it is particularly disconcerting that the Montana Supreme Court summarily rejected the evidence of non-navigability offered by PPL Montana and approved a grant of summary judgment in favor of the State of Montana. Rather than overturn the summary judgment and remand the case for an appropriate evidentiary hearing, the court improperly weighed the conflicting evidence and rejected the evidence offered by PPL Montana. This circumstance alone is sufficient

---

[4] Even in *United States v. Rio Grande Dam & Irrigation*, where a lower court took judicial notice that the Rio Grande is not navigable in New Mexico, this Court examined "the affidavits and other evidence introduced in [the] case" before concluding "it is clear to us that the Rio Grande is not navigable within the limits of the territory of New Mexico." 174 U.S. at 698.

to overturn the decision below. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"); *Andersen v. Schenk*, 353 Mont. 424, ¶2, 220 P.3d 675, 676 (2009) ("at the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses").

II. THE NAVIGABILITY FOR TITLE TEST SHOULD BE APPLIED IN A MANNER THAT REFLECTS CONDITIONS IN THE WESTERN UNITED STATES.

The Montana Supreme Court's decision in this case is especially egregious in the western United States, where rivers often are either steeply sloped mountain streams with frequent falls, rapids and other impediments to navigation, or desert rivers with widely variable flows and shallow, shifting beds. Again, this Court's precedents provide numerous examples of each of these types of rivers being held to be non-navigable.

For example, in *United States v. Utah*, the Court addressed the navigable status of several rivers, including the Colorado River from its confluence with the Green River to Utah's southern border with Arizona. 283 U.S. at 64. The Colorado River rises in the

Rocky Mountains of Colorado, flows through Utah and Arizona, forms a portion of the border between Arizona and Nevada and the border between Arizona and California, and then flows into Mexico. Overall, the Colorado River is more than 1,400 miles in length. In Arizona, the river has been held to be navigable. *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968). Nevertheless, as this Court noted,

> Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends. The question here is not with respect to a short interruption of navigability in a stream otherwise navigable, or of a negligible part, which boats may use, of a stream otherwise nonnavigable. We are concerned with long reaches with particular characteristics of navigability or nonnavigability. . . .

United States v. Utah, 283 U.S. at 77 (footnotes omitted). On this basis, the Court held that a thirty-six mile stretch of the Colorado River through Cataract Canyon was non-navigable. The Court noted that in this reach, "the river has a rapid descent or slope of about 399 feet, a drop of 11 feet per mile, with a long

series of high and dangerous rapids." *Id.* at 80.[5] Importantly, the Court found this reach of the Colorado River to be non-navigable despite the fact that the remainder of the river in Utah downstream of Cataract Canyon was held to be navigable. *Id.* Finally, the Court also found that a stretch of the river approximately four miles in length immediately upstream of "the first rapid in Cataract Canyon" was navigable. *Id.* at 89-90.

The critical element in all three of these determinations was the fact that the Court carefully reviewed and weighed the evidence of navigability and non-navigability for each individual reach of the Colorado River before determining navigability. As the Court stated, "[e]ach determination of navigability must stand on its own facts." *Id.* at 87. No less should be accepted from the Montana Supreme Court. The mere fact that a large part of the Missouri River is navigable downstream of the reach now before this Court does not mean that other portions of the river may be held to be navigable without a careful analysis of all relevant evidence relating to that reach. Because the Montana Supreme Court instead chose to discount all evidence offered by PPL Montana and

---

[5] This description is remarkably similar to the reaches of the Missouri, Madison and Clark Fork Rivers described in PPL Montana's Petition for Writ of Certiorari. *See* Petition, at 5-6 (noting that the Thompson Falls Project is "constructed on a naturally occurring waterfall," and that the Missouri-Madison Project includes a "17-mile stretch with five historic waterfalls, [where] the river drops more than 600 feet").

confirm summary judgment in favor of the State of Montana, the decision below should be reversed.

This conclusion is also supported by the Court's decision in *Oklahoma v. Texas*, which, as noted above, addressed the navigability of a portion of the Red River. In its entirety, the Red River is more than 1,300 miles in length, from its origins in the Texas panhandle to its mouth in the Gulf of Mexico. *Oklahoma*, 258 U.S. at 582. While noting that the portion of the river downstream of the eastern border of Oklahoma is navigable, the Court nevertheless carefully analyzed the evidence concerning navigability of the portion of the river that forms the southern boundary of Oklahoma. In doing so, the Court described the river in this manner:

> When the water rises, it does so very rapidly, and when it falls, in the same way. The river bed has a fall of more than 1 foot to the mile and consists of light sand which is easily washed about and is carried downstream in great quantities at every rise of the water. At all times there is an almost continuous succession of shifting and extensive sand bars. Ordinarily the depth of water over the sand bars is from 6 to 18 inches and elsewhere from 3 to 6 feet. There is no permanent or stable channel. Such as there is shifts irregularly from one side of the bed to the other and not infrequently separates into two or three parts.

Id. at 589. In light of this Court's holding that the upstream portions of the Red River are non-navigable

despite the navigable status of downstream sections, the Montana Supreme Court erred in holding that upstream reaches of the Missouri, Madison and Clark Fork Rivers are navigable merely because lower portions of these rivers have been found to be navigable. Unless corrected by this Court, this error may be misapplied by other lower courts as well, including on rivers in Arizona and New Mexico with conditions very similar to those on the Red River that this Court has held to be non-navigable.

III. MANY STATE COURTS HAVE NOT PROPERLY AND UNIFORMLY APPLIED THE FEDERAL TEST OF NAVIGABILITY FOR TITLE.

The Montana Supreme Court's opinion in the case below, coming 120 years after Montana's statehood, is simply the latest example of state courts loosely applying this Court's test of navigability for title and unsettling long-held expectations of private property rights in western streambeds. Perhaps nowhere is this trend better demonstrated than in Arizona, where the navigability for title doctrine has had a particularly long and convoluted history. As noted above, this issue first arose in Arizona in 1985, a full seventy-three years after Arizona became a state. Until that time, the State of Arizona had not asserted a single claim of title to any streambed in the state other than

the Colorado River.[6] In fact, to the contrary, "since statehood, Arizona has uniformly taxed the property of riparian landowners as if they held clear title to the waterway beds." *O'Toole*, 154 Ariz. at 44, 739 P.2d at 1361; *see also Defenders of Wildlife*, 199 Ariz. at 416, ¶2, 18 P.3d at 727 ("The claims of Arizona officials . . . immediately clouded the title held by political subdivisions, private individuals, and corporations that had for years exercised control over, made improvements to, and paid taxes upon these affected stretches of land."). Unfortunately, in the twenty-six years since Arizona first asserted an interest in riverbeds in the state, the courts of Arizona have failed to bring any clarity, much less finality, to this issue.

A. Arizona's Courts Have Repeatedly Invalidated Legislative Efforts to Conclusively Resolve Navigability in Arizona.

There have been no fewer than five published opinions by the Arizona Court of Appeals on the issue of navigability for title. *See O'Toole*, 154 Ariz. 43, 739 P.2d 1360; *Hassell*, 172 Ariz. 356, 837 P.2d 158; *Calmat of Arizona v. Miller*, 172 Ariz. 300, 836 P.2d 1010, *vacated on other grounds by Calmat of Arizona v.*

---

[6] In 1865, the Arizona Territorial Legislature declared that the Colorado River was the only navigable river in the territory. *See* Memorial of the Legislature of Arizona, 38th Cong., 2d Sess., Misc. Doc. No. 17 (January 25, 1865). In 1968, the Arizona Supreme Court determined the Colorado River is navigable in *Morgan*, 443 P.2d at 427.

Miller, 176 Ariz. 190, 859 P.2d 1323 (1993) (App. 1992); *Defenders of Wildlife*, 199 Ariz. at 411, 18 P.3d at 722; and *State v. ANSAC*, 220 Ariz. at 230, 229 P.3d at 242. At each juncture, the court has ruled either that the navigability issue is unresolved, *see O'Toole*, 739 P.2d at 1364; *Calmat*, 836 P.2d at 1020-21, or that actions by the Arizona Legislature or the Arizona Navigable Stream Adjudication Commission ("ANSAC") were impermissible under federal or state law, *Hassell*, 172 Ariz. at 371, 837 P.2d at 173; *Defenders of Wildlife*, 199 Ariz. at 427, ¶59, 18 P.3d at 738; *State v. ANSAC*, 224 Ariz. at 242, ¶28, 229 P.3d at 254. In each of the latter three cases, the court, relying on increasingly narrow grounds, rejected lower court rulings that would have resolved the navigability for title issue.

For example, in *Hassell*, while the court acknowledged that the Arizona Legislature was validly concerned about the "unsettling of record title" to "substantial real property holdings throughout the state," *Hassell*, 172 Ariz. at 362, 837 P.2d at 164, the court nevertheless rejected the legislature's attempt to resolve this issue through a streamlined process for private parties to obtain clear title to the riparian lands everyone had long believed to be in private ownership. *Id.* at 371, 837 P.2d at 173. The court based its holding in part on the public trust doctrine articulated by this Court in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), and in part on the "gift clause" of the Arizona Constitution, which forbids donations or grants by the State to private parties. *See* Ariz.

Const., art. IX, § 7. The court ruled that before a claim of title to any potentially navigable streambed land could be relinquished by the State, the State must undertake a "particularized assessment" of the validity of the navigability claims asserted for such lands. *Hassell*, 172 Ariz. at 372, 837 P.2d at 174.

Following the *Hassell* opinion, the Arizona Legislature made several attempts to create a mechanism for completing the "particularized assessment" mandated by the court. For example, in 1992 the legislature enacted statutes establishing ANSAC as an administrative agency charged with making the particularized assessment for each watercourse in the state. In 1994, the legislature amended these statutes to adopt a variety of evidentiary standards for ANSAC's determinations. In *Defenders of Wildlife*, the Arizona Court of Appeals ruled that the evidentiary standards were impermissible under the federal test of navigability. *Defenders of Wildlife*, 199 Ariz. at 427-28, ¶¶59-63, 18 P.3d at 738-39. In doing so, the court overruled a trial court determination that the standards were acceptable and consistent with the federal test. *Id.* at 417, ¶8, 18 P.3d at 728.

After the *Defenders of Wildlife* opinion was issued, the Arizona Legislature once again attempted to create an effective means to resolve navigability claims in the state. The legislature further amended the statutes governing ANSAC's administrative duties to remove the evidentiary standards the court of appeals had held invalid. For much of the next decade, ANSAC conducted dozens of evidentiary hearings,

received and considered voluminous evidence submitted both by proponents of navigability and parties that argued specific streams were non-navigable, and made findings concerning more than 39,000 individual stream segments throughout the state. *See* ANSAC, http://www.azstreambeds.com (last visited Sept. 2, 2011). There can be no doubt that this Herculean effort by ANSAC satisfied any reasonable interpretation of the *Hassell* court's requirement that a "particularized assessment" be made of the navigable status of each watercourse before any public trust claims may be relinquished. Nevertheless, despite all of this effort, the Arizona Court of Appeals once again found fault with the process used by ANSAC.

B. The Arizona Court of Appeals Has Rejected a "Particularized Assessment" of Navigability by the Administrative Agency Created Specifically to Make That Determination.

In *State v. ANSAC*, the Arizona Court of Appeals rejected a final administrative decision issued by ANSAC on September 21, 2005 (the "Lower Salt Report"). In the Lower Salt Report, ANSAC determined that the Lower Salt River was non-navigable on February 14, 1912, the date Arizona entered the Union. The Lower Salt Report includes more than forty-five pages of text and fifteen additional pages of

appendices.[7] In the Lower Salt Report, ANSAC specifically notes that

> the Commission received, compiled and reviewed evidence and records regarding the navigability and non-navigability of the Salt River from Granite Reef Dam to its confluence with the Gila River. Evidence consisting of studies, written documents, reports, newspapers and other historical accounts, pictures and testimony were submitted. The written materials and documents submitted are approximately three feet thick.

Lower Salt Report, *supra*, at 22. The documents included "[c]omprehensive studies" submitted by multiple expert witnesses. *Id.* In addition to the abundant documentary evidence, ANSAC held a two-day evidentiary hearing on April 7 and 8, 2003. "A total of 20 witnesses appeared at the hearing in Phoenix and gave testimony. Six of the witnesses were acknowledged experts in the fields of hydrology, hydraulics, geomorphology and history." *Id.* at 23. Finally, ANSAC held another public hearing on January 17, 2004 "to consider all of the evidence, testimony and post-hearing memoranda submitted." *Id.*

---

[7] A copy of the report is available on ANSAC's website. *See* ANSAC, http://www.azstreambeds.com/UserFiles/File/pdf/finalreports/Lower%20Salt%20River.pdf (last visited Sept. 2, 2011).

After considering all of this evidence, ANSAC found:

> [T]he Lower Salt River between Granite Reef Dam and its confluence with the Gila River is an erratic, unstable and undependable stream characterized by periodic floods, sometimes extreme, followed by periods of drought where there is little or no water in the riverbed. The Commission finds that in its ordinary and natural condition even in the absence of the existence of Roosevelt Dam and reservoir the Lower Salt River was a braided stream of 2 to 4 channels interspersed with sandbars and sand islands which shift with floods or high flow of water and as such had a configuration that would be impossible to be considered navigable or susceptible of navigability.
>
> Accordingly, the Commissioner [sic] finds that the Lower Salt River from Granite Reef Dam to its confluence with the Gila River was not used or susceptible of use for commercial trade or travel as of February 14, 1912 and therefore was not navigable as of that date nor was it susceptible of navigation.

Lower Salt Report, *supra*, at 45-46.

Despite this thoroughly documented decision, ANSAC's conclusions regarding the non-navigability of the Lower Salt River were rejected by the Arizona Court of Appeals in *State v. ANSAC*. Rather than consider the totality of the evidence evaluated by

ANSAC and provide the deference to which an administrative agency's determination is entitled under Arizona law, *see Arizona Water Co. v. Arizona Dept. of Water Resources*, 208 Ariz. 147, 154, ¶30, 91 P.3d 990, 997 (2004), the court of appeals instead chose to overturn ANSAC's decision on the narrowest of grounds–that ANSAC did not explicitly exclude the effects of "dams, irrigation diversions, canals, and other human impacts" that existed as of the date of Arizona statehood. *State v. ANSAC*, 224 Ariz. at 239-40, ¶20, 229 P.3d at 251-52. In doing so, the court elevated form over substance, ignored the detailed evidence considered by ANSAC, and set aside ANSAC's "particularized assessment" of the Lower Salt River–the very thing the court had previously insisted on in *Hassell*.

If this pattern continues, the question of navigability for title may never be settled in Arizona. The importance of this issue, both in Arizona and throughout the West, cannot be overstated. Unsettling long-held expectations regarding title to streambeds based on loose and shifting interpretations of the federal test will adversely affect the western states, their citizens and their businesses, all of whom would benefit from a decision by this Court that restores order to this now unsettled area of the law.

IV. THE "LIBERALLY CONSTRUED" STANDARD APPLIED BY THE MONTANA SUPREME COURT IS INCONSISTENT WITH THIS COURT'S DECISIONS ON THE NAVIGABILITY FOR TITLE TEST.

One of the most significant errors in the opinion below is its overly "liberal" application of the navigability for title test. The state district court in this case concluded that the test is "somewhat 'fluid.'" *PPL Montana LLC*, 355 Mont. at 437, ¶98, 229 P.3d at 446. The Montana Supreme Court upheld the district court's "fluid" and "liberal" application of the test, stating: "Our independent review of the caselaw in this area establishes unequivocally that the District Court's understanding of the navigability for title test is correct. The concept of navigability for title purposes is very liberally construed by the United States Supreme Court." *Id.* at 438, ¶99, 229 P.3d at 446. In reaching this conclusion, the Montana Supreme Court has misread this Court's prior decisions regarding the navigability for title test.

The selected quotations from this Court's prior decisions upon which the Montana courts relied do not support this extremely expansive application of the federal test. It is true that this Court has opined that a river need not have been actually used for navigation at statehood and that mere susceptibility to navigation is sufficient if the patterns of civilization and development in the region at the time of statehood otherwise explain the lack of actual navigation. *See Utah v. United States*, 403 U.S. at 10. This

Court has further held that the test for navigability does not depend on the river's ability to float sailing ships or other large vessels of commerce; the ability to float more modest vessels can be sufficient to satisfy the river's classification as a highway for commerce. *Id.* at 10-11. The Court also has found that certain natural impediments to navigation, such as those that require reasonable portages, do not necessarily eliminate the watercourse from being found "navigable" at statehood. *The Montello*, 20 Wall. 430 (1874). But these conclusions do not authorize a "fluid" or "liberal" interpretation of the federal test designed to support a predetermined conclusion regarding navigability.

This same overly expansive view of navigability also has been applied by the Arizona Court of Appeals in the series of cases described in Section III above. Despite the arid nature of the Southwest and this Court's prior decisions regarding the proper application of the federal test, landowners and other affected parties in Arizona have spent more than twenty years in litigation regarding whether the state's watercourses were navigable at statehood.

Upon reviewing this Court's prior decisions on the subject, one might assume that the parameters of the federal test were sufficiently clear to guide the lower courts in applying the test to particular watercourses. Unfortunately, that has not been the case. Lower courts, such as the Montana Supreme Court in this case and the Arizona courts in the decisions cited above, have misused this Court's prior opinions to

justify an overly expansive and "liberal" application of the test, stretching the boundaries of the test beyond the breaking point. This Court's prior decisions simply do not support the overly broad interpretation of the test applied by the Montana Supreme Court in this case—i.e., to determine, on summary judgment, that a reach of a river with little historical evidence of navigation satisfied the federal test because it was subject to modern-day boating on certain stretches or that the entire river was navigable because it was subject to navigation on some stretches but not others.

Because navigability must be determined using the federal test, only this Court can rein in expansive and overly "liberal" applications of the test. As PPL Montana has requested, this Court should reiterate the fundamental concepts of the test that some lower courts have forgotten or ignored. Contrary to the holdings of the Montana and Arizona courts, the test cannot be so "fluid" and "liberal" that it authorizes the use of whatever limited evidence may be before the court to support a finding of navigability and thereby take the property of hundreds or thousands of citizens without notice while creating an unjustified windfall for state governments at the expense of those citizens.

V. THE MONTANA SUPREME COURT'S REFUSAL TO CONDUCT A SECTION-BY-SECTION ANALYSIS IN DETERMINING NAVIGABILITY CONTRAVENES THIS COURT'S PRECEDENTS AND WOULD RESULT IN VAST OVERREACHING ON STREAMS THAT ARE ONLY PARTIALLY NAVIGABLE.

In addition to its overly "liberal" and "fluid" application of the federal test of navigability for title, the Montana Supreme Court also erred by refusing to conduct any meaningful section-by-section analysis of the rivers before it. Justice Rice, in his dissent, aptly described this error:

> Importantly – and I believe the Court begins to get off track in its substantive legal analysis here – in applying the navigability for title test, courts are not to assume that an entire river is navigable merely because certain reaches of the river are navigable, and likewise, are not to conclude that non-navigable reaches render an entire river non-navigable. . . . Instead, courts look to relevant portions of a river and, based upon the facts, determine whether particular reaches at issue are navigable or non-navigable. . . .
>
> . . . Contrary to the Court's view, Utah demonstrates the propriety of applying a section-by-section analysis to determine where navigability begins and "how far navigability extends." . . . Recognizing that navigable and non-navigable reaches may co-exist on the

> same river, the Court [in Utah] refrained from making categorical pronouncements about a river's status. This section-by-section approach has been used by many courts. . . .

PPL Montana, 355 Mont. at 464-65, ¶¶178, 180, 229 P.3d at 462-63 (citations omitted).

Despite Justice Rice's extensive discussion of the controlling law, the majority of the Montana court neglected to perform this section-by-section analysis, deciding instead that the non-navigable reaches identified by the Petitioners were "simply too 'short' to matter." *Id.* at 466 (¶182), 229 P.3d at 464 (Rice, J., dissenting). The majority of the Montana court (again, on summary judgment) found that PPL Montana "merely point[ed] to relatively short interruptions in [the rivers] that impede uninterrupted navigation, but do not affect the actual use or susceptibility of use of these rivers as channels for commerce in Montana at the time of statehood." *Id.* at 443, ¶108, 229 P.3d at 449.

Although a proper analysis of the sections of these rivers that the Montana court deemed "too short" perhaps would have complicated the court's review (and certainly would have precluded summary judgment), those stretches can be critically important to landowners and others who have invested their lives and fortunes along these rivers. Even if substantial parts of a watercourse are generally navigable, that does not relieve courts of their duty to undertake a careful examination of the navigability of each definable

reach. In the present case, evidence was available upon which the courts could have made such a factual determination, but the Montana district court ignored that evidence in favor of an "all-or-nothing" approach, and the Montana Supreme Court wrongly affirmed the decision. *See PPL Montana*, 355 Mont. at 467-77, ¶¶185-202, 229 P.3d at 464-70 (Rice, J., dissenting).

The Montana court's "all-or-nothing" approach could cause serious consequences for landowners along other rivers if this Court allows it to stand. This is true especially in cases where long rivers traverse a variety of terrain and are of substantially different character in different reaches. The Gila River, for example, rises in New Mexico and flows through the entire width of Arizona to the Colorado River on the border of Arizona, California and Mexico. At its headwaters in New Mexico, the river is a mere trickle. At its extreme lower end, adjacent to the Colorado River, steamboats purportedly traveled upriver for several miles in the 1800s. Along its route, the river flows from high mountains, through almost impassable canyons, and then spreads out through flat, broad desert valleys. For a court to find that the Gila River in New Mexico was navigable simply because commercial navigation once occurred on a short stretch near the Colorado River hundreds of miles away would be an absurd result, but such a finding is a short step away from the "all-or-nothing" analysis conducted by the state court in the present Montana case.

Just as this Court should correct the Montana court's misguided use of a "liberal" and "fluid" test,

this case should also be remanded with instructions that lower courts must refrain from applying the less difficult (but improper) approach of finding an entire river navigable or non-navigable based on its general characteristics without conducting a thorough factual analysis of each identifiable reach of the river.

VI. THE MONTANA SUPREME COURT'S CONSIDERATION OF MODERN MODES OF TRANSPORTATION ON WATER IMPROPERLY ANALYZES CURRENT CONDITIONS RATHER THAN CONDITIONS AS THEY EXISTED ON THE DATE MONTANA WAS ADMITTED TO THE UNION.

The Montana Supreme Court also erred in its application of the "date of statehood" element of the federal test. This Court has clearly stated on several occasions that the determination of navigability must be made as of the date of statehood. In *Utah v. United States*, for instance, this Court stated:

> The operation of the 'equal footing' principle has accorded newly admitted States the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown. *Pollard's Lessee v. Hagan*, 3 How. 212, 222-223, 228-230, 11 L.Ed. 565. That means that Utah's claim to the original bed of the Great Salt Lake – whether now submerged or exposed – ultimately rests on whether the lake was navigable (*Martin v. Waddell*, 16 Pet. 367-410, 416-417, 10 L.Ed. 997) at the time

> of Utah's admission. *Shively v. Bowlby*, 152 U.S. 1, 26-28, 14 S.Ct. 557-558, 38 L.Ed. 331. It was to that issue that we directed the Special Master, Hon. J. Cullen Ganey, to address himself. See *Utah v. United States*, 394 U.S. 89, 89 S.Ct. 761, 22 L.Ed.2d 99. In the present report the Special Master found that at the time in question the Great Salt Lake was navigable. We approve that finding.

403 U.S. 9, 10 (1971) (emphasis added); *see also id.* at 12 (focusing on the condition of the lake as of January 4, 1896, the day Utah became a state).

Most lower courts have followed this Court's instructions regarding the "date of statehood" requirement. For example, in *Parks v. Cooper*, the Supreme Court of South Dakota correctly stated the federal test as applying to the actual condition of the river on the day of statehood:

> . . . Under the federal test, the question is whether the water body was "navigable in fact" at the time the state entered the Union. Thus, the waterway must have been susceptible to being used as an "avenue of commerce" in its ordinary condition at the time of statehood. *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971); *Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967); *The Daniel Ball*, 77 U.S. (10 Wall 557) 19 L.Ed.2d 999.

2004 S.D. 27, ¶23, 676 N.W.2d 823 (2004) (emphasis added); *see also, e.g., United States v. Champlin Refining Co.*, 156 F.2d 769, 733 (10th Cir. 1946), *aff'd*,

331 U.S. 788, *reh'g denied*, 331 U.S. 869 (1947) ("In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within a state passes to such state upon its admission into the union, **if the rivers are then navigable.**") (emphasis added); *Bingenheimer v. Diamond Iron Mining Co.*, 237 Minn. 332, 342, 54 N.W.2d 912, 918 (1952) ("States organized in the public domain, as was Minnesota, became vested upon admission to the Union with title to the **beds of all waters then navigable** and not previously granted by the United States. . . .") (emphasis added).

Other courts have been even more emphatic in holding that the federal test must be applied as of the date of statehood. Many of these cases have arisen in Alaska because Alaska was a relative latecomer to statehood. In a case involving the Gulkana River, for instance, the federal district court in Alaska stated that "the requirement that title navigability be determined at the time of statehood means only that when making a title navigability determination, the *Daniel Ball* test is to be applied to the physical dimensions and physical configuration existing at the time of statehood." *Alaska v. United States*, 662 F. Supp. 455, 463 (D. Alaska 1987), *aff'd*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *see also Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989) ("[t]he river must be navigable at the time of statehood") (citing *United States v. Utah*, 283 U.S. at 74). The Ninth Circuit Court of Appeals, in another Alaska case, put it even more succinctly: "The key

moment for the determination of title is the instant when statehood is created. The governing doctrine is that new States 'enter the Union on an "equal footing" with the original 13 States [and] hold title to land under navigable waters within their boundaries upon entry into the Union.'" *Alaska v. United States*, 213 F.3d 1092, 1097 (9th Cir. 2000) (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987) (italics in original).

In the present case, the Montana Supreme Court initially recited the controlling rule that the "key inquiry" for determining title "is whether a river is 'navigable' at the time the State entered the Union." *PPL Montana*, 335 Mont. at 413, ¶23, 229 P.3d at 431 (quoting *Utah*, 283 U.S. at 76). But the Montana court then deviated from this "key inquiry" when it applied the test to the Madison River while relying on present-day uses of the river and modern modes of transportation. *Id.* at 442, ¶108, 229 P.3d at 449.

Montana became a state on November 8, 1889. *Id.* at 463, ¶177, 229 P.3d at 464 (Rice, J., dissenting). With respect to the Madison River, the State of Montana contended that "the Madison is used heavily today by commercial fishing guides and their clients and that this use is also sufficient to support a conclusion that the Madison River was susceptible to commercial navigation at the time of statehood." *Id.* at 415-16, ¶28, 229 P.3d at 432. The Montana Supreme Court relied on this purported modern-day usage of the river as evidence that the river was navigable in 1889. *Id.* at 442, ¶108, 229 P.3d at 449.

While acknowledging that there was "little historical documentation" regarding use of the river at or near statehood, the court upheld the district court's finding of navigability on summary judgment based in large part on the district court's statement that "the Madison today experiences 'considerable recreational use.'" *Id.* at 420, ¶41, 229 P.3d at 435. The court stated: "Despite the admittedly 'sparse' record before it, the District Court concluded that the Madison was a navigable river." *Id.*, ¶41, 229 P.3d at 435. The court then concluded: "While the historical usage of the Madison was not as well-established [as for the other two rivers], the evidence of a log float on its middle portion in the 19th century, combined with its present-day usage, demonstrates that this river was susceptible to providing a channel for commerce at the time of statehood." *Id.* at 439, ¶101, 229 P.3d at 447.

The Montana court expressly rejected PPL Montana's argument that this modern-day usage is not evidence to prove that the river was navigable at statehood. *Id.* at 417, ¶32, 229 P.3d at 443. In making this determination, the court ignored evidence presented by PPL Montana to show that the condition of the river today is different from its condition at statehood. In doing so, the court relied upon an opinion by the Ninth Circuit Court of Appeals, which had considered such evidence, but only because, in that case, the parties stipulated that the characteristics of that river had not changed since statehood. *Id.*

The Montana court's reliance on modern-day boating is directly contrary to the prior pronouncements of this Court that the test for determining navigability is applied on the date a state is admitted to the Union. *Utah*, 403 U.S. at 10. The Montana court's reliance on modern-day boating is also internally inconsistent with its own statement, just a few paragraphs earlier in its opinion, that "the key inquiry in determining whether a state holds title to riverbeds under the equal footing doctrine is whether a river was 'navigable' at the time the state entered the Union." *PPL Montana*, 355 Mont. at 413, ¶23, 229 P.3d at 431. Evidence of recreational use of a river in 2011 does not demonstrate that the river was susceptible to navigation in 1889.

The Montana court's inconsistent application of the "date of statehood" test is an example of the "drift, confusion, and divisions among the lower courts over these important, recurring federal issues" identified by PPL Montana in its petition to this Court. *See* Petition at 3. The extensive case law cited in Section I.C of the Petition shows that the lower courts have not consistently and steadfastly applied this Court's holdings on the "date of statehood" test. Despite often repeating the underlying language of that test (as the Montana court did in this instance, *see PPL Montana*, 355 Mont. at 413, ¶23, 229 P.3d at 431), the lower courts have failed to faithfully apply that test and have, instead, placed undue reliance on evidence of modern-day boating or other activities. *See* cases cited in Petition at § I.C.

If this Court does not correct this errant application of the federal test, other state courts also may feel free to use evidence of modern-day boating in making navigability determinations. This may have serious adverse consequences in many western states. For example, in Colorado, kayaks and whitewater rafts are frequently used today on mountain streams that no rational application of the federal test could possibly consider to be navigable. Indeed, such watercraft are specifically designed for use in the kind of "high and dangerous rapids" that this Court has previously held to be evidence of non-navigability. *See United States v. Utah*, 283 U.S. at 80. The lower courts need to be re-focused on the "date of statehood" element of the federal test for navigability. This Court should take this opportunity to instruct the Montana court regarding the proper application of the test.

CONCLUSION

The decision below by the Montana Supreme Court fails, for all of the reasons described above, to apply properly this Court's long-established test of navigability for title. Because the Montana decision, if it is allowed to stand, not only will affect PPL Montana, but also may adversely impact thousands of landowners and water users in Arizona, Colorado, New Mexico and other western states, Amici urge the Court to overturn the decision below and remand the

case with instructions to properly apply the test of navigability for title.

Respectfully submitted,

L. WILLIAM STAUDENMAIER
Counsel of Record
ANDREW M. JACOBS
SNELL & WILMER, L.L.P.
400 E. Van Buren Street
Suite 1900
Phoenix, Arizona 85004
(602) 382-6000
wstaudenmaier@swlaw.com
Counsel for
Freeport-McMoRan Corp.

JOHN B. WELDON
MARK A. MCGINNIS
SALMON, LEWIS &
WELDON, P.L.C.
2850 E. Camelback Road
Suite 200
Phoenix, Arizona 85016
(602) 801-9060
mam@slwplc.com
Counsel for Salt River
Project Agricultural
Improvement and
Power District and
Salt River Valley Water
Users' Association

September 6, 2011

AMICUS CURIAE BRIEF

RECORD
AND
PRESS

No. 10-218

In The
Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF *AMICI CURIAE* OF WILBUR AND KATHRYN HARDY; IDELLE COLLINS; CRAIG TOMPKINS; KIRTLAND FARMS 600, LLC; MARY CALDWELL; CRIS CALDWELL; CALDWELL FAMILY LLC; AND ROBERT AND MARILYN MALLOY IN SUPPORT OF PETITIONER

JENNIE L. BRICKER
Counsel of Record
BEVERLY C. PEARMAN
AMY EDWARDS
STOEL RIVES LLP
900 SW Fifth Ave., Ste. 2600
Portland, OR 97204
jlbricker@stoel.com
(503) 294-9631

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Oregon, Like Montana, Relies upon a Lenient Interpretation of the Federal Test to Make Belated Claims of Ownership	3
II. The Federal Test Should Not Change over Time to Broaden States' Claims to "Navigable" Waterways	5
III. This Court Should Reaffirm the Core Principles of the Federal Test	6
A. The Federal Test Has Been Clearly Applied and Developed in This Court's Jurisprudence	7
B. Sporadic, Ineffective Use Is Not Sufficient to Prove Navigability	10
C. Obstacles to Navigation Indicate Nonnavigability Where a Waterway Lacks a General Capacity for Useful Navigation	11
D. "Susceptibility" Cannot Substitute for Evidence of Usefulness	12
IV. This Court Should Clarify That Log Drives Are Not Evidence of Navigability	15
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 8

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 5

Guilliams v. Beaver Lake Club, 175 P. 437 (Or. 1918) 20

Hardy v. Oregon State Land Board, No. 083817Z7, Opinion (Feb. 10, 2011) 11, 15

Idaho v. United States, 533 U.S. 262 (2001) 9

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 19

Luscher v. Reynolds, 56 P.2d 1158 (Or. 1936) 20

North Dakota v. United States, 972 F.2d 235 (8th Cir. 1992) 18

Oklahoma v. Texas, 258 U.S. 574 (1922) 8

Oregon v. Riverfront Protective Association, No. 79-40-E (D. Or. Dec. 5, 1980) 16, 17

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) 9

Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission, 644 F.2d 785 (1981) 17

Shaw v. Oswego Iron Co., 10 Or. 371 (1882) 20

State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989) 9, 14, 15, 20

TABLE OF AUTHORITIES – Continued

Page

State of Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982) ..... *passim*

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) 7

The Montello, 87 U.S. (20 Wall.) 430 (1874) 7, 11, 12

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 17, 18, 19

United States v. Holt State Bank, 270 U.S. 49 (1926) 7

United States v. Oregon, 295 U.S. 1 (1935) 8, 9

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 7, 18

United States v. Utah, 283 U.S. 64 (1931) 12, 13, 14

Utah v. United States, 403 U.S. 9 (1971) 8, 9

Weise v. Smith, 3 Or. 445 (1869) 20

Wycoff v. Mayfield, 280 P. 340 (Or. 1929) 5

CONSTITUTIONAL PROVISIONS

Or. Const. art. VIII § 5 3

STATUTES

Or. Rev. Stat. § 274.400 3

Or. Rev. Stat. § 274.402 3

Or. Rev. Stat. § 274.430 9

Or. Laws 1973 ch. 496, § 2 3

Or. Laws 1977 ch. 471, § 1 19

TABLE OF AUTHORITIES – Continued

Page

Or. Laws 1983 ch. 566, § 1 ..... 19, 20

Or. Laws 1983 ch. 566, § 3 20

OTHER AUTHORITIES

22 Op. Or. Att'y Gen. 409 (Mar. 5, 1946) 5

23 Op. Or. Att'y Gen. 249 (June 10, 1947) 6

Oregon Department of State Lands, *Rogue River Navigability Report* (May 19, 2008) ..... *passim*

Philip G. Eastwick, 1879, *Examination of Rogue River, Oregon: G.L. Gillespie, Report of the Chief of Engineers* (U.S. Government Printing Office) at 1858-63 10

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are individuals and limited liability companies who own or have an interest in property affected by the State of Oregon's declaration of ownership of an 89-mile segment of the Rogue River in southern Oregon. Wilbur and Kathryn Hardy,[2] Idelle Collins, Craig Thompkins, Kirtland Farms 600, LLC, Mary Caldwell, Cris Caldwell, Caldwell Family LLC, and Robert and Marilyn Malloy (the "Rogue River Petitioners") were petitioners in *Hardy v. Oregon State Land Board and Oregon Department of State Lands*, Case No. 083817Z7, before the Circuit Court of the State of Oregon for the County of Jackson. The Rogue River Petitioners respectfully submit this brief in support of the brief of petitioner on a writ of certiorari to the Supreme Court of the State of Montana. This case is significant for the Rogue River Petitioners because *Hardy v. Oregon State Land Board* is currently on appeal to the Oregon Court of Appeals, which will review the lower court's decision concerning whether portions of the Rogue River were

---

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] Wilbur Hardy, petitioner before the Jackson County Circuit Court, is now deceased.

navigable for title. Certainly, the decision in this case will affect the outcome of the appeal.

SUMMARY OF ARGUMENT

The Rogue River Petitioners agree with PPL Montana that the Montana Supreme Court erroneously interpreted and applied the federal test for title navigability, employing an unduly lenient interpretation that favors the state's interest and does not comport with the jurisprudence of this Court, or background principles of law and property ownership, or indeed common sense.

The Rogue River Petitioners submit this brief to inform the Court about similarities between the State of Montana's assertion of ownership over waterways never previously considered navigable, and the State of Oregon's similar approach to Oregon waterways. To protect the stability of land titles in Oregon as in other states, we urge the Court to reiterate the importance of uniformity over time in the application of the federal test for title navigability, and to clarify the fundamental basis of the test – a waterway's overall, general capacity for useful navigation. Finally, we invite the Court to further clarify that log drives are not evidence of title navigability.

ARGUMENT

I. Oregon, Like Montana, Relies upon a Lenient Interpretation of the Federal Test to Make Belated Claims of Ownership.

In Oregon, the State Land Board, comprising the governor, the secretary of state, and the treasurer, has authority to assert title to the beds and banks of waterways that were navigable for title when Oregon became a state in 1859. Or. Const. art. VIII § 5; Or. Rev. Stat. § 274.402. The Department of State Lands ("DSL") functions as staff to the Land Board, and from its inception in 1967 one of its tasks was to determine which of Oregon's thousands of lakes, rivers, and streams were navigable for title. *See, e.g.*, Or. Laws 1973 ch. 496, § 2 (directing DSL to inventory navigable streams by July 1, 1977). The state has tended toward an aggressive approach in asserting state ownership.

In 1992, for example, DSL sent a letter to riparians on the Sandy River, near Portland, Oregon, notifying them, without preamble or process, that the state held title below the river's high water line. The Sandy River had not been meandered by the Government Land Office surveys, so most of the land the state claimed had ostensibly passed into private ownership. Several property owners sought redress at the legislature, and in 1995 the Oregon Legislative Assembly created a statutory process the state must follow to determine the navigability of Oregon waterways. *See* Or. Rev. Stat. §§ 274.400-.412. Acting under that law, the "navigability study statute," the State

Land Board and DSL have "studied" and declared navigable segments of the Sandy River in 2002, the John Day River in 2005, and the Rogue River in 2008. The navigability study statute provides for judicial review of the state's declaration of navigability, but affected property owners were not able to mount a court challenge until August 2008, when the Rogue River Petitioners asked the Jackson County Circuit Court to review the state's declaration under the Oregon Administrative Procedures Act. On March 28, 2011, the circuit court set aside the state's declaration and entered judgment for the petitioners. A petition for $555,174 in attorney fees and disbursements is still pending in the circuit court, and the state has appealed the judgment to the Oregon Court of Appeals.

The Rogue River flows 215 miles in a general east-west direction from its headwaters near Crater Lake National Park to the Pacific Ocean at Gold Beach, Oregon. In its upper reaches, the river's average gradient is 57 feet per mile, with ordinary flows that range from less than 1,000 cubic feet per second ("cfs") in September to more than 2,000 cfs in the spring. In the vicinity of and west of Grants Pass, Oregon, at river mile 100, the average gradient is 10 feet per mile or less and flows range from 1,100 to 5,000 cfs. Oregon Department of State Lands, *Rogue River Navigability Report* at 18-20, 37 (May 19, 2008) ("*Navigability Report*").[3] In the 1970s, the state had

[3] The *Navigability Report* is available on DSL's website, at http://oregonstatelands.us/DSL/NAV/rogue_intro.shtml.

already asserted ownership of the lower Rogue River from its mouth to river mile 68.5. The "study segment" declared navigable in 2008 extended from river miles 68.5 to 157.5, with the upper reach of claimed ownership less than 60 river miles downstream from the headwaters.

II. The Federal Test Should Not Change over Time to Broaden States' Claims to "Navigable" Waterways.

The Rogue River Petitioners agree with PPL Montana that the federal test for title navigability should not remain in flux – the equal footing doctrine as well as basic principles of stability in land titles mandate reasonable uniformity in its application, both between and among states and across the passage of years or decades. On the Rogue River, the state's assertion of ownership relied unabashedly on the liberalization of the federal test in the Ninth Circuit and in Oregon state courts. *Navigability Report* at 13. The state acknowledged, but discounted, the fact that historically the Rogue River had been viewed as nonnavigable. *See Wycoff v. Mayfield*, 280 P. 340 (Or. 1929) (concluding that the Rogue River was not navigable at river mile 128, squarely in the middle of the 2008 study segment); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 151 (1935) (taking judicial notice of the Rogue River's nonnavigability in the same reach as the 2008 study segment); 22 Op. Or. Atty. Gen. 409 (Mar. 5, 1946) (advising the state that the Rogue River was

not navigable for title); 23 Op. Or. Atty. Gen. 249, 250 (No. 363) (June 10, 1947) ("[W]e held that a point on the Rogue river, which is navigable for fishermen and hunters in rowboats and does not afford a channel for useful commerce, is not navigable in the sense that the state would acquire title to the bed of the stream.").

In essence, the state used what it perceived as an expansion of the reach of the title navigability test to enlarge its real property holdings at the expense of individual property owners. The Court should take this opportunity to clarify the test's scope and forestall this strategy in Oregon as well as other states.

III. This Court Should Reaffirm the Core Principles of the Federal Test.

The Rogue River Petitioners agree with PPL Montana that the Court should "provide a meaningful check on States and state courts by reaffirming certain core principles of the navigability-for-title test." Brief for Petitioner (Aug. 31, 2011) at 33. On the Rogue River, the State of Oregon, like Montana, relied on sparse evidence and a lenient interpretation of the federal test to claim the bed and banks of a river long regarded as nonnavigable. The two states used similar arguments that gave undue prominence to isolated aspects of the federal test without remaining faithful to its underlying principles as elucidated by this Court's precedent. First, the states each relied on isolated incidents of irrelevant or speculative use

as evidence of navigability, without analyzing the waterway's overall capacity for useful navigation in commerce. Second, because of their failure to analyze usefulness, both states minimize the significance of obstacles to navigation. Third, both Montana and Oregon resorted to the "susceptibility" aspect of the test to compensate for the lack of evidence of actual use at the time of statehood.

A. The Federal Test Has Been Clearly Applied and Developed in This Court's Jurisprudence.

This Court has developed the federal test for title navigability with reasonable clarity. After adopting the language and analysis from two admiralty law cases, *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), and *The Montello*, 87 U.S. (20 Wall.) 430 (1874), the Court has consistently employed, as the gravamen of navigability, the *general usefulness* of a waterway as a highway or channel for commerce at the time of statehood. *See The Montello*, 87 U.S. at 443 ("[T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce."); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699 (1899) (Rio Grande was nonnavigable because it lacked a "general capacity for navigation along its entire length."); *United States v. Holt State Bank*, 270 U.S. 49, 56-57 (1926) (Mud Lake and associated waterways were navigable because they were "dependable routes for trade and travel" and could provide, in their natural and ordinary

condition, "a channel for useful commerce."); *Utah v. United States*, 403 U.S. 9, 11 (1971) (Great Salt Lake was navigable because it "was used as a highway and that is the gist of the federal test.").

Where the evidence demonstrates general, overall usefulness, measured as of the date of the state's admission, a waterway is navigable for title and the state may claim ownership. Where the evidence falls short of that showing, the state has no claim. As this Court's decisions consistently hold, evidence of sporadic, ineffective, or attempted use is not sufficient to satisfy the test. Thus the Court concluded that neither the Red River nor the Arkansas River were navigable in Oklahoma because, though there was evidence of use, that use had been exceptional. *Oklahoma v. Texas*, 258 U.S. 574, 591-92 (1922) (Red River); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86, 89 (1922) (Arkansas River). On the Red River, there was evidence that small boats had transported goods and produce, but even that evidence was not enough to satisfy the navigability test because the use had been too difficult to make the river useful as a transportation route. Attempts to navigate it for commerce had ceased as soon as an alternative – rail transportation – presented itself. 258 U.S. at 589-90. Similarly, the Court decided that Oregon's Lake Malheur, Mud Lake, and Harney Lake were not navigable.[4] *United States v. Oregon*, 295 U.S. 1 (1935).

---

[4] In 1921, Oregon's legislature had enacted a law asserting state ownership of any lake that had been meandered by the

(Continued on following page)

As on the Red River, there was evidence of boat use around the time of statehood, but the Court characterized such use as "occasional," "sporadic," and "ineffective" and therefore concluded that the lakes did not possess "that capacity for general and common usefulness for purposes of trade and commerce which is essential to navigability." 295 U.S. at 22, 23.

The Court has not authored a navigability-for-title opinion, however, since *Utah v. United States* in 1971. In actuality, the Court has not provided a rigorous application and analysis of the federal test since *United States v. Oregon* in 1935.[5] In the interim, states like Oregon and Montana have strayed vast distances from anything like a faithful reading of the Court's precedent, and the Ninth Circuit has flatly left it behind in two title navigability decisions in Oregon and Alaska. *State of Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792 (9th Cir. 1982); *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989).

United States surveys. Or. Rev. Stat. § 274.430. The *United States v. Oregon Court* chastised the state for attempting to wrest title from the United States or its grantees "by legislative fiat." 295 U.S. at 29.

[5] The Court *has* decided cases addressing the validity of pre-statehood grants of waterways assumed to be navigable, *see, e.g., Idaho v. United States*, 533 U.S. 262 (2001), and it has concluded that tidality constitutes an independent basis for state ownership, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

B. Sporadic, Ineffective Use Is Not Sufficient to Prove Navigability.

To prove that the Rogue River was navigable in 1859, the State of Oregon cited to a handful of historical references to canoe use by Indian Tribes, to the use of cable ferries to *cross*, rather than navigate, the river, and to four accounts of boat travel in the 19th century. The first boat journey occurred in 1869, from Grants Pass at approximately river mile 100 downstream to the ocean, and was reported in the newspaper because it was a remarkable venture. *Navigability Report* at 42-43. The second and third private attempts did not take place until 25 years later, in 1894; they, too, were featured in the *Gold Beach Gazette*, which reported: "For the third time in a quarter century Rogue river has been navigated between Grants Pass and Gold Beach." *Id.* at 43. The only documented 19th-century travel on the river above Grants Pass was a government survey of the river's potential for navigation in 1879. The journey took Army Engineer Philip Eastwick from river mile 110.5 to river mile 51, where the examination ended abruptly when the boat was dashed to pieces in the rapids. *Id.* at 22-23, 44. Eastwick reported back that the Rogue River, "by reason of its ruggedness and forbidding character," was not navigable and could not be improved to render it navigable. Philip G. Eastwick, 1879, *Examination of Rogue River, Oregon: G.L. Gillespie, Report of the Chief of Engineers* (U.S. Government Printing Office) at 1863.

In asserting title to the Rogue River between river miles 100 and 68.5, the State of Oregon merely collected and catalogued historical accounts of sporadic, ineffective use, second-hand reports of Indian canoe sightings, and irrelevant evidence that overland travel had included cable ferry crossings. In applying the federal test to that evidence, the state failed utterly to analyze the overall usefulness of the 30-mile river segment as a highway for commerce. Nevertheless, the Jackson County Circuit Court, using a deferential "substantial evidence" standard, concluded on summary judgment that the state had proved its case for navigability between river miles 100 and 68.5. *Hardy v. Oregon State Land Board*, No. 083817Z7, Opinion (Feb. 10, 2011).

C. Obstacles to Navigation Indicate Non-navigability Where a Waterway Lacks a General Capacity for Useful Navigation.

The Montello, 87 U.S. (20 Wall.) 430 (1874), introduced the principle that obstructions to uninterrupted navigation would not preclude a finding that a river was navigable. Oregon, like Montana, has strayed from the core of the federal test for title navigability by over-emphasizing this aspect of the test's interpretation. *The Montello* Court began with the fundamental notion of usefulness, which is "the vital and essential point" of navigability. 87 U.S. at 443. *If* a river meets the usefulness requirement, *then* obstacles to navigation, such as rapids and sand bars, may be discounted and will not defeat overall navigability. *Id.* It follows that if a river, or a segment of a river,

does not meet the "vital and essential" requirement of usefulness, then it is not navigable. On the Rogue River, as on the disputed rivers in Montana, the overall character of the waterway was treacherous and difficult; obstacles to navigation were the norm, not the exception. *See United States v. Utah*, 283 U.S. 64, 77 (1931) ("We are concerned with long reaches with particular characteristics of navigability or non-navigability. . . ."). Rivers without a general character of usefulness for trade and travel are not navigable, and it is unfair to this Court's precedent to use isolated language from *The Montello* while sidestepping the true basis for navigability.

D. "Susceptibility" Cannot Substitute for Evidence of Usefulness.

United States v. Utah, 283 U.S. 64 (1931), developed the "susceptibility" aspect of the federal test. Both Oregon and Montana have compensated for thin evidence of actual use at the time of statehood with misplaced reliance on susceptibility. For example, the primary author of DSL's *Navigability Report* for the Rogue River made the following statement in his deposition: "On those parts where the uses can't be historically documented to the extent of other places, what we do is we fall back on the susceptibility." Kroft Dep. at 31:5-8; *Navigability Report* at 26-27, 32, 33, 35-36, 43.

Oregon, like Montana, treats susceptibility as though it were a separate prong of the federal test, an independent route to navigability. It is not. In *United*

States v. Utah, the navigable portions of the Green, Grand, and Colorado Rivers were not subject to extensive actual use, but there was a good explanation: That region was sparsely settled when Utah became a state. 283 U.S. at 82-83. The Court concluded that, while evidence showing actual use is "most persuasive," nevertheless, "where conditions of exploration and settlement explain the infrequency or limited nature of such use" it is appropriate to prove a river's susceptibility through other evidence, such as the waterway's physical characteristics. 283 U.S. at 82. It is *not* appropriate, however, to "fall back" on susceptibility without first examining the reasons for the lack of evidence of actual use.

On the Rogue River, the lack of actual use stemmed not from the fact that no one had settled near the river, but rather from the river's treacherous and generally nonnavigable character. In other words, the Rogue River simply did not afford a useful highway for transportation. In 1860, a year after statehood, the census indicated a population in Jackson and Josephine Counties of approximately 5,400 people, and the Government Land Office survey in 1854 showed dirt roads and pack trails along both sides of the river. *See Navigability Report* at 24 ("A number of roads and trails are indicated to exist in the 1850s paralleling various segments of the Rogue River."). The state's own evidence showed that the Rogue River basin was settled at the time of statehood and that people traveled extensively over land, transporting goods and equipment in commerce in defiance of

rugged terrain and the poor quality of pack trails and roads. If those travelers could have used the river, they would have. The fact that they did not indicates that the river was not useful for travel, and there is no justification for resort to the susceptibility aspect of the test.

The "susceptibility" component of the federal test cannot and should not carry the weight that Oregon and Montana wish to assign it, but those states have been emboldened by the Ninth Circuit's cavalier treatment of "susceptibility" in *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). In *Ahtna*, the Ninth Circuit held that present-day recreational use of the lower Gulkana River was sufficient to prove navigability for title. 891 F.2d at 1405. *Ahtna*, however, deviates from this Court's precedent in *United States v. Utah* by treating susceptibility as a "fall back" concept, much as the State of Oregon did on the Rogue River. Navigability, said the *Ahtna* court, "*only* means that, at the time of statehood, *regardless of the actual use of the river*, the river must have been susceptible to use as a highway for commerce." 891 F.2d at 1404 (emphasis added). The *Ahtna* court compounded its error by mixing precedents: To justify its position that recreational use constituted "commercial activity," the court imported the concept of "flexibility" from the regulatory navigability context into a case about title navigability. 891 F.2d at 1405.

As discussed above, however, the navigability-for-title test should *not* be flexible; because it affects land

title, it must be stable in its application, and in spite of the Ninth Circuit's digression in *Ahtna*, overall usefulness for navigation is still the essential principle of the federal test. If states like Oregon and Montana are to be permitted to make belated claims of ownership based on navigability, they must at a minimum conduct a rigorous, objective examination of a river's capacity for useful navigation at statehood.

IV. This Court Should Clarify That Log Drives Are Not Evidence of Navigability.

The Rogue River Petitioners agree with PPL Montana that log drives should not constitute evidence of navigability for title, but rather that "a river must be capable of carrying human travelers, not just logs or other inanimate objects," to be deemed navigable. Brief for Petitioner (Aug. 31, 2011) at 53. In pressing its claim to the Rogue River, the State of Oregon relied *solely* on use of the river for log drives in the upper reach of the 89-mile study segment. The state's evidence was ludicrously sparse: The *Navigability Report* mentions one unsuccessful tie drive that *may* have occurred in the 1880s, and it speculates that other log drives *probably* occurred between river miles 160 and 125.5 sometime around 1910. *Navigability Report* at 50-51. Not surprisingly, the circuit court decided that no matter how deferential the standard, the state had not demonstrated navigability between river miles 157.5 and 100. *Hardy v. Oregon*

State Land Board, No. 083817Z7, Opinion (Feb. 10, 2011).

The state's temerity in asserting title to 60 miles of river on such a thin evidentiary reed arises from a 1982 decision of the Ninth Circuit Court of Appeals. In *State of Oregon v. Riverfront Protection Association*, 672 F.2d 792 (9th Cir. 1982) ("*Riverfront*"), the Ninth Circuit reversed the District Court of Oregon to declare the McKenzie River navigable for title between river miles 0 and 37. Evidence in *Riverfront* was (by stipulation) limited to log drives that occurred for a 17-year period in the late 19th and early 20th centuries, attended by great difficulty and conducted only for a period of two or three months each year. 672 F.2d at 795. The defendant riparian property owners described the log drives in their opening brief: "It is not entirely accurate to say logs were 'floated' down the McKenzie. In truth, logs were hauled, pushed, rolled, blasted and pulled down the channel. The waters of the river were more of a lubricant than a vehicle of transportation." Defendant's Opening Memorandum at 16-17, *Oregon v. Riverfront Protective Ass'n*, No. 79-40-E (D. Or. Dec. 5, 1980).

The district court agreed that the McKenzie River was not navigable: First, it could only be used for an average of 53 days per year. Second, log driving required artificial alterations to the river – log drivers blasted a large rock out of the way in 1907 and routinely constructed "wing dams," which impounded tributaries so that the river's volume could be regulated. Third, the log drives had been conducted with

such difficulty that the McKenzie lacked practical usefulness as a highway for commerce. *Oregon v. Riverfront Protective Ass'n*, No. 79-40-E, Opinion at 13-15 (D. Or. Dec. 5, 1980).

The Ninth Circuit reversed, in a five-page opinion whose reasoning was fundamentally flawed. First, the court conflated analyses of navigability for title with navigability for regulatory jurisdiction. The opinion began with an implicit admission that the court's view of the case was influenced by a regulatory navigability case decided the previous year, *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785 (9th Cir. 1981), which found shingle bolt drives sufficient for navigability under the Federal Power Act. *See Riverfront*, 672 U.S. at 794-95. Later in the opinion, the Ninth Circuit posited that the construction of wing dams and use of dynamite to clear the channel could be disregarded in applying the aspect of the federal test that requires evaluation of a waterway in its natural and ordinary condition. 672 F.2d at 795-96. The court discounted the fact that wing dams "sometimes temporarily deepened" the river to aid log driving, *id.*, and it ignored the fact that the log drivers used dynamite not only to blast apart log jams, but also to clear the channel, *see Oregon v. Riverfront Protective Association*, No. 79-40-E, Opinion at 13. Instead, the court cited *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), another regulatory navigability case, by way of comparing the insignificance of wing dams and dynamite to large-scale "planned civil

engineering projects." 672 F.2d at 796. Ironically, even that inapplicable case seemed in disagreement with the court's position on wing dams: *Appalachian Electric* defined "natural and ordinary condition" as including "*volume of water*, the gradients and the *regularity of the flow*." 311 U.S. at 407 (emphasis added).

Second, the court veered sharply away from this Court's precedent. In *United States v. Rio Grande Dam & Irrigation Co.*, the Court stated: "The mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river." 174 U.S. 690, 698 (1899); *see also North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992) (rejecting, a decade after *Riverfront*, tie drives on the Little Missouri as evidence of navigability). Log drives on the McKenzie River could only take place in April, May, and early June: The river was too high in the winter and spring, and too low in late summer. The Ninth Circuit nonetheless quoted the *Rio Grande* statement and read it verbatim – log drives on the McKenzie could only take place for two or three months each year, but they "did not depend on high water" specifically, so the court held that the admittedly "seasonal nature of log drives on the McKenzie" would not defeat navigability. 672 F.2d at 795.

In regulatory navigability caselaw, "natural and ordinary condition" relates to the volume and gradient of a river and includes the concept that a river may be navigable for regulatory jurisdiction if it can

be made navigable by construction of reasonable improvements. In the regulatory context, navigability may, with the passage of time, "later arise." *Appalachian Electric*, 311 U.S. at 408. Not so in title navigability analysis: -Title navigability is property law; it determines whether title vested in a state on its date of admission. Neither title to real property, nor the title navigability doctrine itself, ought to be in flux: There is a repugnance in the law for unsettling expectations of property ownership. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned. . . .").

The *Riverfront* case unsettled more in Oregon than private property expectations. First, it sent title companies scrambling for cover – by the following year, a standard exception appeared in nearly all title insurance policies excluding coverage against ownership rights that might be claimed by the State of Oregon below the high water mark.

Second, the Oregon legislature took immediate action in its next regular session, repealing a statutory definition of navigability in which use of a stream for floating unrafted logs was not sufficient for state ownership. Or. Laws 1977 ch. 471, § 1 (codified as amended at Or. Rev. Stat. § 274.029, *repealed by* Or. Laws 1983 ch. 566, § 1). In the same session, DSL presented a comprehensive navigability study, 10 years in the making, that recommended the state not assert title to nontidal waterways unless they had

been meandered by the United States surveys. The legislature disregarded the report and repealed DSL's statutory mandate to determine ownership of Oregon waterways. Or. Laws 1983 ch. 566, §§ 1, 3.

Third, *Riverfront* turned 100 years of common law in Oregon inside out. Since early statehood, Oregon courts recognized a public right, in the nature of an easement, to float logs or boats on any stream capable of floating them, even though the bed and banks of the stream were in private ownership. *See Weise v. Smith*, 3 Or. 445 (1869); *Shaw v. Oswego Iron Co.*, 10 Or. 371 (1882); *Guilliams v. Beaver Lake Club*, 175 P. 437 (Or. 1918) (extending log floatation right to recreational use); *Luscher v. Reynolds*, 56 P.2d 1158 (Or. 1936) (same). Before the *Riverfront* case, streams that could be used for log drives, or later recreation, were understood in Oregon to be privately owned but subject to a right of public use. After the case, the state's confidence in asserting ownership based on title navigability swelled to gigantic proportions.

The Court should take this opportunity to correct the flawed reasoning in Ninth Circuit title navigability caselaw. The Rogue River Petitioners urge the Court to overrule *Riverfront* as well as the Ninth Circuit's other maverick decision, *State of Alaska v. Ahtna, Inc.*

CONCLUSION

For all the foregoing reasons, the Court should reverse the decision of the Montana Supreme Court and find for Petitioner.

Respectfully submitted,

JENNIE L. BRICKER
Counsel of Record
BEVERLY C. PEARMAN
AMY EDWARDS
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

SUPREME COURT, U.S. FILED

SEP - 7 2011

OFFICE OF THE CLERK

No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF THE MONTANA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, CATO INSTITUTE, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AS *AMICI CURIAE* SUPPORTING PETITIONER

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae Cato Institute

MARK F. "THOR" HEARNE II
Counsel of Record
ARENT FOX LLP
1050 Connecticut Ave. NW
Washington, DC 20036
thor@arentfox.com
(202) 857-6000

ROBERT C. O'BRIEN
STEVEN A. HASKINS
ARENT FOX LLP
555 West Fifth St., Fl. 48
Los Angeles, CA 90013-1065
obrien.robert@arentfox.com
(213) 629-7400

Counsel for Amicus Curiae Montana Farm Bureau Federation

September 7, 2011

Additional counsel on inside cover

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress
Law Library

ELIZABETH MILITO
NATIONAL FEDERATION
OF INDEPENDENT BUSINESS
SMALL BUSINESS
LEGAL CENTER
1201 F Street N.W., Suite 200
Washington, DC 20004
Elizabeth.milito@nfib.org
(202) 406-4443

Counsel for Amicus Curiae National Federation of Independent Business Small Business Legal Center

HERTHA L. LUND
LUND LAW, PLLC
502 S. 19th Ave, Ste. 306
Bozeman, MT 59718
lund@lund-law.com
(406) 586-6254

Additional Counsel for Amicus Curiae Montana Farm Bureau Federation

DANIELLE QUIST
AMERICAN FARM
BUREAU FEDERATION
600 Maryland Avenue, SW
Suite 1000W
Washington, DC 20024
daniellеq@fb.org
(202) 406-3618

Counsel for Amicus Curiae American Farm Bureau Federation

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. The Montana Supreme Court's Novel Title Navigability Standard Imperils Established Property Rights 4

A. For Decades, Montana Farmers And Ranchers Have Owned The Riverbeds At Issue 4

B. Montana And Its Courts Are Hostile To These Established Interests 5

C. The Decision Below Was Not Grounded In Law Or Fact 7

II. This Court Should Protect Settled Property Interests By Affirming The Utah Navigability Test 8

A. The Montana Supreme Court Gave Undue Deference To The State Of Montana's Evidence 9

B. Montana Did Not Meet Its Burden Of Proof On Summary Judgment 11

C. The Lower Courts Misapplied Utah, Thus Disregarding Material Facts Demonstrating Non-navigability 19

1. Utah Establishes Federal Standards For Determining Title Navigability.....20

2. Other Courts Have Correctly Applied Utah When Analyzing Title Navigability.....23

III. The Redefinition Of Established Private Property Rights Violates the Fifth Amendment 26

CONCLUSION..... 33

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Arenas v. United States,
322 U.S. 419 (1944) 18

Armstrong v. Manzo,
380 U.S. 545 (1965) 32

Bd. of Regents v. Roth,
408 U.S. 564 (1972) 27

Brewer-Elliot Oil & Gas Co. v. United States,
260 U.S. 77 (1922) ..... passim

Brinkeroff-Faris Trust & Sav. Co. v. Hill,
281 U.S. 673 (1930) 31

Chicago, B. & Q. R. Co. v. City of Chicago,
166 U.S. 226 (1897) 30

Dugan v. Rank,
372 U.S. 609 (1963) 6

E. Enters. v. Apfel,
524 U.S. 498 (1998) 31

Ex Parte Virginia,
100 U.S. 339 (1879) 30

George v. Beavark, Inc.,
402 F.2d 977 (8th Cir. 1968) 15

Great N. Ry. v. Sunburst Oil & Ref. Co.,
287 U.S. 358 (1932) 31

Hage v. United States,
35 Fed. Cl. 147 (1996) 6

Holyoke Co. v. Lyman,
82 U.S. 500 (1872) 5

Hughes v. Washington,
389 U.S. 290 (1967) 10, 29, 30, 31

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997) 10

In re River Queen,
275 F. Supp. 403 (W. D. Ark. 1967) 11, 25

In re Strahle,
250 F. Supp. 2d 997 (N.D. Ind. 2003) 15

Iowa-Wisconsin Bridge Co. v. United States,
84 F. Supp. 852 (Ct. Cl. 1949) 11

Iron Silver Min. Co. v. Elgin Min. & Smelting Co.,
118 U.S. 196 (1886) 32

Leo Sheep Co. v. United States,
440 U.S. 668 (1979) 9, 27

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 3

Louisiana v. Garfield,
211 U.S. 70 (1908) 32

Loving v. Alexander,
548 F. Supp. 1079 (W.D. Va. 1984) 24

Loving v. Alexander,
745 F.2d 861 (4th Cir. 1984) 24

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) 27

Lykes Bros. v. U.S. Army Corps of Eng'rs,
64 F.3d 630 (11th Cir. 1995) 12

Lynch v. Household Fin. Corp.,
405 U.S. 538 (1972) 26

Maritrans Inc. v. United States,
342 F.3d 1344 (Fed. Cir. 2003)..... 27

Miami Valley Conservancy Dist. v. Alexander,
692 F.2d 447 (6th Cir. 1982) 12

Mintzer v. N. Am. Dredging Co.,
242 F. 553 (N.D. Cal. 1916)..... 17

Mundy v. United States,
22 Cl. Ct. 33 (1990)..... 23, 24, 25

Niemotko v. Maryland,
340 U.S. 268 (1951) 21, 22

North Dakota ex rel. Bd. of Univ. and School Lands v. United States,
770 F. Supp. 506 (D. N.D. 1991) 11, 14

Oklahoma v. Texas,
258 U.S. 574 (1922) 25

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 9, 28

Payne v. Tennessee,
501 U.S. 808 (1991) 9, 32

Penn. Coal Co. v. Mahon,
260 U.S. 393 (1922) 29

Phillips Petroleum Co. v. Mississippi,
484 U.S. 469 (1988) .....passim

Sotomura v. Hawaii Cnty.,
460 F. Supp. 473 (D. Hawaii 1978)..... 29, 32

State Oil Co. v. Khan,
522 U.S. 3 (1997) 9, 32

Stevens v. Cannon Beach,
510 U.S. 1207 (1994) 30, 32

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,
130 S. Ct. 2592 (2010) ..... passim

Texaco, Inc. v. Short,
454 U.S. 516 (1982) 29

Ultimate Sportsbar, Inc. v. United States,
48 Fed. Cl. 540 (2001) 29

United States v. 531.10 Acres in Anderson Cnty., S.C.,
243 F. Supp. 981 (D. S.C. 1965) 25

United States v. Alaska,
521 U.S. 1 (1997) 10

United States v. Appalachian Elec. Power Co.,
311 U.S. 377 (1940) 24

United States v. Brewer-Elliot Oil & Gas Co.,
249 F. 609 (W.D. Okla. 1918) 15, 18

United States v. Crow, Pope & Land Enters., Inc.
340 F. Supp. 25 (N.D. Ga. 1972) 13, 24, 25, 27

United States v. Holt State Bank,
270 U.S. 49 (1926) 20, 33

United States v. Oregon,
295 U.S. 1 (1935) 10, 15

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 25

United States v. Utah,
283 U.S. 64 (1931) ..... passim

Wash. Water Power Co. v. F.E.R.C.,
775 F.2d 305 (D.C. Cir. 1985) 15

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 27

Yee v. City of Escondido,
503 U.S. 519 (1992) 28

STATE CASES

Boerner v. McCallister,
89 S.E. 2d 23 (Va. 1955) 23

Harrer v. N. Pac. Ry. Co.,
410 P.2d 713 (Mont. 1966) 6

Hot Springs Lumber & Mfg. Co. v. Revercomb,
65 S.E. 557 (Va. 1909) 23

Missoula v. Bakke,
198 P.2d 769 (Mont. 1948) 5

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,
582 P.2d 1352 (Or. 1978) 24

Osnes Livestock Co. v. Warren,
62 P.2d 206 (Mont. 1936) 6

People ex rel. Deneen v. Econ. Light & Power Co.,
89 N.E. 760 (Ill. 1909) 6, 13

Porter v. Galarneau,
911 P.2d 1143 (Mont. 1996) 17

PPL Mont., LLC v. Montana,
229 P.3d 421 (Mont. 2010) ..... passim

Smith v. Denniff,
60 P. 398 (Mont. 1900) 6

STATE CONSTITUTION AND STATUTES

MONT. CONST. art. IX, § 3 5

MONT. CODE ANN. § 70-16-201 5

OTHER AUTHORITIES

56 Am. Jur., Waters, § 193 25

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) 27

Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1457 (1990) 30

John A. Kupiec, *Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations In Total Regulatory Takings Claims*, 49 B.C. L. REV. 865, 903-07 (2008) 29

THE FEDERALIST No. 78 27

THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION 12, 22

INTEREST OF *AMICI CURIAE*[1]

The Montana Farm Bureau Federation represents more than 17,500 member families operating farms, ranches, and other agricultural concerns in almost every county in Montana. Agriculture and related industries have been a critical part of Montana's economy since its founding, and agriculture is the largest industry in the state. Since 1919, MFBF has provided its members with a forum representing their interests at every level of government. MFBF unites the individual voices of its members to address government policy that affects property rights, water quality, water rights, taxes, government regulations, use of public lands, and the environment.

MFBF believes its member families are best served by supporting our free enterprise system and defending those policies that protect individual freedom and opportunity.

MFBF is a member of the American Farm Bureau Federation (Farm Bureau). The Farm Bureau is organized as a federation of fifty independent state Farm Bureaus and the Puerto Rico Farm Bureau, whose members include family farmers. Established in 1919, the Farm Bureau is a general farm organization that protects, promotes, and represents the business, economic, social, and

---

[1] In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel has made a monetary contribution to the preparation or submission of this brief. In accordance with Rule 37.3(a), *amici* state that all parties consented to the filing of this brief.

educational interests of American farmers and ranchers before the Executive Branch, Congress, and federal courts. The Farm Bureau represents family farmer members who produce and raise every type of agricultural crop and commodity in the nation.

The Cato Institute is a nonpartisan national public policy research foundation dedicated to advancing principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Among its other endeavors in support of these goals, Cato files *amicus* briefs.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

SUMMARY OF THE ARGUMENT

The Montana Supreme Court's sweeping decision markedly diverges from fundamental principles protecting the property rights of private citizens.[2] It erred in its analysis of navigability in the context of title and ownership of submerged riverbeds by failing to follow this Court's title navigability standard.[3] This Court should overturn the decision below and reaffirm the federal test for title navigability found in *United States v. Utah*, 283 U.S. 64 (1931).

In Part I, *amici* explain the rights at stake not only for Montanans, but for property owners nationwide. In Part II, *amici* demonstrate why the Montana Supreme Court's affirmance of the trial court's premature summary judgment ruling was wrong. Part III explains why the decision below is a judicial taking and a due process violation, as understood by a majority of this Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010). For each of these reasons, this Court should reverse the Montana Supreme Court's erroneous decision.

---

[2] At their simplest, property rights in a physical thing are the rights "to possess, use and dispose of it." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). When the government permanently occupies another's property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.*

[3] This brief addresses "navigability" as it applies to determinations of title, and not navigability determinations in any other context (such as regulatory authority).

ARGUMENT

I. The Montana Supreme Court's Novel Title Navigability Standard Imperils Established Property Rights

A. For Decades, Montana Farmers And Ranchers Have Owned The Riverbeds At Issue

Montana's farmers and ranchers have been encouraged for many years, by the State of Montana, to use the streambeds at issue here. No one ever believed that Montana owned these streambeds. Property owners have never been charged for their use, and their ownership has never—prior to this case—been challenged. Until the ruling below, it was rightfully understood that the disputed river segments were "non-navigable."

That changed only because the lower courts ignored a "mountain" of evidence, while concurrently employing an amorphous legal standard inconsistent with federal navigability law. *See PPL Mont., LLC v. Montana*, 229 P.3d 421, 467 (Mont. 2010) (Rice, J., dissenting). The lower court's redefinition of title navigability paves the way for Montana to begin claiming title to dozens of submerged riverbeds long believed to be non-navigable, disturbing (and ultimately, usurping) the established property rights of its citizens. *See* JA 196. The Montana Supreme Court's analysis cannot stand.

B. Montana And Its Courts Are Hostile To These Established Interests

Amici are further concerned by Montana's open hostility to these settled property rights. Montana, for example, claims that PPL has no title to the riverbeds abutting its property because title does not appear in its deed. *See* Pet. Cert. Opp. at p. 24. This position flatly contradicts Montana law, providing that where rivers are non-navigable, title reverts to the United States, or, if applicable, to private owners. *See* MONT. CODE ANN. § 70-16-201; *Missoula v. Bakke*, 198 P.2d 769, 772 (Mont. 1948). Indeed, when land "borders upon a navigable . . . stream," the owner "takes to the edge of the . . . stream at the low-water mark," but when land abuts any other type of stream, "the owner takes to the middle of the . . . stream." *Id.* This is true for PPL, and it is true for all similarly-situated Montanans.[4]

MFBF's members use the streams flowing through their lands for irrigation and related purposes. *See* MONT. CONST. art. IX, § 3 (existing water rights exercised "for any useful or beneficial purpose" are "recognized and confirmed"). In many cases, these farmers have built small dams, diversions, or head gates on the riverbeds that are

---

[4] This is a longstanding principle of law dating to Blackstone. *See Holyoke Co. v. Lyman*, 82 U.S. 500, 506-07 (1872) ("Where such a proprietor owns the land on one side only of the stream, his right to the land and to the use of the water, whether used as power to operate mills and machinery or merely as a fishery, extends only to the middle thread of the stream, as at common law, and is subject to the same conditions and regulations as when the ownership includes the whole soil over which the water of the stream flows.").

crucial for ensuring effective irrigation. Pursuant to settled Montana law, farmers' rights to build these structures on rivers long considered non-navigable have never previously been challenged by the State.

The Montana Supreme Court's divergent navigability standard may also bar affected Montana farmers from exercising their existing water rights. *See Hage v. United States*, 35 Fed. Cl. 147, 159 (1996) ("Likewise, plaintiffs can have a property interest in water, and even defendant concedes that a water right is a type of property right."). Indeed, Montana's high court has previously explained that "[w]hen the [water] right was fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the owner could only be divested in some legal manner." *Osnes Livestock Co. v. Warren*, 62 P.2d 206, 210 (Mont. 1936). Consequently, that right cannot be appropriated by the government without compensation. *See Harrer v. N. Pac. Ry. Co.*, 410 P.2d 713, 175 (Mont. 1966) ("One who has appropriated water in Montana acquires a distinct property right"); *Smith v. Denniff*, 60 P. 398, 400 (Mont. 1900) (holding that a water right is a "positive, certain, and vested property right"); *see also People ex rel. Deneen v. Econ. Light & Power Co.*, 89 N.E. 760, 768 (Ill. 1909) (holding that "[t]he property rights of riparian owners in the bed of an unnavigable stream are as sacred as any other property right"). Had the Montana legislature passed a law in the same manner, it would have been a compensable taking. *See Hage*, 35 Fed. Cl. at 159; *see also Dugan v. Rank*, 372 U.S. 609, 625 (1963).

These are not hypothetical concerns for Montana farmers. The loss of water for irrigation and related purposes will have serious economic consequences. Montana previously released a list of at least three dozen rivers—or portions thereof—that it believes are navigable. JA 196. Already, MFBF members report disputes with emboldened state officials regarding the navigability of streams bisecting their lands. And in reliance upon the Montana Supreme Court's novel title navigability standard, Montana is preparing to levy unprecedented assessments on property owners.

C. The Decision Below Was Not Grounded In Law Or Fact

The decision below unduly assaulted Montanans' property rights in two crucial ways. First, in confirming the trial court's rush to judgment on Montana's behalf, the Montana Supreme Court ignored unmistakable evidence that significant portions of the upper Missouri, Clark Fork, and Madison rivers were not, in fact, navigable. The evidence was at least sufficient to raise a question of fact that should have been resolved at trial.

Second, the Montana Supreme Court came to the wayward conclusion that non-navigable stretches of the disputed rivers were, legally, too "short" to support a non-navigability finding. Relying on its own truncated analysis, the Montana Supreme Court held that even if certain stretches of river were non-navigable, those stretches were "too short to matter." *See PPL Mont.*, 229 P.3d at 464 (Rice, J., dissenting) ("Disturbing to me is that the Court is declaring, as a matter of law, that the reaches claimed by PPL to be

non-navigable are simply too 'short' to matter."). The Montana Supreme Court did this despite *Utah*'s unmistakable teaching that length is ***just one*** of the factual considerations that must be considered in a "precise" title navigability analysis. *See Utah*, 283 U.S. at 82-84.

The Montana Supreme Court was not applying an established navigability standard to a unique situation. Rather, it created a new navigability standard with the consequence of unduly divesting and destroying property interests previously established under *Utah*. This Court should affirm the federal *Utah* standard and reverse the Montana Supreme Court, reestablishing the settled property rights that Montanans have long enjoyed.

II. This Court Should Protect Settled Property Interests By Affirming The *Utah* Navigability Test

Montana seeks to benefit from redefining the property rights of its citizens out of existence.[5] It was for that very purpose that the lower courts disregarded the *Utah* title navigability standard, and instead adopted a "concept of navigability for title

---

[5] The lower court's ruling below led to an award of over $40 million against PPL. *See PPL Mont.*, 229 P.3d at 457. Given this precedent, the States' incentives to wrest federal law for their benefit could not be more apparent. *See, e.g.*, Outlook Declines As Budget Cut Proposals Come In, BILLINGS GAZETTE, Jan. 30, 2010, at A1; Charles S. Johnson, *State Sees Another Fall In Revenue Outlook*, BILLINGS GAZETTE, Mar. 14, 2009, at B1; *see also* Michael Powell, *Illinois Stops Paying Its Bills, But Can't Stop Digging Hole*, N.Y. TIMES, July 3, 2010, at A1; Mary Williams Walsh and Amy Schoenfeld, *Padded Pensions Add To New York's Fiscal Woes*, N.Y. TIMES, May 21, 2010, at A1.

purposes" charitably characterized as "*very liberally construed* by the United States Supreme Court." *PPL Mont.*, 229 P.3d at 446. The Montana Supreme Court thus denoted its intent to favor the State's ambitions from the outset.

A. The Montana Supreme Court Gave Undue Deference To The State Of Montana's Evidence

But the lower courts' "liberal" reading of *Utah* violated fundamental principles of property title jurisprudence. They failed to adequately protect settled property interests by engaging in a selective review of the facts designed to favor Montana. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (holding that *stare decisis* concerns are "at their acme" in cases involving property and contract rights) (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). Indeed, there is no better evidence to determine a river's "susceptibility to commerce" than available historical evidence of non-navigability, but this is precisely the evidence the lower courts ignored. *See Utah*, 283 U.S. at 82. This was error.

The property rights at issue here are the most fundamental in the property "bundle," and thus, a thorough factual review consistent with the rules of federal title navigability is vital. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned . . ."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-627 (2001) (rejecting the argument that inherent uncertainty in legislative action forecloses a taking, because "[t]he State may not put so potent a

Hobbesian stick into the Lockean bundle"). Here, the draconian nature of the relief Montana sought—reversion of title—must be tempered by the federal requirement that Montana meet its burden to prove navigability prior to embarking on a *de facto* taking.

Instead, the Montana Supreme Court conflated what it characterized as a "liberal" legal standard with a jurisprudential monster of its own creation—an indefensible evidentiary standard tilting the evidence in favor of the State, against PPL, and, by extension, against all other property holders holding title to riverbeds that Montana now belatedly disputes. *See PPL Mont.*, 229 P.3d at 467 (Rice, J., dissenting) (criticizing majority for "disregarding the considerable evidence PPL [] presented").

The lower courts' biased approach finds no succor in cases holding that States presumptively hold title to submerged riverbeds under navigable waters. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284-85 (1997); *United States v. Alaska*, 521 U.S. 1, 34 (1997); *United States v. Oregon*, 295 U.S. 1, 14 (1935). None of these cases supports the presumption that a river is navigable in the first instance. The presumption of title applies only ***after*** the *Utah* navigability test is satisfied. The lower courts below failed to apply the federal standard for proving title navigability, and thus erred to the extent that they invoked a presumption appropriate only for navigable waters.

There is no support in *Utah*—or in any of this Court's other navigability decisions—for the deference exhibited by the courts below. *See Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring) ("But to the extent that it constitutes a

sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate."). Quite the opposite—the State must demonstrate navigability and ownership. And, at the summary-judgment stage, Montana's burden of proof was extremely high.

B. Montana Did Not Meet Its Burden Of Proof On Summary Judgment

The lower courts' extraordinary deference to the State was plainly at odds with the requirement that Montana prove title navigability. *See North Dakota ex rel. Bd. of Univ. and School Lands v. United States*, 770 F. Supp. 506, 509 (D. N.D. 1991) (holding that North Dakota "bears the burden of proving that the Little Missouri River was navigable at the time of statehood"); *In re River Queen*, 275 F. Supp. 403, 408 (W. D. Ark. 1967) ("The burden of proof rests upon the petitioners to establish the navigability of the portion of White River that is involved in this proceeding"); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F. Supp. 852, 867 (Ct. Cl. 1949) (criticizing defendant for making "no effort" to prove navigability in fact). That deference was all the more indefensible at the summary-judgment stage of the proceedings. Indeed, the majority opinion below reflects the extent to which Montana's evidence was favored over PPL's. *See PPL Mont.*, 229 P.3d at 470 (Rice, J., dissenting) ("The Court's decision to the contrary makes one wonder just what evidence the Court would have considered sufficient for PPL to defeat summary judgment in this case.").

For instance, the majority held that the Great Falls reach was navigable because it had been

"portaged by the Lewis and Clark expedition, and many others, early in the 19th century, allowing the Missouri to provide a useful channel of commerce." *Id.* at 447. But that conclusion was dispelled by PPL's expert. *Id.* at 465 (Rice, J., dissenting); JA 375-377 (describing the extreme impracticality of Lewis and Clark's "portage," presenting evidence that their passage took several weeks, and concluding that their route held no commercial value). Indeed, there was little evidence that Lewis and Clark's route was used as a regular—much less useful—channel of commerce, however storied its early explorers may have been.[6] JA 789 (noting that 1866 Bancroft report, if taken at face value, "would have left those poor passengers in the middle of the Falls, and dead by drowning").[7] Montana's scant

---

[6] Clark wrote, "[T]he men has to haul with all their Strength wate & art, maney times every man all catching the grass & knobes & Stones with their hands to give them more force in drawing on the Canoes & Loads, and notwithstanding the Coolness of the air in high presperation and every halt, [those in the company] are asleep in a moment, maney limping from the Soreness of their feet. Some become fant for a few moments, but no man Complains all go Chearfully on—to State the fatigues of this party would take up more of the journal than other notes which I find Scercely time to Set down." THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION, June 23, 1805, *available at* http://lewisandclarkjournals.unl.edu; *see also* STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST 230-250 (1996).

[7] *Cf. Lykes Bros. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 635 (11th Cir. 1995) (affirming district court's holding of non-navigability despite a historical account describing one exploring party's ability to traverse the river "with great difficulty, pushing the canoes through the weeds, and hauling the canoes over two troublesome places"); *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 451 (6th Cir.

evidence was directly contradicted by PPL, creating a material issue of fact. *Id.* at 465-69 (Rice, J., dissenting).

The majority below also held that the upper Madison River was navigable at the time of statehood based on evidence of "present-day recreational use."[8] *Id.* at 448. But Montana offered no evidence that the rivers remain in the same condition today as they were in the late 19th Century. *See United States v. Crow, Pope & Land Enters., Inc.* 340 F. Supp. 25, 36 (N.D. Ga. 1972) ("[T]he court is unable to determine whether the natural and ordinary condition of the river, *i. e.*, volume of water, gradient, and regularity of flow, is capable of supporting navigation since that information . . . has not been presented."). Instead, the lower court shifted the burden to PPL to show that the river had changed—a burden PPL met. *See* JA 570; *PPL Mont.*, 229 P.3d at 465 (Rice, J., dissenting) ("For purposes of summary judgment, PPL demonstrated that the Madison River today is not the same as it was at the time of statehood, and that, at that time, it was not navigable."). This burden-shifting alone was contrary to elementary procedure, undermining the lower courts' holdings further.

1982) (rejecting navigability of 36-mile portion of river where evidence offered was of "early military expeditions").

[8] The rule that States must demonstrate evidence of navigability at the time of statehood itself plays a protective role in guarding private property rights, since any changes that convert "an un-navigable stream to one that is navigable" would simply "destroy or damage" existing rights. *See Econ. Light & Power*, 89 N.E. at 769.

Amici agree with Petitioner that evidence of modern-day recreational use does not establish navigability. Pet. Br. 49-52. But even assuming its relevance, Montana at least needed to lay the foundation for it by demonstrating that river conditions had not changed over time. *See PPL Mont.*, 229 P.3d at 466 (Rice, J., dissenting) (criticism of Montana's use of present-day evidence was rooted in "clear legal support"). The State offered ***no*** such evidence. *See North Dakota*, 972 F.2d at 240 (holding that modern day canoe use and modern day "boatability" data were not "reliable indicators" of navigability at statehood, particularly where conflicting evidence was offered "at trial"). PPL, on the other hand, demonstrated that they had changed. JA 570. At best, conditions at the time of statehood were disputed and summary judgment premature. *See PPL Mont.*, 229 P.3d at 467 (Rice, J., dissenting) (criticizing majority for disregarding expert opinion "that the current condition of the Madison River is completely different than at the time of statehood").

The trial court also wrongly relied on the present navigability of Hebgen Lake, near the Missouri River. *See id.* at 466-67 (Rice, J., dissenting). Hebgen Lake did not exist at the time of Montana's admission to the Union. *Id.*; JA 258. Its navigability is irrelevant to the factual question of whether the upper Missouri River was navigable when Montana became a state—the only relevant question in determining title navigability. *See id.* at 466-67 (Rice, J., dissenting) (citing *Oregon v. Riverfront Prot. Ass'n.*, 672 F.2d 792, 794 n.1 (9th Cir. 1982)).

Additional evidence ignored by the courts below was substantial, including:

- Evidence that the disputed rivers had been studied and considered non-navigable by federal agencies, including the Army Corps of Engineers. *See id.* at 464-65 (Rice, J., dissenting) ("Addressing the same stretches of the Madison River which are at issue here, the Army Corps of Engineers concluded that "[a]s far as is known there has never been any navigation on these streams, *and commercial navigation on them is entirely out of the question*"); *id.* at 465 (Rice, J., dissenting) (noting a 1891 Army Corps of Engineers report concluding that the Clark Fork was "a mountain torrential stream, full of rocks, rapids and falls, and *is utterly un-navigable, and incapable of being made navigable except at an enormous cost*"); *id.* at 467 (Rice, J., dissenting) (referencing the Corps' 1931 finding that "commercial navigation" on challenged portions of the Clark Fork river was "entirely out of the question"); *id.* at 465 (Rice, J., dissenting) (noting War Department's finding that the Great Falls were non-navigable); JA 472, 475, 535, 564, 919.[9]

---

[9] A host of cases demonstrate that this evidence was, at the very least, probative of navigability. *See Oregon*, 295 U.S. at 23 ("It is not without significance that the disputed area has been treated as nonnavigable both by the Secretary of the Interior and the Oregon courts."); *Wash. Water Power Co. v. F.E.R.C.*, 775 F.2d 305, 329 n.20 (D.C. Cir. 1985) (noting evidence that War Department and Army Corps of Engineers had determined the Spokane River to be non-navigable); *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) (holding that Army Corps of Engineers' opinion that stream was non-navigable was "not

- Historical evidence that disputed areas were not susceptible to commercial use at the time of statehood.[10] *See id.* at 464 (Rice, J., dissenting) ("PPL submitted a 'mountain'-over 500 pages-of affidavits and exhibits demonstrating that the portions of the Missouri, Madison, and Clark Fork Rivers at issue were non-navigable at the time of statehood."); JA 367, 656, 729, 922.
- Evidence and testimony challenging Montana's evidence. *See id.* at 466 (Rice, J., dissenting) (noting flaws in 1986 study

---

without significance"); *United States v. Brewer-Elliot Oil & Gas Co.*, 249 F. 609, 619 (W.D. Okla. 1918) ("Valuable evidence is found in the reports of engineers in the War Department . . . sufficient reference to them may be made to show their weight in the case."); *In re Strahle*, 250 F. Supp. 2d 997, 1001 (N.D. Ind. 2003) ("Arguably the Court's decision cannot rest solely on the conclusion of the United States Army Corps of Engineers, however it can be a significant factor in rendering its decision."). The Montana Supreme Court's dismissal of this evidence as "conclusory statements . . . insufficient as a matter of law to raise genuine issues of material fact" is, ironically enough, conclusory in its own right—and highly inappropriate at the summary judgment stage. *See PPL Mont.*, 229 P.3d at 448; *id.* at 469 (Rice, J., dissenting) ("[T]he District Court, and now this Court, has taken upon itself the role of factfinder, weighing PPL's evidence and concluding that it lacks credibility, rendering it mere 'conclusory statements.'").

[10] Historical evidence is admissible—if not the most reliable—evidence, and presents a question of weight for a trier of fact. In *Utah*, the United States put forth "limited historical facts" in support of its case, evidence that the Court weighed in its determination. 283 U.S. at 81-82 ("Much of this evidence as to actual navigation relates to the period after 1896, but the evidence was properly received and is reviewed by the master as being relevant. . . .").

Montana relied on to demonstrate navigability); *id.* at 470 (Rice, J., dissenting) (noting State's problematic reliance on "two of the least trustworthy historical sources" in establishing navigability).

- Evidence that Montana had not claimed the rivers in question before joining the lawsuit. *See id.* at 466 (Rice, J., dissenting) (noting evidence that Montana had previously identified only one section of the Madison River as navigable).[11]

The existence of a material factual dispute defeats summary judgment. *See Porter v. Galarneau*, 911 P.2d 1143, 1146-47 (Mont. 1996) (holding that the standard of review from summary judgment is *de novo* and that the party seeking summary judgment "has the burden of establishing a ***complete absence*** of any genuine factual issues") (emphasis added).

---

[11] *See also Brewer-Elliot*, 260 U.S. at 89 ("Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control."); *see also Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 492 (1988) (O'Connor, J., dissenting) (noting that facts demonstrated that "Mississippi showed no interest in the disputed land from the time it became a State until the 1970's"); *Mintzer v. N. Am. Dredging Co.*, 242 F. 553, 560-61 (N.D. Cal. 1916) (holding that river "has never been in fact navigated in any true sense; and has not been treated or considered, either by the public or by the state, as capable of navigation. While this lack of recognition by the state is not conclusive, ***it is nevertheless not without potency as a fact in its bearing on the question***, since it is not to be lightly presumed that the state will part with its title to property of known or recognized value for public use") (emphasis added).

The Montana Supreme Court did not comply with this elementary rule. *See id.* at 470 (Rice, J., dissenting) ("Consistent with the legal standards, this Court has steadfastly guarded against depriving a party of the right to trial by the improper entry of summary judgment. Today, I believe we step back from the protection of that right."); *see also* U.S. Amicus Brief, pp. 16-17 (noting lower court's "deficient application of the relevant legal principles to the facts of this case"). That was plain error.

The lower courts' rush to summary judgment is all the more disconcerting when Montana and the United States both previously insisted that title navigability was fact-intensive and, thus, concluded that this Court should not review this case. Pet. Cert. Opp. at 17-20; U.S. Amicus Brief at 16. Navigability is irreducibly fact-intensive, and often hotly disputed. *See Brewer-Elliot*, 249 F. at 615 ("The issue of navigability is one of fact. The purely 'legal test' cannot be accepted. A river is not navigable, unless so in fact."). This is necessarily so, given the crucial rights at stake—and because Montana, and other states, have a vested interest in tipping the scales in their own favor. *See Brewer-Elliot*, 260 U.S. at 89. Yet, in deciding the issues below on summary judgment, the lower courts set aside the very factual record they were charged with reviewing. *See PPL Mont.*, 229 P.3d at 467 (Rice, J., dissenting). That was insupportable as a matter of both law and common sense. *See Arenas v. United States*, 322 U.S. 419, 434 (1944) (in determining property rights on Indian reservation, setting aside grant of summary judgment for government because "we think the duty of the Court . . . can be discharged in a case of this complexity only by trial, findings and

judgment in regular course"); *PPL Mont.*, 229 P.3d at 467 (Rice, J., dissenting) (explaining that "evidentiary issues" raised by PPL "should be tested at trial-including cross-examination, rebuttal, and by application of the proper burden of proof-and resolved there by the factfinder"). Only a sufficient factual review under federal standards of title navigability ensures that fundamental property rights are protected.

The lower courts' disregard for accepted summary judgment standards deeply concerns *amici*'s affected members, many of whom are small farmers and ranchers without the resources to marshal the "mountain" of evidence that PPL presented below. *See* Pet. Br. 56. And the Montana Supreme Court's "very liberal" legal standard, which allows the State of Montana to establish title while ignoring contradictory facts, sets a dangerous precedent for divesting established property rights not only across Montana, but throughout the nation.

Because the Montana Supreme Court's decision is inconsistent with *Utah* and violates fundamental principles of jurisprudence applicable to property title, this Court should reverse.

C. The Lower Courts Misapplied *Utah*, Thus Disregarding Material Facts Demonstrating Non-navigability

The lower courts' inexplicable disregard for the facts below demonstrates that they were unlikely to give property owners a fair shake under any legal standard. Forging onward, however, they compounded their errant analysis by adopting a legal standard inordinately favorable to Montana. Rather

than "precisely" determining where navigability starts and stops as required under federal law, the Montana Supreme Court instead held that certain non-navigable parts of the river, typified by—but not limited to—the Great Falls, were too "short" to support a non-navigability finding. *Id.* at 464 (Rice, J. dissenting). This conclusory legal standard was highly inappropriate, particularly with fundamental property rights at stake.

1. *Utah* Establishes Federal Standards For Determining Title Navigability.

A review of *Utah* demonstrates the errors inherent in the lower courts' contrary approach. The United States brought suit to quiet title to certain submerged riverbeds claimed by the State of Utah.[12] *See Utah*, 283 U.S. at 71. To assist in its determination, the Court referred the case to a special master to "take the evidence and to report it with his findings of fact, conclusions of law, and recommendations for decree." *Id.* at 72. "Voluminous evidence" was offered, and the special master's report gave a "comprehensive statement of the facts adduced with respect to the topography of the rivers, their history, impediments to navigation, and the use, and susceptibility to use, of the rivers as highways of commerce." *Id.* at 72-73. The special

---

[12] Federal law indisputably governs title navigability. *See United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926) ("Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.").

master preliminarily found that various stretches of the Colorado, Green, and Grand Rivers were navigable, and others were non-navigable. *Id.* at 73-74. Utah did not challenge any of the special master's findings except for four miles of the Colorado River deemed as non-navigable. *Id.* at 74-75.

The Court determined that the four-mile stretch at issue in *Utah* was navigable based on the unique facts presented in that case. *See PPL Mont.*, 229 P.3d at 464 (Rice, J., dissenting) (explaining that the "nuances of the test for title navigability underscore the critical nature of the facts and circumstances of each case"). What must be considered here, however, is that the navigability of a stretch of river merely four miles long was carefully considered and adjudicated by this Court. *See Utah*, 283 U.S. at 89-90. Indeed, it directed that "the exact point at which navigability may be deemed to end . . . should be calculated ***precisely***."[13] *See id.* at 90 (emphasis added).

Consistent with this Court's direction, courts must "precisely" calculate where title navigability begins and ends. *Id.* Whether labeled a "section-by-section" approach or not, the result is the same—title rests in the state only at points where the river was navigable at the time of statehood. Otherwise, it belongs elsewhere. To determine the difference, this Court must undertake a precise review—one the lower courts failed to perform. *See id.*; *Brewer-Elliot*, 260 U.S. at 88; *see also Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) ("In cases in which there is a

---

[13] *Amici*'s brief seeking certiorari also discusses the *Utah* standard, and that discussion is incorporated herein.

claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.").

The practice of precisely determining navigability is regularly followed. Below, PPL even offered evidence of the Army Corps of Engineers' conclusion that "[f]or the purpose of administering the laws for the preservation and improvement of navigable waters of the United States, this Department considers Clark Fork navigable from its mouth in Pend O'Reille [sic] Lake to the Northern Pacific Railroad Bridge, ***a distance of only about four miles.***"[14] *See id.* at 467 (Rice, J., dissenting) (emphasis added); JA 568. This is notable, of course, because four miles is the same length of river that this Court considered when making its own "precise" determination of navigability in *Utah*. 283 U.S. at 89-90. The question is simply whether a stretch of river, however long, provided a useful channel of commerce at statehood.[15] If it did, it is navigable for

---

[14] Meriwether Lewis appears to have agreed. *See* THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION, July 4, 1806, *supra* note 5 (describing east fork of Clark Fork river as not navigable "in consequence of the rapids and shoals" obstructing its currents).

[15] Hypothetically, one can imagine a four-mile stretch of navigable river that is difficult to access and surrounded by non-navigable stretches, such as in a canyon. A "short" stretch such as this may remain non-navigable because this short stretch could serve no regular, useful commercial purpose. On the other hand, one can imagine the same four-mile stretch of river providing a potential (or actual) commercial link between towns—or from railroad to highway. In these cases, a navigability finding may be appropriate. Whatever the case, to

title. If it did not, it is not. With this in mind, title navigability must be precisely determined from point to point, using the correct legal standard and considering all the facts. *See PPL Mont.*, 229 P.3d at 464 (Rice, J., dissenting) (citing *Utah*).

2. Other Courts Have Correctly Applied *Utah* When Analyzing Title Navigability.

Lower courts following *Utah* are precise in adjudicating title navigability. The Federal Court of Claims, for example, demonstrated appropriate discretion in *Mundy v. United States*, 22 Cl. Ct. 33 (1990). In *Mundy*, plaintiffs sued the United States alleging that actions taken by the Army Corps of Engineers had diminished the value of their property on the Jackson River. The United States argued that the portion of the Jackson River neighboring plaintiffs' property was navigable, and thus the disputed riverbed belonged to the State.

Both sides argued that previous court rulings had established the navigability, or lack thereof, of the Jackson River. Plaintiffs cited two previous rulings by the Supreme Court of Virginia holding that sections of the Jackson were non-navigable. *See id.* at 35-36 (citing *Hot Springs Lumber & Mfg. Co. v. Revercomb*, 65 S.E. 557 (Va. 1909) and *Boerner v. McCallister*, 89 S.E. 2d 23 (Va. 1955)). The United States, on the other hand, cited a Fourth Circuit case

---

simply say that certain stretches of river are too "short" to be non-navigable is to substitute subjective whim for a measurable legal standard.

allegedly establishing the Jackson River's navigability between two points in its middle. *See id.* (citing *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984)).

The *Mundy* court reviewed the cases and distinguished them, principally because none addressed navigability ***at the point on the Jackson River at issue***. *See Mundy*, 22 Cl. Ct. at 36. Concluding that "[a] river can be navigable in some parts and non-navigable in others," it explained that its task was to "determine whether the Jackson River at RM-5—***where plaintiff claims to have an easement***—is a navigable river." *See id.* (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940)) (emphasis added).[16] Evidence

---

[16] *See also Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 87 (1922) (affirming lower courts' holding that Arkansas River "along the Osage Reservation" was not navigable, and that point of navigability began miles below the reservation); *Crow*, 340 F. Supp. at 31 (limiting holding to a "segment of the Chattahoochee River approximately 47 miles in length without regard to the navigability of the river at any other point"); *Loving v. Alexander*, 548 F. Supp. 1079, 1086 n.6 (W.D. Va. 1984) (in determining navigability for purposes of Commerce Clause jurisdiction, holding that "[t]he navigability of only a portion of a river may be determined irrespective of the navigability of the river at any other point"); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1356 (Or. 1978) (holding that under Equal Footing Rule, Oregon acquired title to "the bed of the navigable portions of the Willamette River"). In *Loving*, the Fourth Circuit upheld the district court's finding that a twenty-mile portion of the Jackson River was "navigable" for purposes of determining federal Commerce Clause jurisdiction. *See Loving v. Alexander*, 745 F.2d 861, 867 (4th Cir. 1984). It declined, however, to extend its ruling beyond the disputed portions of the river. *Id.* Dozens of plaintiffs were joined as parties in the *Loving* case. *Id.*

regarding the navigability of other river sections was not helpful.

Because the parties had not offered "sufficient evidence" on which to determine the Jackson River's navigability at the disputed point, summary judgment was denied and the parties ordered to complete factual discovery. *Id.* This is the correct approach.[17] When title is at stake, "precise" factual determinations are required. *See* Pet. Br. 35.

Montana's courts simply cannot ignore tangible evidence of non-navigability, particularly at the summary judgment stage. *See Utah*, 283 U.S. at 77 ("Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question to be determined upon evidence, how far navigability extends.") (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899)).[18] And the length of a

---

[17] *See Crow*, 340 F. Supp. at 29 (holding that it is "an evidentiary question as to where along the course of the river between its mouth and its source navigability ceases"); *United States v. 531.10 Acres in Anderson Cnty., S.C.*, 243 F. Supp. 981, 986-87 (D. S.C. 1965) (reviewing evidence put forward by historical experts "predicated generally upon the same information, with each arriving at varying determinations as to the question of navigability"); *see also PPL Mont.*, 229 P.3d at 462 (Rice, J., dissenting) ("[C]ourts look to relevant portions of a river and, based on the facts, determine whether particular reaches at issue are navigable or non-navigable.").

[18] *See also River Queen*, 275 F. Supp. at 408 (citing 56 Am. Jur., Waters, § 193, p. 656); *Phillips Petroleum*, 484 U.S. at 491 (O'Connor, J. dissenting) ("[I]f part of a freshwater river is navigable in fact, it does not follow that all contiguous parts of the river belong to the public trust, no matter how distant they are from the navigable part."); *Oklahoma v. Texas*, 258 U.S.

stretch of impassible river like the Great Falls reach does not provide legal cover for doing so. *See PPL Mont.*, 229 P.3d at 470 (Rice, J., dissenting) ("The Court does not explain why a non-navigable reach running from Fort Benton to Great Falls is too 'short,' and how it can so declare as a matter of law without factfinding"); U.S. Amicus Brief, p. 15 (noting that summary judgment on the basis that PPL only offered evidence of "relatively short interruptions of navigability" was "incorrect, particularly given the length of the segments as to which petitioner submitted evidence of non-navigability"). This Court requires just the opposite approach.

The lower courts' erroneous application of the governing *Utah* standard requires review and reversal, with direction to comply with this Court's previous holdings.

III. The Redefinition Of Established Private Property Rights Violates the Fifth Amendment

The Montana Supreme Court's errant decision is all the more troubling for its disregard of conventional principles governing property law. Courts must give existing property rights paramount consideration. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("That rights in property are basic civil rights has long been recognized.").

574, 591 (1922) ("While the evidence relating to the part of the river in the eastern half of the state is not so conclusive against [n]avigability as that relating to the western section, we think it establishes that trade and travel neither do nor can move over that part of the river . . .").

Property rights are not given or taken at whim, but are instead "defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)). The rules governing title navigability are no different.

Established property rights must be governed by established rules and enforced uniformly. *See Leo Sheep*, 440 U.S. at 687-88; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (noting that courts are more likely to defend rights where "they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases").[19] The *ipse dixit* adoption of a novel legal standard below was contrary to these principles.

Navigability, in the context of title, is fundamentally concerned with property ownership. *See Crow*, 340 F. Supp. at 33 ("[T]he court is not unmindful of the difference between suits brought to

---

[19] The need for clear principles to govern *all* cases is particularly noteworthy given the United States' recommended denial of certiorari merely because PPL is a private utility. *See* U.S. Amicus Brief at 15. Had this Court accepted that position and refused to grant *certiorari*, state tribunals would have been effectively insulated from review on this important federal question—at least until the federal ox was gored. The United States' position here ironically highlighted Hamilton's assertion that the judiciary must "ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST No. 78 (Hamilton).

fix the rights of riparian owners, those concerned with the determination of admiralty jurisdiction, and the scope of Congress' regulatory power over navigable waters under the "commerce clause.'"). Indeed, title is the most fundamental "stick" in the "Lockean bundle." *Palazzolo*, 533 U.S. at 627; *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation."). These rights demand adjudication in the most "precise" manner possible. *See Utah*, 283 U.S. at 89-90. This is true whether the property owner is a large utility or a small rancher.[20]

This Court recently revisited these concepts in *Stop the Beach*. Writing for a plurality of the Court, Justice Scalia concluded that "[t]he Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . . ." *Stop the Beach*, 130 S. Ct. at 2601. Thus, when a court "declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 2602; *see also Palazzolo*, 533 U.S. at 627 ("Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without

---

[20] Though it opposed *certiorari*, the United States recognized that this Court's review might be warranted upon "an attempt to apply the decision below more broadly" to claim "title from others." U.S. Amicus Brief, p. 15. But it has always been the case that this ruling affects more than just some "private utility"—rather, it substantially undermines title held by a large number of private landowners.

effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title.").[21]

To hold otherwise would render the constitutional prohibition against takings without meaning. *Stop the Beach*, 130 S. Ct. at 2602 (Scalia, J., plurality opinion) (("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."). Just as courts have adopted rules forbidding the judicial branch from violating non-economic rights, so the judicial branch must be barred from redefining, and in effect nullifying title to, private property rights.

---

[21] *See also Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding that statute may frustrate investment-backed expectations to such an extent that it amounts to a "taking"); *Phillips Petroleum*, 484 U.S. at 492 (O'Connor, J., dissenting) (criticizing majority's grant of non-navigable tidal areas to Mississippi where that decision "could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interests reasonably believed was lawfully theirs"); *Texaco, Inc. v. Short*, 454 U.S. 516, 542 (1982) (explaining that the "operative restrictions" of the Constitution are triggered where "the State seeks to change the fundamental nature of a property interest already in the hands of its owner") (Brennan, J., dissenting); *Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540, 550 (2001) (holding, in dicta, that a judicial taking occurs when "a court's decision does not arguably conform to reasonable expectations") (citing *Hughes*) (internal quotations omitted); *Sotomura*, 460 F. Supp. at 481 (holding that the Supreme Court would "probably vote" with Justice Stewart in ruling that "a taking of private property through a radical and retroactive change in state law, effected by judicial decision, is an unconstitutional taking"); John A. Kupiec, *Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations In Total Regulatory Takings Claims*, 49 B.C. L. REV. 865, 903-07 (2008).

See id. ("In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking"); *see also Hughes*, 389 U.S. at 298 (Stewart, J., concurring) ("[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does.").[22]

As an instrument of state power, the Montana Supreme Court's redefinition of established rights based on a novel legal standard is the very definition of a right destroyed by fiat. Despite the Montana Supreme Court's effete attempts at reassurance, small property owners know what is coming next. *See PPL Mont.*, 229 P.3d at 460-61.

And while Justice Kennedy's concurrence suggested that the Due Process Clause is the proper method for setting aside a "judicial decision" that "eliminates an established property right," the same concerns arise under a due process analysis as under a takings analysis. *See Stop the Beach*, 130 S. Ct. at 2614 (Kennedy, J., concurring) ("The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause."). Both are concerned with protecting and sustaining established rights.

---

[22] *See also Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897) ("[T]he prohibitions of the [Fourteenth Amendment] refer to all the instrumentalities of the state—to its legislative, executive, and judicial authorities . . . .") (citing *Ex Parte Virginia*, 100 U.S. 339, 346 (1879)); *Stevens v. Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting from denial of *certiorari*); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1457 (1990).

At a minimum, due process must accompany the redefinition of settled property rights. *See id.* at 2614 (Kennedy, J., concurring) ("It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.").[23] But property owners whose rights have been subsumed by the lower courts' broad navigability rulings have not had their day in court—due process was, indeed, sorely lacking.

The rulings below substantially revised the *Utah* standard, extinguishing existing property rights. *See id.* at 2615 (Kennedy, J., concurring) ("The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause."). Whether the Takings Clause or the Due Process Clause governs, both assume, as do *amici*, that a court's power does not include the ability "to eliminate or change established property rights." *Id.* (Kennedy, J., concurring). This case demonstrates why existing constitutional limitations on judicial action are of great consequence to property owners, and must be maintained accordingly.

---

[23] *See also E. Enters. v. Apfel*, 524 U.S. 498, 539-40 (1998) (Kennedy, J., concurring and dissenting) (noting that the Supreme Court has given "careful consideration to due process challenges to legislation with retroactive effects"); *Hughes*, 389 U.S. at 298 (Stewart, J., concurring) ("[T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate . . . ."); *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-66 (1932); *Brinkeroff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680-81 (1930).

Moreover, the lower courts' errors contradicted existing federal precedent. *See Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910).[24] Even if federal court decisions do not formally bind state courts, surely it must take more than a rogue "liberal" legal standard to overcome property rights once they are established. *See Brewer-Elliot*, 260 U.S. at 88 (holding that states cannot adopt a "retroactive rule for determining navigability which would destroy a title already accrued under federal law"). This is particularly true when those rights were swept away without an opportunity to defend them. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (explaining that a fundamental requirement of due process is "'the opportunity to be heard' . . . at a meaningful time and in a meaningful manner"). The lower courts' failure to conduct a thorough inquiry under the *Utah* standard violated both the Takings and the Due Process Clauses.

As such, the decision below set a damning precedent for affected Montanans. *See Louisiana v. Garfield*, 211 U.S. 70, 76 (1908); *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U.S. 196, 207-08 (1886); *see also Phillips Petroleum*, 484 U.S. at 494 (O'Connor, J., dissenting) (noting that adoption of broad definition of tidewaters as public trust lands "will increase the amount of land" vulnerable to challenge); *Cannon Beach*, 510 U.S. at 1211 (Scalia, J., dissenting from denial of certiorari). It uniformly

---

[24] *See also State Oil*, 522 U.S. at 20 (citing *Payne*, 501 U.S. at 828); *Sotomura v. Hawaii Cnty.*, 460 F. Supp. 473, 482 (D. Hawaii 1978) (holding that when "refusal of a state court to apply *res judicata* results in the direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge" due process).

upset title held by similarly-situated property owners, many of whom have enjoyed the benefits of title for decades. It also upset long-settled water rights that have not been disputed at all. The economic harm originating from the lower courts' distortion of these rights—and the concomitant undermining of the reasonable investment-backed expectations accompanying them—will be severe and enduring. Given the far-reaching and potentially intrusive effect of any title navigability analysis, the precise analysis mandated by federal navigability law is not only warranted but mandatory—all the more so where Montana's claim was as blatantly "belated and opportunistic" as here. *See Phillips Petroleum*, 484 U.S. at 492 (O'Connor, J., dissenting); Pet. Br. 54-58.

Whether labeled a Taking or a Due Process violation, the lower courts' actions violated established property rights. Properly understood, the *Utah* test is not just a guideline—much less a rubber stamp for States seeking favorable navigability rulings—but a constitutional requirement for properly adjudicating property rights. *Holt*, 270 U.S. at 55-56. The lower courts' failure to apply it is determinative here.

CONCLUSION

When the most fundamental stick in the property rights bundle is challenged, there is no substitute for the precise analysis required under federal law. The shortcuts taken below were, unfortunately, fatally flawed.

This Court should reverse the Montana Supreme Court with instructions to correctly apply federal—that is to say, precise—navigability

principles in analyzing ownership of title to the Montana riverbeds at issue in this case. Anything less is a violation of deep-rooted federal law backed by established constitutional principles.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, DC 20001
ishapiro@cato.org
(202) 842-0200

Counsel for the Cato Institute

ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street N.W.
Suite 200
Washington, DC 20004
Elizabeth.milito@nfib.org
(202) 406-4443

Counsel *for National Federation of Independent Business Small Business Legal Center*

MARK F. "THOR" HEARNE II
Counsel of Record
ARENT FOX LLP
1050 Connecticut Ave. NW
Washington, DC 20036
thor@arentfox.com
(202) 857-6000

ROBERT C. O'BRIEN
STEVEN A. HASKINS
ARENT FOX LLP
555 West Fifth St., Fl. 48
Los Angeles, CA 90013
obrien.robert@arentfox.com
(213) 629-7400

HERTHA L. LUND
LUND LAW, PLLC
502 S. 19th Ave, Ste. 306
Bozeman, MT 59718
(406) 586-6254

Counsel for Montana Farm Bureau Federation

DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, SW
Suite 1000W
Washington, DC 20024
danielleq@fb.org
(202) 406-3618

Counsel for American Farm Bureau Federation

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-218

Supreme Court, U.S.
FILED
SEP - 7 2011
OFFICE OF THE CLERK

In The Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Montana

BRIEF OF THE MONTANA WATER RESOURCES ASSOCIATION, THE NATIONAL WATER RESOURCES ASSOCIATION, HEIDI GILDRED, PATRICK BYRNE, CLINTON IRRIGATION DISTRICT, BOYD STANDLEY, FRANK SOMMER AND JEFFREY CARLILE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

HOLLY J. FRANZ
FRANZ & DRISCOLL PLLP
21 N. Last Chance Gulch,
Suite 210
Helena, MT 59601
(406) 442-0005
hollyjo@franzdriscoll.com

JON METROPOULOS
Counsel of Record
METROPOULOS LAW FIRM, PLLC
50 S. Last Chance Gulch,
Suite 4
Helena, MT 59601
(406) 442-0285
jon@metropouloslaw.com

Counsel for Amici Curiae

September 7, 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

23

QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river was navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. The Montana Supreme Court Rejected Long-Established Precedent To Confiscate The Property Of The Montana *Amici* And To Prepare The Path For Charging Petitioner (And Others) Multiple Millions Of Dollars In Past And Future Riverbed Rents	14
A. Montana Law Before The Current Decision	16
B. Montana Law Today	33
II. Unique Federalism Concerns Can Only Be Vindicated If This Court Reverses The Decision Of The Montana Supreme Court	35
CONCLUSION	39

TABLE OF AUTHORITIES

Page

CASES

Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 F. 638 (9th Cir. 1917) 21

American Land Co. v. Zeiss, 219 U.S. 47 (1911) 37

BFP v. Resolution Trust Corporation, 511 U.S. 531 (1994) 37

Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 38

Colorado v. New Mexico, 467 U.S. 301 (1984) 37

Department of State Lands v. Pettibone, 702 P.2d 948 (Mont. 1985) 32

Donich v. Johnson, 250 P. 963 (Mont. 1926) 22

Federal Land Bank v. Morris, 116 P.2d 1007 (Mont. 1941) 27

Geary v. Harper, 12 P.2d 276 (Mont. 1932) 25

General Agriculture Corp. v. Moore, 534 P.2d 859 (Mont. 1975) 30, 31

Helena Power Trans. Co. v. Spratt, 188 P. 773 (Mont. 1907) 20

Jeffers v. Montana Power Co., 217 P. 652 (Mont. 1923) 21, 22, 27, 29, 32

Jones v. Hanson, 320 P.2d 1007 (Mont. 1958) 28

Mettler v. Ames Realty Co., 201 P. 702 (Mont. 1921) 17

Montana Power Co. v. Carey, 685 P.2d 336 (Mont. 1984) 32

TABLE OF AUTHORITIES – Continued

Page

Montanans For The Responsible Use Of The School Trust v. State ex rel. Board of Land Commissioners, 989 P.2d 800 (Mont. 1999) 35

Newton v. Weiler, 286 P. 133 (Mont. 1930).....23, 24

Paradise Rainbows v. Fish & Game Commission, 421 P.2d 717 (Mont. 1966).....28

Peralta v. United States, 70 U.S. 434 (1865) 37

Prentice v. McKay, 98 P. 1081 (Mont. 1909).....21, 27, 29

Republic of Austria v. Altmann, 541 U.S. 677 (2004).....37

Smith v. Denniff, 60 P. 398 (Mont. 1900).....*passim*

Spratt v. Helena Power Trans. Co., 94 P. 631 (Mont. 1908) 21, 32, 37

State ex rel. Crowley v. District Court, 88 P.2d 23 (Mont. 1939) 25, 26, 27, 29

Stop The Beach Renourishment v. Florida Dep't of Environmental Protection, ___ U.S. ___, 130 S.Ct. 2592 (2010).....36

United States v. Conrad Inv. Co., 156 F. 123 (D. Mont. 1907) 19

United States v. Utah, 283 U.S. 64 (1931).....12

Wiley v. Decker, 73 P. 210 (Wyo. 1903) 21

CONSTITUTIONS AND STATUTES

1889 Mont. Const. Art. III, § 15 .....17, 29

1972 Mont. Const. Art. IX, § 3.....29, 30

TABLE OF AUTHORITIES – Continued

Page

Ch. 60, Mont. Laws 1927 22

Ch. 108, Mont. Laws 1927 ..... 22, 24

Ch. 123, Mont. Laws 1931 24

Ch. 148, Mont. Laws 1937 24

Sec. 1880, Civ. C. 1895 ..... 17, 18

Senate Bill 35, 62nd Leg., Mont. 2011 34

MISCELLANOUS

1972 Montana Const. Conv. Verbatim Trans. 29

INTEREST OF *AMICI CURIAE*[1]

MONTANA WATER RESOURCES ASSOCIATION

Amicus Montana Water Resources Association ("MWRA") is an association of holders of appropriated water rights, and other individuals and entities interested in issues related to water rights in Montana. Its members include irrigation districts, cooperative ditch companies, public water supply companies, utilities, power cooperatives and individual farmers, ranchers and others who put the waters of Montana to beneficial use.

Many of MWRA's members hold water rights on rivers that Montana claims are navigable, and own and operate diversion and impoundment structures located in the beds of such rivers. These members have a direct pecuniary interest in asking this Court to overturn the Montana Supreme Court's decision because, if it is left standing, it will lead to the imposition of charges for their use and operation of their diversion and impoundment structures, whether as

---

[1] In accordance with Rule 37.6 *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel have made a monetary contribution to the preparation or submission of this brief. In the interest of full disclosure, *amici* state the Petitioner is a member of MWRA, and Petitioner abstained from any involvement with the decision to file this brief and did not make any monetary contribution to its preparation or submission. In accordance with Rule 37.3(a), *amici* state that all parties consented to the filing of this brief.

owner in fee or owners with rights by prescription or adverse possession.

The Montana Supreme Court's navigability decision is deeply troubling to MWRA's members because it disturbs their long-standing property interests. Those members have two equally important types of ownership interests affected by that decision. Some members own real property directly abutting the rivers and so long as the rivers have not been legally designated "navigable" at Statehood, they own the property to the middle of the stream. Thus, if this Court reviews and overturns the Montana Supreme Court, they would have their fee ownership of sections of the riverbeds returned to them.

Other members own and operate diversion and impoundment structures built on or into the riverbeds, and by deed, prescriptive easement, or rights otherwise long-settled under state law hold the property right to continue to operate, without charge, those structures to divert or impound water allowing the exercise of their water rights. The Montana Court's decision upsets both types of these foundational rights. Whether by fee ownership or as part of their water rights under the beneficial use doctrine, MWRA's members had for decades exercised their right to continue to operate their diversion and impoundment structures on the riverbeds with no payment to anyone. This was the long-settled law in Montana in accordance with western water law generally. The Montana Supreme Court has now

taken these long held critical riverbed ownership and access rights and granted them to the State.

Some MWRA members also own real property along other rivers Montana claims are navigable and have a direct pecuniary interest in the value of that real property not being diminished by attacks on the historic and continuing right to appropriate and store water pursuant to appurtenant water rights and related diversion and impoundment structures located on navigable riverbeds.

MWRA members use of their constitutionally protected water rights in Montana are crucial to the success of the long-established ranching and farming businesses of some of its members. A central component of their use of the river's water is the operation of diversion structures located within the banks of the river. The historically unfettered access to the riverbed for purposes of operating these diversion structures will be severely jeopardized if this Court were to let stand the Montana Supreme Court's holdings that the State owns the entirety of the riverbeds at issue in trust and that no statutes of limitations apply to claims by the State seeking back rent for purported wrongful occupation of riverbeds by those structures.

MWRA members use numerous diversion and impoundment structures to appropriate water from the rivers, including ditches, headgates, intake pipes, diversion dams, and pumps. Use of these structures is absolutely necessary to access, use and store water.

Without such structures – which by their nature must be cut into, drilled under, or built on top of, the riverbed – it is impossible for MWRA's members to put their constitutionally protected water rights to beneficial use required by law for maintenance of these rights. MWRA's members cannot access water from a river without some use of the riverbed, even if that use is as limited as livestock walking onto the riverbed to stand and drink.

To MWRA's collective knowledge, no member has ever (before this case) been asked by a representative of the State to pay a fee, rent or any other type of payment for these diversion and impoundment structures. Likewise, to MWRA's collective knowledge its members have always made unrestricted use of the riverbeds to operate their diversion and impoundment structures.

In sum, MWRA's members have strong interests in the issues raised by PPL Montana's Petition, and will suffer direct, pecuniary losses as well as the diminishment or loss of property rights if this Court lets stand the rulings of the Montana Supreme Court. The interests at stake in this matter are not just those of "out-of-state corporations" as argued by the Montana Attorney General. Instead, MWRA's members, the irrigators, ranchers, small cooperatives, ditch companies, etc., will suffer the most if this Court does not reverse the decision.

NATIONAL WATER RESOURCES ASSOCIATION

Amicus the National Water Resources Association ("NWRA") is a nonprofit federation, with roots going back to the 1890s, of associations and individuals dedicated to the conservation, enhancement, and efficient management of our Nation's most precious natural resource: water. The NWRA is the oldest and most active national association concerned with water resources policy and development. Its strength is a reflection of the tremendous "grassroots" participation it has generated on virtually every national issue affecting western water conservation, management, and development.

The mission of *amicus* NWRA is to advocate federal policies, legislation, and regulations promoting protection, management, development, and beneficial use of water resources to:

- Achieve sustainable water supply for all beneficial uses in an economical and environmentally responsible manner.
- Promote the development, conservation, preservation and utilization of the water resources of the nation.

Amicus NWRA is a voluntary organization of state water associations whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers, and others with an interest in water issues in the Reclamation states of the Western

United States. *Amicus* NWRA has member associations in California, Colorado, Idaho, Montana, North Dakota, Nebraska, New Mexico, Nevada, Oregon, South Dakota, Texas, Utah, and Washington.

NWRA, its association members and their members share the concerns of its association member MWRA and its members, and are concerned that if this Court does not reverse the decision of the Montana Supreme Court, that the anti-water user policies from that decision could spread to their states as well.

PRIVATE PARTY LANDOWNERS

Amicus Heidi Gildred ("Gildred") owns riparian land along the Madison River in Montana. She draws water from the river to water livestock, has paid all property taxes assessed by Montana on all her lands, and believes that before this case that assessment included the beds and banks of the Madison to the middle of the stream along her riparian lands. Since this case, Montana has claimed ownership of those beds and banks that she continues to believe she owns, and has not offered her a tax refund. Gildred is concerned about what this uncertainty does to the value of her land as a whole (including her appurtenant water rights), and her ability to freely sell or transfer real property, along with water rights and their diversion structures. Gildred asks this Court to overturn the decision of the Montana Supreme Court

so that Montana will stop claiming ownership of what she believes to be her Madison riverbed lands.

Amicus Patrick Byrne ("Byrne") owns riparian land along the Clark Fork River in Montana around fourteen miles east of the City of Missoula. He has paid all property taxes assessed by Montana on all his lands, and believes that before this case that assessment included the beds and banks of the Clark Fork to the middle of the stream along his riparian lands. Following the decision by the district court in this case, Montana claimed ownership of those beds and banks that Byrne continues to believe he owns, and has not offered him a property tax refund. Byrne is concerned about what this uncertainty does to the value of his land as a whole (including his appurtenant water rights), and his ability to freely sell or transfer real property, along with appurtenant water rights and their diversion structures. *Amicus* Byrne lives along the East Mullan Road. As detailed in the report of Petitioner's expert historian, Dr. David Emmons, the Mullan Road was constructed by the United States Army, beginning in 1865, to connect the head of navigation on the Missouri River, Fort Benton, to the head of navigation on the Columbia River, Wallula Washington. (Pet. App. 242-43). That road was not "terminat[ed] on the Clark Fork [because] it was no more navigable than the upper Missouri." *Id.* Byrne agrees and asks this Court to overturn the decision of the Montana Supreme Court so Montana will stop claiming ownership of what he believes to be his Clark Fork riverbed lands.

Amicus Clinton Irrigation District ("CID") is an irrigation district on the Clark Fork River. Irrigation districts are limited purpose governmental units created by the district courts under Montana law. CID, created in 1919, is about 20 miles above Missoula on the Clark Fork River, and over 150 miles upstream of Thompson Falls, where PPL Montana's sole hydroelectric project on the Clark Fork River is located. CID holds water rights recognized under Montana law and diverts water from the Clark Fork River for its members using two headgates located on the river bank. After the district court's decision, CID received a letter from the Montana Department of Natural Resources and Conservation ("DNRC") telling CID that in order to continue making use of its headgates to divert water for its members, it would need to pay for an annual license or obtain an easement from the State for the stated reason that the Clark Fork is a navigable waterway, the streambed of which is owned by the State of Montana. CID believes the Clark Fork is not navigable, and that it has the right to have and use its headgates on the beds and banks of that river without any charge due to Montana. CID asks this Court to overturn the decision of the Montana Supreme Court so that it can continue to make use of its headgates on the Clark Fork riverbeds to divert and appropriate water for its members, without charge from the State, as it has always done before this case.

Amicus Boyd Standley ("Standley") owns riparian land along the upper Missouri River above the Great Falls and Fort Benton. His address is in Cascade,

Montana. Standley holds water rights on the Missouri, and irrigates his land and waters his livestock from the upper Missouri River using sump pumps and pipes located on and in the riverbeds. He has paid all property taxes assessed by Montana on all his lands, and believes that before this case that assessment included the beds and banks of the Missouri to the middle of the stream along his riparian lands. Since this case, Montana has claimed ownership of those beds and banks that he continues to believe he owns, and has not offered him a property tax refund. Before this case, Standley was never asked to pay a fee for his pumps and pipes on and in the riverbed, and has always appropriated and diverted water in accord with his water rights, for free and with no charge for a license or easement from the State. Standley is concerned about what this uncertainty does to the value of his land as a whole (including his appurtenant water rights), and his ability to freely sell or transfer real property, along with appurtenant water rights and their diversion structures. Standley asks this Court to overturn the decision of the Montana Supreme Court so that Montana will stop claiming ownership of what he believes to be his Missouri riverbed lands, and so that he will continue to be able to divert and appropriate water without charge as he and his family have always done.

Amicus Frank Sommer ("Sommer") owns riparian lands along the Bull River in Montana near its confluence with the Clark Fork River. When Sommer recently purchased his land, he believed it to include

the beds and banks of the Bull River to the middle of the river. Sommer has since paid all property taxes assessed by Montana on all his lands, and believes those assessments include the beds and banks of the Clark Fork to the middle of the stream along his riparian lands. Sommer has become aware that the Bull River is included on the State of Montana's "Navigable Rivers List," (Joint Appendix 196, 198), and that his riparian lands lie along the part of the river the State claims was navigable at statehood, and so claims that it, not Sommer (and his riparian neighbor across the river), owns the Bull River's beds and banks. As far as Sommer knows, although the State claims ownership of what he believes are his riverbed lands, it has not instructed the county to remove those lands from his property tax assessment, nor has it offered him a refund for taxes already paid. Sommer is concerned about what this uncertainty does to the value of his land as a whole (including his appurtenant water rights), and his ability to freely sell or transfer real property, along with water rights and their diversion structures. Sommer asks this Court to overturn the decision of the Montana Supreme Court so that Montana will stop claiming ownership of what he believes to be his Bull riverbed lands.

Amicus Jeffrey Carlile ("Carlile") owns riparian lands along the Smith River in Montana near its confluence with the upper Missouri River. Since long before this case, Carlile and his family have believed that riparian land to include the beds and banks of

the Smith River to the middle of the river. Carlile has paid all property taxes assessed by Montana on all his lands, and believes those assessments include the beds and banks of the Smith River to the middle of the stream along his riparian lands. Since this case, Carlile has become aware that the Smith River is included on the State of Montana's "Navigable Rivers List," (Joint Appendix 196, 199), and that his riparian lands lie along the part of the Smith River that the State claims was navigable at statehood, and so claims that it, not Carlile, owns the river's beds and banks. As far as Carlile can ascertain, although the State claims ownership of what he believes are his Smith riverbed lands, it has not instructed the county to remove those lands from his property tax assessment, nor has it offered him a refund for taxes already paid. Carlile is concerned about what this uncertainty does to the value of his land as a whole (including his appurtenant water rights), and his ability to freely sell or transfer real property, along with water rights and their diversion structures. Carlile asks this Court to overturn the decision of the Montana Supreme Court so that Montana will stop claiming ownership of what he believes to be his Smith riverbed lands.

SUMMARY OF ARGUMENT

Amici agree with Petitioner that the Montana Supreme Court's ruling regarding navigability is erroneous and should be reversed. This Court's precedent,

in particular *United States v. Utah,* 283 U.S. 64 (1931), contains federal protective rules that underlie an ancient doctrine of the law, which provides critical protection to owners of private property along non-navigable rivers. *Amici* urge this Court to uphold and reaffirm that precedent.

The ability of elected and appointed state court judges to take private property by simply ignoring or misconstruing state and federal precedent, including this Court's decisions, brings into sharp focus why this Court's review and authority over state courts regarding federal navigability title rights is a necessary and indispensible backstop against state takings of property rights that cannot be effectively challenged in any other court. What Montana has done will spread to other states unless this Court puts a stop to this now by overturning the decision of the Montana Supreme Court and reaffirming its long-standing, federal rules regarding what constitutes a navigable river at the time of statehood.

Along with rejecting this Court's precedent on navigability, the Montana Supreme Court also overturned a century of its own precedent recognizing and allowing free use of state owned riverbeds to appropriate water for beneficial use. It apparently did this so that the State of Montana could charge multiple millions in back and future rents to long-time beneficial users of riverbeds that the State now, a century after statehood and contrary to its prior acts and inactions, claims to own. Without the Montana Supreme Court's second action, rejection of the ancient

doctrine of free, beneficial use of the public riverbeds, which was fundamental to the development of the West, the navigability ruling would have had less monetary effect. Likewise, without the navigability ruling, the rejection of the beneficial use doctrine would not have brought much (if any) money into the State's empty coffers.

The Montana Supreme Court's joint rulings took the property of hundreds of riparian landowners and water rights users along the many hundreds of miles of the upper Missouri, Madison and Clark Fork Rivers that run through Montana, and threaten to do the same to the thousands of riparian owners and water rights users along the thirty-four other rivers on the list of what Montana claims as navigable rivers in the state. (Joint Appendix 196). If the Montana Supreme Court's navigability ruling is not reversed, water users throughout the West face a similar threat.

The large amount of precedent the Montana Supreme Court summarily rejected, implicitly if not directly, demonstrates the necessity for this Court to protect the stability and applicability of its controlling precedent on the foundational federal issues regarding navigability determinations, for the benefit of *amici* here and similarly situated persons throughout the West.

ARGUMENT

Amici rely upon and join in with the brief of Petitioner, and will not burden the Court with yet more argument regarding how the Montana Supreme Court so egregiously erred in its decision to reject this Court's precedent and controlling federal law, when declaring the entirety of the beds and banks of the upper Missouri, Madison and Clark Fork Rivers (and presumptively the beds and banks of the other thirty-four rivers on the State's Navigable Rivers List), to be owned by Montana since its statehood in 1889. Instead, by focusing on and explaining the historical background of the rest of that lengthy opinion, these *amici* offer context for *why* that decision was made, and to illustrate why it is so important for this Court to hold states to the long-standing *federal* rules for navigability: this case stands as a veritable "poster child" that demonstrates it is far too easy for *state* courts to sweep away long-standing *state* court precedent for result-driven reasons, implicitly violating fundamental federal rules if this Court does not act as a bulwark against such caprice.

I. The Montana Supreme Court Rejected Long-Established Precedent To Confiscate The Property Of The Montana *Amici* And To Prepare The Path For Charging Petitioner (And Others) Multiple Millions Of Dollars In Past And Future Riverbed Rents.

Once the Montana Supreme Court declared the State the indisputable owner of the riverbeds, by

rejecting (indeed eviscerating) this Court's federal title navigability rules, the State demanded monetary compensation for past and future uses, not only from Petitioner, but from *amicus* CID and other water users along the rivers. But to get to this point, the Montana Supreme Court first wrote out of state law a doctrine that had existed since the State first came into being, *i.e.*, that beneficial uses of water are public uses, and Montanans may freely use public state lands (including public riverbeds) to effectuate those public uses as an incident to the holding of water rights, without payment to the State.

From its earliest days, Montana recognized by Constitution, statute and case authority, that the right to make beneficial use of water is a vital part of the life of the State and its citizens; and further, that a necessary part of the exercise of the right to appropriate water is the right to free and open use of riverbeds for dams, ditches and other diversion and impoundment structures. This law – the law of appropriated water put to beneficial use – was, and is, part of the fabric of the Western United States, including the states where NWRA's members put their states' waters to beneficial use.

Montana's adoption of this doctrine was not a casual, infrequent or careless reference in the law: it is stated over and over again as a vital right critical to the development and character of Montana, and decade after decade, as an important part of life in Montana. Nevertheless, both the district court and the Montana Supreme Court ripped this ancient

doctrine from the pages of Montana's law books, and the concomitant property rights from its people, with the following holding:

> The District Court determined that Montana law did not exempt PPL from paying the State for the use of state lands while appropriating water for a beneficial use. . . . We affirm the District Court. The cases relied on by PPL simply do not establish that PPL has a right to make *free* appropriation of waters on and within state-owned [riverbed] lands without paying any compensation to the State.

(Pet. App. 65). *Amici* believe that Petitioner PPL Montana was correct, and that the decision of these 21st Century Montana courts to reject the 19th Century doctrine of beneficial use, represents nothing less than a critical cog in a massive land grab by the State for its own purposes, taken not only without just compensation paid to the prior owners, but with charges assessed to those prior owners for their past use.

Amici set out prior Montana law in some detail below, so that this Court can see the entire context of the erroneous decision it now has under review.

A. Montana Law Before The Current Decision.

1. Territorial Law.

As a territory, like most arid, western areas, Montana followed the customs of miners and ranchers

that all water is subject to appropriation for such beneficial uses as mining, irrigation and stock watering, and that "first in time is first in right." *Mettler v. Ames Realty Co.*, 201 P. 702, 708 (Mont. 1921).

2. Montana's First Constitution.

The 1889 Montana Constitution formally adopted the rule of appropriation:

> The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use.

Art. III, § 15, 1889 Mont. Const.

3. Montana's First Law Code.

In 1895, Montana's first Legislature codified the appropriation doctrine:

> The right to the use of running water flowing in the rivers, streams, canyons, and ravines of this state, may be acquired by appropriation.

(Section 1880, Civ. C. 1895). The 1895 Code also recognized the right to construct a "ditch, flume, pipe or aqueduct by which the diversion [of the water] is

made," and provided as follows regarding dams and reservoirs:

> The right to conduct water from or over the land of another for any beneficial use, includes the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor, may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for public use.

(Sections 1882, 1894, Civ. C. 1895; now 85-2-414, Mont. Code Ann.; Sec. 1880, Mont. Civ. C. 1895). Thus, compensation was required for constructing a diversion structure on private land owned by another, but no such payment was required for beneficial use of the public lands.

4. Case Law and Relevant Statutes.

In 1900, the Montana Supreme Court decided the seminal case of *Smith v. Denniff*, 60 P. 398 (Mont. 1900). *Smith* involved someone who had appropriated water from a stream along which he owned no riparian land. The court gave a detailed explanation regarding water rights, including appropriations made on state owned land:

> By section 1880 et seq. of the Civil Code the right is conferred upon any one to make a valid appropriation of water on the unsold

> state lands. But such permission can and does apply only to lands owned by the state.

Id. at 399.

The court explained that a ditch "over the public domain or state lands" is "an easement in the stream" . . . "a burden upon the land which [the appropriator] occupies but does not own," and held that this "servitude thereon or easement therein is a vested interest in the public domain. . . ." *Id.* at 400. Since an irrigation ditch by its nature must be cut into a riverbed, the State's navigable riverbeds were plainly included in this holding allowing free use of the state's public lands for diversion and appropriation of water.

In 1907, the Montana federal court discussed the right to construct diversion structures on the public lands as "an incident of" the right of appropriation. *United States v. Conrad Inv. Co.*, 156 F. 123 (D. Mont. 1907):

> [Plaintiff] could rightfully divert water from streams coursing through the public domain. . . . If it was entitled to do this, then it was entitled to do that which was reasonably necessary to effectuate the diversion, by the construction of a dam . . . *the right to do so would be but an incident of the right of diversion.*

Id. at 128 (emphasis added).

Also in 1907, several cases proceeded through Montana's courts regarding the Hauser dam (one of the dams now at issue in this case). None of those

cases suggested the State should be paid rent for the Missouri riverbeds where that dam and reservoir would be built, even as the dam builder sought eminent domain rights to take and pay private landowners for the lands to be submerged. In *Helena Power Trans. Co. v. Spratt*, 88 P. 773, 776 (Mont. 1907), the Montana Supreme Court determined that a non-public, for-profit use of water to generate power is a beneficial, public use, as is the storage and sale of water for irrigation, and allowed eminent domain, compensated takings of the private land at issue. *Id.* at 776.

In 1909, the Montana Supreme Court reaffirmed its seminal holding in *Smith* about beneficial uses on the state's public lands, while explaining again that a private landowner must be paid for such a use of his lands:

> The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation. . . . The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation, and *the statutes of this state* (sections 4840-4891)[2] only *apply to appropriations made on the public lands of the United States* **or** *of the state,* and to such as are made by individuals who have riparian rights either as owners of riparian lands or

---

[2] Section 1880, *et seq.*, recodified in 1907.

> through grants from such owners. *This is the doctrine announced in Smith v. Denniff.*

Prentice v. McKay, 98 P. 1081, 1083 (Mont. 1909) (emphasis added, citations omitted).

Other courts reported this established Montana law. *See, e.g., Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co.*, 239 F. 638, 644-45 (9th Cir. 1917) (discussing *Prentice v. McKay* and appropriation "upon the public lands of a state"); and *Wiley v. Decker*, 73 P. 210, 214 (Wyo. 1903) ("In Montana it seems one may make a valid appropriation of water with the same effect on unsold state lands").

Construction of instrumentalities on the riverbeds was open and obvious, particularly for such large structures as dams, dikes and weirs. As the Montana Supreme Court described in 1908, the Hauser dam is "an immense structure of steel and concrete, built across the Missouri river . . . about 70 feet high. . . ." *Spratt v. Helena Power Trans. Co.*, 94 P. 631 (Mont. 1908). If the right to freely use Montana's public riverbeds for such a public use was not firmly established, it is difficult to understand why the State did not assert a right to rent for use of the riverbeds at that time or for roughly 100 years after.

In 1923, a Madison River landowner complained that the Hebgen facility had injured his land. *Jeffers v. Montana Power Co.*, 217 P. 652 (Mont. 1923). The Montana Supreme Court held:

> [W]e find that the operation of the Hebgen reservoir, the sale of the use of the water stored therein, and the transportation of such waters so stored through the channels of the Madison river for a useful purpose is authorized by statute and is a lawful business. (Sections 7093, 7096, 7113, Rev. Code 1921). [The 1895 statutes, recodified in 1921].

Id. at 659.

In 1926, the Montana Supreme Court again addressed dams and reservoirs:

> the practice of impounding water in reservoirs has obtained in this state from the earliest days. . . . [C]ounsel for respondents insist that reservoirs should not be permitted in the course of, or at the headwaters of, adjudicated streams. This argument cannot be admitted.

Donich v. Johnson, 250 P. 963, 965-66 (Mont. 1926).

In 1927, Montana's Legislature addressed riverbed leases. It did not grant the Board of State Lands, or the newly-created Department of State Lands, plenary authority over the riverbeds. (Ch. 60, Mont. Laws 1927). Instead, by separate act the Legislature provided solely for oil and gas leasing on "any state lands," extending "[t]his power and authority to lease state lands for such purposes . . . to and include all lands owned by the State under navigable lakes and streams. . . ." (Sec. 1, Ch. 108, Mont. Laws 1927).

In 1930, the Montana Supreme Court made its first (and until this case, only) exception to the beneficial use doctrine. It addressed the appropriation of water on School Trust lands, not state owned riverbeds. *See Newton v. Weiler*, 286 P. 133 (Mont. 1930). Newton's rights depended upon establishing that her predecessor had acquired a prescriptive ditch easement against the State. Newton's counsel invoked *Smith*, which the Montana Supreme Court distinguished because the Weiler land was school land:

> The precise question here presented was not involved in [the *Smith*] case, and it appears not to have been heretofore passed upon by this court. Here the land in controversy is part of the land granted to the state of Montana by . . . the Enabling Act, for the support of common schools.

Id. at 136 (emphasis added). The court concluded that because of the requirements of federal law, Montana law could not be construed "as authorizing the right of one to obtain title to, or any estate or interest in, any part of the school lands of the state by adverse possession."

This was because such a construction "would readily appear [to] impinge upon the terms of the grant from the United States" set forth in the Enabling Act. *Id.* In other words, the public lands at issue in *Smith* and its progeny (*e.g.*, riverbeds) were distinguishable from school lands that are subject to the

Enabling Act's restrictions regarding their use and transfer.[3]

In 1931, the Montana Legislature enacted "An Act relating to Hydro-Electric Power Sites on State Lands." ("The HRA"). The 1931 Act granted the Land Board authority to lease power sites on "state lands." However, that power was *not* broadened to "include all lands owned by the State under navigable lakes and streams," as it specifically was in the 1927 Act, discussed above, or in a later 1937 law about mineral prospecting. (*Compare* Sec. 1, Ch. 108, Mont. Laws 1927; Sec. 1-6, Ch. 123, Mont. Laws 1931; Sec. 2, Ch. 148, Mont. Laws 1937). Thus, the HRA applied to *Newton v. Weiler* school lands, not *Smith v. Denniff* riverbeds and other state public lands.

If – as the State argued 70 years later, and the Montana Supreme Court decided in the opinion on review – the HRA was meant to apply to the hydroelectric dams already in existence in 1931, there would surely have been mention of those dams, either in the Act as offered or enacted, in the Legislative Minutes or the Commissioner's reports. There is not. This conclusion is further bolstered by the fact (conceded by the State) that for the next *seventy plus years*, the Land Board and the people who actually drafted and

---

[3] Although it misunderstood or ignored the importance of its ruling, the Montana Supreme Court in the case on review, properly recognized that the riverbeds are *not* Enabling Act school lands. (Pet. App. 64).

implemented the statute *never* attempted to apply the Act to any of the pre-existing hydroelectric dams or those later constructed on rivers the State now claims to be navigable. Rather, only after the elapse of decades and the passing of the drafters and legislators who crafted the HRA, did anyone suggest that it was somehow meant to apply to hydroelectric facilities *not* on school section lands, but on riverbeds the State now – a century after statehood and decades after passage of the HRA – claims it owns.

In 1932 (a year after enactment of the HRA), the Montana Supreme Court minced no words about a dispute over a dam:

> The law recognizes the right of an appropriator to construct a permanent dam in a stream, when necessary to raise the surface to the level of his headgate, and to maintain the same as a part of his irrigation system . . . , so long as such a dam is constructed and maintained in a safe condition. . . .

Geary v. Harper, 12 P.2d 276, 280 (Mont. 1932).

In 1939, the Montana Supreme Court again dealt with dams on the Madison River bed. In *State ex rel. Crowley v. District Court of Sixth Jud. Dist.*, 88 P.2d 23 (Mont. 1939), downstream water right holders sued the owner of the Hebgen dams regarding its operation of that dam. Crowley "maintained a wing dam constructed of brush, rocks and dirt extending into said Madison River at the head of his diversion ditch," to divert water into that ditch. *Id.* at 2.

The Montana Power Company (owner of the dam before PPL Montana) argued Crowley did not have a valid complaint because there was water for him to appropriate, he simply needed to build a better dam. The Montana Supreme Court firmly rejected that argument, holding instead that once a dam is built, as long as it remains "reasonably efficient" it cannot be interfered with. This is so because:

> *His right is to divert and use the water, not merely to have it left in the streambed*; that is the essential difference between riparian and appropriation rights.

Id. at 27 (emphasis added).

Quoting the Utah Supreme Court, the Montana Supreme Court concluded:

> We think the original taker or appropriator from a stream or body of water also *acquires the right to continue to use his method or means of diverting, which he has installed.*

Id. (emphasis added).

Completing its rejection of the Montana Power Company's arguments, the Montana Supreme Court invoked the then half-century old 1895 Code sections (recodified in 1921), and told the company to take any complaints to the legislature:

> [D]efendants must address themselves to the legislative branch, which expressly authorized that practice in 1894 by an enactment

> which now appears as section 7110, Revised Codes, and which reads in part as follows: *The right to conduct water from or over the land of another for any beneficial use includes the right to raise any water by means of dams, reservoirs, or embankments to a sufficient height to make the same available for the use intended.*

Id. at 30 (emphasis added). If the company did complain, it got nowhere. The law remained the same.

In 1941, the Montana Supreme Court again addressed the issue of dams, reaffirming *Jeffers:*

> [R]eservoirs, dams, ditches and flumes are the instrumentalities for the impounding and conveyance of the waters. . . .
>
> Our Constitution, Article III, Sec. 15, provides that the appropriation and use of these waters, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. . . . The storage of water in Montana is not new. *The western part of our state is now dotted with reservoirs, usually built near the headwaters of streams. This work has been encouraged at all times. . . .*

Federal Land Bank v. Morris, 116 P.2d 1007, 1011 (Mont. 1941) (emphasis added).

In 1958, the Montana Supreme Court once again reaffirmed *Smith* and *Prentice*, again in the context of requiring payment for beneficial use of private land, but not public land:

> The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation. . . . The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation . . . and *the statutes of this state* . . . only *apply to appropriations made on the public lands of the United States or of the state.*

Jones v. Hanson, 320 P.2d 1007, 1013 (Mont. 1958) (emphasis added).

In 1966, the State Fish & Game Commission refused to re-license a fishing pond. The parties disputed whether the Commission could require Paradise Rainbows to construct a fishladder on its dam seven years after the Commission had inspected it. The Montana Supreme Court said no:

> Under Article III, § 15 of the Montana Constitution, a private beneficial use of water is declared to be a public use. *Individuals who have put water to a beneficial use should not have their rights arbitrarily diluted, under claim of sovereign right or otherwise.*

Paradise Rainbows v. Fish & Game Commission, 421 P.2d 717, 721 (Mont. 1966) (emphasis added).

5. The 1972 Montana Constitution.

This was the history and status of Montana's law on beneficial use of water, and its appropriation and

capture by dams, reservoirs and other structures, when the delegates met in 1972 to promulgate Montana's new constitution. Up to this point, there is no question that ditches, headgates and dams of any nature were considered instrumentalities of appropriation for a beneficial, public use (including hydropower), and that since the navigable riverbeds are state public domain lands, they were freely available to be used for the construction and maintenance of these means of appropriation. The historic actions (and inactions) of Montana's legislative, judicial and executive branches make no sense if this were not so.

The delegates expressed their strong intent to maintain the law on appropriation as it had developed over the decades, stating that *they "felt it very important to preserve 80 years or more of water law litigation."* (Verbatim Trans. March 2, 1972, p.1303) (emphasis added). Thus, *Smith*, *Prentice*, *Jeffers*, *Crowley*, etc., were all accepted by the delegates as controlling and continuing law. Indeed, the delegates felt so strongly about this that they made virtually no changes in the language of Article III, Section 15 of the old constitution, but imported it almost verbatim into Article IX, Section 3(2) of the new constitution.

Delegate Berg discussed the concept that "[t]he State of Montana owns the water for the use and for the benefit of the people of this state," and for "navigable streams," the beds and banks are *"considered to be, on a navigable stream, public domain."* (1972 Montana Const. Conv. Verbatim Trans.) (emphasis added). This is the very concept applied by the Montana

Supreme Court in *Smith* and its progeny. The ratified language of Montana's constitution provides that waters in the state "are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." 1972 Mont. Const. Art. IX, § 3(3).

Finally, and most importantly, the delegates adopted the following provision:

> All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.

(1972 Mont. Const. Art. IX, § 3(1)). By this language, the Montana Constitution "grandfathered" in all beneficial uses in lawful existence before July 1, 1973 – the effective date of the new constitution – including all the diversion structures owned and operated by these *amici* and, and the dams of PPL Montana at issue herein.

The Montana Supreme Court quickly confirmed that the language in Article IX, Section 3(1) of the new constitution did precisely what the delegates intended. In *General Agriculture Corp. v. Moore*, 534 P.2d 859 (Mont. 1975), the court upheld a notice of water right filed under the old law against a new law passed by the legislature, which became effective on July 1, 1973:

> We construe Article IX, Section (3)(1) of the 1972 Constitution as not only reaffirming the public policy of the 1889 Constitution but also as recognizing and confirming all rights

> acquired under that Constitution and the implementing statutes enacted thereunder. Construed in this context, Article IX, Section 3 . . . is self-executing. . . . The word 'rights' is limited only by the word 'existing.' Outside this limitation it extends to 'All,' a word that needs no definition.

Id., 535 P.2d at 862-63. In short, *all* rights that existed under the water laws prior to July 1, 1973, are rights that still exist:

> The supremacy of constitutional mandates is too well established to require citation. . . . 'The state constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations.'

Id.

In 1984, the Montana Supreme Court adjudicated a dispute between a junior appropriator under Montana's new water permit law and senior appropriators under the old law. The senior beneficial users prevailed. As the court described the parties:

> Montana Power Company, a Montana corporation, owns and operates six hydroelectric generation facilities located on the Missouri River downstream from the [plaintiff's] proposed diversion point. Numerous existing

> water rights are appurtenant to these hydro-electric plants.

Montana Power Co. v. Carey, 685 P.2d 336, 338 (Mont. 1984).

Based on Montana's "water law" stretching back to "*Smith v. Denniff (1900)*," the Court affirmed DNRC's accommodation of the "Cochrane facility [which] has the largest turbine capacity of putting water to beneficial use on the Missouri River,. . . ." *Id.* at 339-40. Here again, as it did for Hauser in *Spratt*, and Hebgen in *Jeffers*, the Montana Supreme Court (and also the Montana DNRC) recognized the lawfulness of yet another of the dams in issue, and its status as a proper instrumentality for appropriation of water for a public, beneficial use.

In 1985, the Montana Supreme Court once again reaffirmed the continuing validity of *Smith* regarding use of the state public domain for appropriation of water – *i.e.*, "ordinary public trust lands held broadly in trust for the people" – as opposed to the school trust lands granted by the Enabling Act, "which are subject to a different set of rules than other public lands." *Dept. of State Lands v. Pettibone*, 702 P.2d 948, 955 (Mont. 1985); *distinguishing* and *affirming* *Smith v. Denniff*. That was the law in 1889, and under the 1972 Constitution, that continued to be the law for appropriation structures constructed before 1973, and "grandfathered" for all time, until 2010, when the Montana Supreme Court said: "never mind, we really didn't mean it."

B. Montana Law Today.

Under the decision at issue here, long-established property use rights of the Montana *amici* have effectively been judicially taken. This was accomplished by the artifice of the Montana Supreme Court simply saying that its earlier decisions, above, do not say what they actually do say, and that the understanding of water users throughout the State for decades was wrong. Thus, with the erroneous navigability ruling also in hand, the State was set free to run roughshod over the water related property rights of Petitioner, MWRA's members, the other *amici*, hereto, and thousands like them who own land and use water along Montana's rivers. And the decision provides a roadmap for the courts in the other states where NWRA's members reside, to do the same.

Needing an explanation for why Montana waited until the 21st century to claim rent due for dams built in the 19th and early 20th centuries, and for the decades of inexplicable inaction of the entirety of the mechanisms of state government to even suggest that beneficial users of public riverbeds were required to pay compensation to the State for public uses of the public's land, the Montana Supreme Court retreated into denial. The answer was not that *it* was wrong, and that *its* new reading of old precedent ran contrary to a century of history written large onto the Montana landscape by the very dams, ditches, headgates and weirs that stand in quiet rejection of its ruling. Instead, its answer was a mere "lack of diligence" on the part of the State and its land boards.

(Pet. App. 68). In point of fact, the State had not been dilatory all those decades, *it was correct*. There was no right to collect rent and no reason for the State to request it until the Montana Supreme Court totally rewrote this Court's federal law on navigability, and its own state law on beneficial use.

Understanding it could not leave other water users like these *amici* – who made their disbelief and anger at the district court's treatment of fellow beneficial user PPL known through *amicus* briefs in the state court proceedings – the Montana Supreme Court conceded they, too, could no longer rely on the ancient beneficial use doctrine, which it had now so facilely written out of existence. Instead, the "irrigators, stockmen, recreationists, and other water users" must look to the Montana legislature to what proper outcome is required by "the public trust with respect to these different classes of usage." (Pet. App. 90).

Before this Court granted PPL's Petition, MWRA and others did just that, finding the current legislature willing to at least set some limits on what they will be charged for uses once free. *See* Senate Bill 35, 62nd Legislature, Montana 2011. But this is at best a sop, and a likely short-lived one at that. What is clear now is that parties interested in seeing every nickel that could possibly be charged for any use of state trust lands will have every reason to file more lawsuits to force state agencies either to charge exorbitant prices for uses long free, or to lease exclusive riverbed rights to the highest bidder, stripping all value from water rights that cannot be effectively

used without access to riverbeds for diversion ditches, dams, pipelines, and the like. *See, e.g.*, *Amicus* Brief of Teacher's Unions, etc., (Joint Appendix 961) (asking the Montana Supreme Court to affirm the large rent award against Petitioner in order to increase state education revenue).

And there is no reason to believe that the current Montana Supreme Court, or a later elected one, will not agree and make real these Montana *amici's* worst fears. *See, e.g., Montanans For The Responsible Use Of The School Trust v. State ex rel. Board of Land Commissioners*, 989 P.2d 800 (Mont. 1999) (holding unconstitutional decades old statutes on setting charges for use of School Lands, and *inter alia,* forcing DNRC to put cabin leases long held by families up for lease to the highest bidder, and requiring DNRC to charge members of the public to gather dead wood from public lands).

II. Unique Federalism Concerns Cry Out for This Court to Reverse the Decision of the Montana Supreme Court.

Federalism is a two-way street. While states can look to this Court to protect it from improper actions by the federal government, surely the citizens of those states must be able to count on long-standing federal law, and this Court's enforcement of that law, to protect them from the confiscatory actions of their own states.

Here, in order to strip away long-established rights of *amici*, the first step was for the Montana Supreme Court to declare the rivers navigable at statehood and thus owned by the State. It did this without the benefit of an evidentiary hearing as to each section of the rivers, and in complete reliance on a "River Study" it itself had commissioned. (Pet. App. 193). This preemptive navigability conclusion is the foundation of Montana's confiscatory conduct, and if it is reversed, the other concerns discussed herein will, in largest part, go away. Without the ability to simply declare navigable, and thus owned by the State, without a trial of the facts, thirty-seven rivers that were not navigable at statehood, the State's new ability to charge for past and future beneficial uses made of newly state-owned riverbeds would have less effect. If the decision is not reversed, that flawed foundation will remain in place and a flood of judicial takings litigation will surely follow.

If the decision is not reversed, river by river, diversion by diversion, riverbed structure by riverbed structure, each rancher, farmer, ditch company, or the like, next focused on by the State, will have to pay up or fight. That fight will necessarily take place in state courts because of the Eleventh Amendment, but under *Stop The Beach Renourishment v. Florida Dep't of Environmental Protection,* 130 S.Ct. 2592 (2010), this Court's assistance will ultimately be sought, in case after case across Montana and across the West. The only way to avoid this slow motion property

rights train wreck that the Montana Supreme Court has put in motion is for this Court to reverse the decision before it and reinstate the fundamental, long-standing rules of title navigability.

This Court has long-recognized the importance of stability for property rights. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 693 (2004) (observing that "contractual [and] property rights [are] matters in which predictability and stability are of prime importance"); *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994) (noting "[w]e have said that 'the general welfare of society is involved in the security of titles to real estate") (*quoting American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911); *Colorado v. New Mexico*, 467 U.S. 301, 316 (1984) (recognizing society's "interest in increasing the stability of property rights" when discussing water rights); and *Peralta v. United States*, 70 U.S. 434, 439 (1865) ("The right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions.").

In its early days, Montana welcomed in-state and out-of-state corporations alike to build dams on it riverbeds and to provide electricity to its industry and citizens, and enacted a constitution and statutes precisely to encourage such conduct. *See, e.g., Spratt v. Helena Power Trans. Co.*, 94 P. 631, 634 (Mont. 1908). Likewise, as discussed above, Montana encouraged and enforced stability of title and water rights.

Sadly, in Montana today, that critical stability as to ownership of lands and water rights can only be maintained if this Court reverses the judgment that Montana owns the entirety of the riverbeds of the three rivers in question, and the underlying implicit holding that Montana also owns all of the riverbeds of the thirty-seven rivers on its navigable rivers list.

Indeed, the combined action of Montana's executive and judicial branches in this matter make it clear this Court was right to question whether states can be trusted with making decisions about riverbed ownership. *Brewer-Elliot Oil & Gas Co. v. United States,* 260 U.S. 77, 89 (1922) (recognizing the problem that "[s]ome states have sought to retain title to the bed of streams by recognizing them as navigable when they are not actually so.") Without enforcement of the federal navigability rules adopted by this Court, and ignored by the Montana courts, the obvious answer is no. Only reversal of the Montana Supreme Court's decision can remedy the important property ownership concerns of these *amici*.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Montana Supreme Court.

Respectfully submitted,

JON METROPOULOS
Counsel of Record
METROPOULOS LAW
50 S. Last Chance Gulch,
Suite 4
Helena, MT 59601
(406) 442-0285
jon@metropouloslaw.com

September 7, 2011

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-218

Supreme Court, U.S.
FILED
SEP - 7 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE UTAH FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

STEVEN J. LECHNER
Counsel of Record
JOEL M. SPECTOR
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

QUESTION PRESENTED

Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question "very liberally construed" in the State's favor?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE UTAH FARM BUREAU FEDERATION	1
IDENTITY AND INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	9
ARGUMENT	10
I. PRIVATE PROPERTY IS THE GUARDIAN OF LIBERTY	10
II. CERTAINTY OF TITLE IS OF PARAMOUNT IMPORTANCE TO PRIVATE PROPERTY OWNERS AND SOCIETY	15
III. THE EQUAL FOOTING DOCTRINE IS IN ACCORDANCE WITH CERTAINTY OF TITLE PRINCIPLES	22
IV. THIS COURT SHOULD EMPHATICALLY DECLARE THAT EVIDENCE OF PRESENT-DAY USE HAS LITTLE, IF ANY, ROLE IN DETERMINING NAVIGABILITY FOR TITLE PURPOSES BECAUSE IT CREATES UNCERTAINTY OF TITLE	24
A. Navigability For Title Purposes Is Determined By Federal Law	24

TABLE OF CONTENTS – Continued

Page

B. The Montana Supreme Court Created A New Navigability For Title Test That Is Based Upon Present-Day Use 26

C. The Montana Supreme Court's New Present-Day Use Test Has No Support In This Court's Decisions Or Those Of Other Courts 28

D. The Montana Supreme Court's Present-Day Use Test Violates Certainty Of Title Principles And Undermines Private Property Rights 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989) 31

Alvey Dev. Corp. v. Mackelprang, 51 P.3d 45 (Utah Ct. App. 2002) 19

American Land Co. v. Zeiss, 219 U.S. 47 (1911) 16

Arkansas River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738 (Ark. App. 2003) 30

Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 26

Carpenter v. Duke, 56 S.E. 938 (N.C. 1907) 19

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) 14

Colorado v. New Mexico, 467 U.S. 310 (1984) 16

Doolittle's Lessee v. Bryan, 55 U.S. 563 (1852) 16

Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981) 18

Galt v. State Dept. of Fish, Wildlife & Parks, 731 P.2d 912 (Mont. 1987) 19

George v. Beavark, Inc., 402 F.2d 977 (8th Cir. 1968) 28

Geosearch, Inc. v. Andrus, 508 F. Supp. 839 (D. Wyo. 1981) 18

Hughes v. State of Wash., 389 U.S. 290 (1967) 26

Iron Silver Min. Co. v. Elgin Min. & Smelting Co., 118 U.S. 196 (1886) 17

TABLE OF AUTHORITIES – Continued

Page

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 21, 25, 26

Kean v. Calumet Canal & Improvement Co., 190 U.S. 452 (1903) 17

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 15

Leo Sheep Co. v. United States, 440 U.S. 668 (1979) 17, 18

Lownsdale v. Portland, 15 F. Cas. 1036 (D. Or. 1861) 19

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 14

Matter of Estate of Violi, 482 N.E.2d 29 (N.Y. 1985) 19

McIver v. Ragan, 15 U.S. (2 Wheat.) 25 (1817) 20

McMaster v. United States, 2010 WL 3582555 (E.D. Cal. 2010) 2

Montana Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984) 19

Morse v. Lorenz, 104 N.E. 237 (Ill. 1914) 19

Mountain States Legal Found. v. Hodel, 799 F.2d 1423 (10th Cir. 1986) 2

North Dakota ex rel. Bd. of Univ. and Sch. Lands v. Andrus, 671 F.2d 271 (8th Cir. 1982), *rev'd on other grounds*, 461 U.S. 273 (1983) 30

TABLE OF AUTHORITIES – Continued

Page

North Dakota ex rel. Bd. of Univ. and Sch. Lands v. United States, 972 F.2d 235 (8th Cir. 1992) 25, 30

Oklahoma v. Texas, 258 U.S. 574 (1922) 27

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 23, 25

Pan Am. Petroleum Corp. v. Pierson, 284 F.2d 649 (10th Cir. 1960) 18

Peralta v. United States, 70 U.S. 434 (1865) 15

Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007) 27

PPL Montana, LLC v. State of Montana, 229 P.3d 421 (Mont. 2010) ..... *passim*

Proctor v. Sagamore Big Game Club, 265 F.2d 196 (3rd Cir. 1959) 20

Seven Up Pete Venture v. Montana, 114 P.3d 1009 (Mont. 2005), *cert. denied*, 546 U.S. 1170 (2006) 19

Shields v. Collins, 268 N.W.2d 371 (Mich. Ct. App. 1978) 19

State of Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979) 2

Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot., ___ U.S. ___, 130 S. Ct. 2592 (2010) 15

Stupak-Thrall v. Glickman, 988 F. Supp. 1055 (W.D. Mich. 1997) 2

Sumner v. Seaton, 19 A. 884 (N.J. Ch. 1890) 21

TABLE OF AUTHORITIES – Continued

Page

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).....24, 25

United States v. Beggerly, 524 U.S. 38 (1998).....20

United States v. Holt State Bank, 270 U.S. 49 (1926).....24, 25

United States v. Jenks, 22 F.3d 1513 (10th Cir. 1994), *appeal after remand*, 129 F.3d 1348 (10th Cir. 1997).....2

United States v. Lee, 106 U.S. 196 (1882).....10

United States v. Locke, 471 U.S. 84 (1985).....22

United States v. Oregon, 295 U.S. 1 (1935).....24

United States v. Reimann, 504 F.2d 135 (10th Cir. 1974).....16

United States v. Utah, 283 U.S. 64 (1931).....23, 28, 29, 30, 33

United States v. Wharton, 514 F.2d 406 (9th Cir. 1975).....21

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987).....22

Utah Stream Access Coalition v. Park, Civ. No. 110500360 (Third Judicial District).....3

Utah v. United States, 403 U.S. 9 (1971).....24

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).....26

TABLE OF AUTHORITIES – Continued

Page

STATUTES

An Act to provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50 (1789) 23

Desert Land Act of 1877, 43 U.S.C. §§ 321-339 2

Homestead Act of 1862, Act of May 20, 1862, ch. 75, 12 Stat. 392 (1862) (repealed 1976) 2

16 U.S.C. § 803(e) 5

28 U.S.C. § 2409a 20

43 U.S.C. § 772 16

Northwest Ordinance of 1787, art. V 22, 23

RULES

Supreme Court Rule 37.3 1

Supreme Court Rule 37.6 1

OTHER AUTHORITIES

Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135 (1918) 20

Steven W. Carothers & Dorothy A. House, *Decommissioning Glen Canyon Dam: The Key to Colorado River Ecosystem Restoration and Recovery of Endangered Species?*, 42 Ariz. L. Rev. 215 (2000) 33

TABLE OF AUTHORITIES – Continued

Page

James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2d ed. 1998) 10, 11, 12, 13, 15

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) 21

Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002) 12

Paul W. Gates, *History of Public Land Law Development* (1968) 2

John Locke, *Second Treatise of Government* (C.B. Macpherson ed., 1980) 11

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE UTAH FARM BUREAU FEDERATION

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation and the Utah Farm Bureau Federation, respectfully submit this amicus curiae brief, on behalf of themselves and their members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has thousands of members throughout the United States, many of whom own and use property in the West. Since its creation in 1977, MSLF and its attorneys have participated in litigation to defend the

[1] The parties have consented to the filing of this amicus curiae brief by filing a blanket consent with this Court. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, counsel for amici curiae affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity other than amici curiae, their members, and counsel made a monetary contribution specifically for the preparation or submission of this brief.

right to own and use property and to prevent governments from redefining property rights. *E.g.*, *State of Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc); *United States v. Jenks*, 22 F.3d 1513 (10th Cir. 1994), *appeal after remand*, 129 F.3d 1348 (10th Cir. 1997); *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997); *McMaster v. United States*, 2010 WL 3582555 (E.D. Cal. 2010).

The Utah Farm Bureau Federation ("UFBF") is a non-profit corporation organized under the laws of the State of Utah. UFBF was formed in 1916 to protect, promote, and assert business, economic, social, and educational interest of its membership. UFBF is Utah's largest farming and ranching organization, consisting of 28 county Farm Bureaus and more than 30,000 member families. Many of UFBF's members are descendants and/or successors-in-interest to the original pioneers, who settled Utah. Like many pioneers in the arid West, these pioneers settled on, improved, and cultivated lands adjacent to water bodies, built diversion works, and, ultimately, received title to these lands, including the beds under non-navigable water bodies, from the United States. *See* Homestead Act of 1862, Act of May 20, 1862, ch. 75, 12 Stat. 392 (1862) (repealed 1976); Desert Land Act of 1877, 43 U.S.C. §§ 321-339 (granting the right to enter upon desert lands and receive title thereto after improving the lands through the beneficial application of water); Paul W. Gates, *History of Public*

Land Law Development 635-36 (1968) (noting that as settlers moved west past the 100th meridian they naturally settled on lands adjacent to streams). Importantly, many of these pioneers received their patents and concomitant property interests before Utah was admitted into the Union.

In the instant case, the Montana Supreme Court, in total disregard of 140 years of this Court's precedents, created a new test for determining whether a water body is navigable for title purposes. In so doing, the Montana Supreme Court not only assessed tens of millions in dollars in back rent against Petitioner, PPL Montana, LLC ("PPL"), but also upset the settled and investment-backed expectations of other landowners along the Missouri, Clark Fork, and Madison Rivers in Montana, who have been using and paying taxes on land they reasonably believed they owned.

Unless this Court corrects the mistakes made by the Montana Supreme Court, the settled and investment-backed expectations of hundreds of other landowners in Montana and Utah, including UFBF and MSLF members, could be destroyed. In fact, there is a current effort by a non-state entity to apply the Montana Supreme Court's new navigability for title test on the Weber River in Utah. *Utah Stream Access Coalition v. Park*, Civ. No. 110500360 (Third Judicial District). UFBF members own land along that river and risk losing title to their land that is critical to their farming and ranching operations, and on which they and their predecessors have been paying taxes on for over 100 years. The State of Utah has also

expressed concerns that this case could adversely impact private property rights and more than 100 years of settled water law. Importantly, the State of Utah has never asserted that the Weber River is navigable for title purposes.

STATEMENT OF THE CASE

This case involves the State of Montana's attempt to redefine private property interests to effectuate a land grab and to reap a huge financial windfall. Specifically, this case involves ownership of riverbeds under more than 500 miles of rivers, including approximately 5,600 acres of riverbeds under dams and reservoirs that are part of two federally licensed hydropower projects on the Missouri, Clark Fork, and Madison Rivers in Montana. The two hydropower projects at issue, the Missouri-Madison Project and the Thompson Falls Project, have a combined generating capacity of approximately 350 megawatts. This valuable energy is sold to customers in Montana and surrounding states.

The Missouri-Madison project includes nine dams built between 1891 and 1958 on the Missouri and Madison rivers. Because they are designed to generate hydropower, the dams were constructed on sections of the river with flowing rapids and vertical drops. Five dams are on the Missouri River near Great Falls, Montana. At the time of statehood, this 17-mile stretch of the Missouri contained five historic waterfalls and had an elevation drop of more than

600 feet. Two other dams are located on the Stubbs Ferry stretch of the Missouri River, near Helena, Montana. The last two dams are on the Madison River. One of these dams, the Hebgen Dam, stores and releases water to regulate flow to the other downstream dams. The Missouri-Madison project was first licensed in 1956 and, in September 2000, the federal government issued a new license that expires in 2040.

The Thompson Falls project, which began operations in 1915, is located on the Clark Fork River at Thompson Falls, Montana. This project, which was constructed on a naturally occurring waterfall, was first licensed by the federal government in 1949, and re-licensed in 1979. This license expires in 2025.

The State of Montana participated in the federal licensing proceedings for both of these projects and neither claimed ownership of the riverbeds under the projects nor suggested that it was entitled to lease payments for the use of the riverbeds. For decades the riverbeds under the dams and reservoirs were understood to be either private lands owned by the Montana Power Company ("MPC") or other private parties from whom flood easements were granted, or federal lands for which the federal government was paid substantial sums of money for the use thereof. *See* 16 U.S.C. § 803(e).

In 1999, PPL purchased the two hydropower projects from MPC and, with the federal government's approval, continued to operate them. Importantly, when PPL purchased the hydropower

projects, the State never suggested that it held title to the riverbeds or that PPL may owe rent for the use thereof.

In 2003, two Montana citizens sued PPL and two state-regulated hydropower companies, in the U.S. District Court for the District of Montana, asking that retroactive compensation be awarded to the State for the use of riverbeds under hydropower facilities in Montana. The plaintiffs' attempted to apply the Equal Footing Doctrine in arguing that the riverbeds were owned by the States and that PPL and the other companies owed hundreds of millions of dollars in unpaid rent to the State. In 2004, the State intervened as plaintiff. In September 2005, the district court dismissed the case for lack of diversity jurisdiction.

PPL and the other state-regulated hydropower companies then filed this case in the Montana First Judicial District Court seeking a declaration that federal law precludes or preempts any claim for compensation. In response, the State filed a counterclaim, contending that it was entitled to back rent for the use of its lands.

After the state-regulated hydropower companies settled, the State then moved for partial summary judgment against PPL. The State asserted that the Missouri, Clark Fork, and Madison Rivers were navigable in 1889, when Montana was admitted to the United States, and, therefore, the States owned title to the riverbeds under the Equal Footing Doctrine.

In response, PPL argued that, pursuant to this Court's well-established navigability for title test, navigability is determined on a section-by-section basis in light of navigability at the time of statehood, not on a river-as-a-whole basis in light of present-day use.

Notwithstanding the substantial evidence submitted by PPL showing that navigation was impossible on the date of statehood, the trial court mistakenly concluded that there were no disputed issues of material fact regarding navigability at statehood, and granted partial summary judgment in the State's favor. In so doing, the trial court ruled that navigability need not be determined on a section-by-section basis and that, in light of present-day recreational use on some parts of the rivers, the entire rivers were navigable in 1899.

On June 13, 2008, the trial court awarded the State $34 million in retroactive back-rent for PPL's use of the riverbeds from 2000 through 2006; an additional $6 million for its use of the riverbeds in 2007; and whatever future amounts the Montana State Land Board may determine that PPL owes for its use in 2008 and the future.

PPL naturally appealed to the Montana Supreme Court. On March 30, 2010, the Montana Supreme Court, over a powerful dissent, affirmed the trial court. *PPL Montana, LLC v. State of Montana*, 229 P.3d 421 (Mont. 2010). Specifically, the Montana Supreme Court affirmed the trial court's ruling that the relevant stretches of the rivers were navigable at

statehood. *Id.* at 449. In so doing, the Montana Supreme Court made several critical errors. One error of particular interest to both MSLF and UFBF was the Montana Supreme Court's reliance on present-day recreational use and its disregard of evidence showing impossibility of navigation on the date of statehood. *Id.* at 446. According to the Montana Supreme Court, the navigability for title test is "fluid" and "very liberally construed" in favor of the State. *Id.* Thus, in the opinion of the Montana Supreme Court, it is appropriate to consider present-day use to determine whether a river is navigable for title purposes on the date of statehood. *Id.* at 449 ("[I]t is equally clear that the present-day usage of the Madison, Clark Fork, and Missouri rivers demonstrates that these rivers were susceptible of providing a useful channel of commerce throughout the state of Montana at the time of statehood."). The result of this decision is shocking: private property interests, thought to have been established more than a century ago and relied upon for the construction of large hydropower projects and other private diversion works for the beneficial use of water, were eviscerated by the Montana Supreme Court.

SUMMARY OF THE ARGUMENT

The importance of private property is deeply entrenched in the history of this Nation. Indeed, it has long been understood that the protection of private property is necessary for the security of all individual liberties. Private property, however, ceases to exist if there is not certainty of title. As a result, this Court and others have consistently recognized the importance of certainty of title.

The Montana Supreme Court orchestrated an enormous land grab by redefining property rights under the auspices of the Equal Footing Doctrine and, thereby violated certainty of title principles. Pursuant to the Equal Footing Doctrine, navigability for title purposes is determined on the date a state is admitted into the Union. Thus, on that date, the state, the federal government, and private landowners all know for certain – based on the condition of the river on that date – who owns the bed of the river.

The Montana Supreme Court, however, ignored certainty of title principles and evidence showing that it was impossible to navigate the relevant stretches of the rivers at statehood. Instead, it held that the present-day recreational use of the rivers was "sufficient" to prove that the rivers were navigable over 120 years ago, even though the subsequent construction of dams had significantly altered the flow of the rivers. Thus, under the Montana Supreme Court's new test, title to a riverbed is never certain and can never be relied upon. Instead, ownership of a riverbed

may shift depending on natural and/or manmade changes to the flow of a river. This blatant disregard for certainty of title is incompatible with the notion of private property that is essential for the protection of other individual liberties. As a result, this Court should reverse the decision of the Montana Supreme Court and emphatically declare that present-day use has little, if any, role in determining navigability for title purposes.

ARGUMENT

I. PRIVATE PROPERTY IS THE GUARDIAN OF LIBERTY.

The importance of private property in America can be traced to the Magna Carta (1215), which many colonists believed to be part of their birthright as English subjects. *See United States v. Lee*, 106 U.S. 196, 228 (1882). Chapter 29 of the Magna Carta provides: "[n]o freeman shall be taken or imprisoned, or disseised of his free tenement or of his liberties or free customs . . . unless by the lawful judgment of his peers, or by the law of the land." Thus, the Magna Carta secured the rights of property owners against deprivations by the government without due process of law. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 13 (2d ed. 1998).

In 1687, William Penn advised the colonists "not to give away any thing of *Liberty* and *Property* that at

present they do . . . enjoy." *Id.* (quoting William Penn, *The Excellent Privilege of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England* (William Bradford 1687)) (emphasis in original). Shortly thereafter, in 1690, John Locke published his famous *Second Treatise of Government*, in which he opined that legitimate government was based on a compact whereby people gave their allegiance to the government in exchange for protection of their property rights. John Locke, *Second Treatise of Government*, §§ 123-131 (1690) (C.B. Macpherson ed., 1980). According to Locke, private property existed under natural law before the creation of governments. *Id.* §§ 25-51. Locke further believed that the major purpose of government was to protect private property. *Id.* § 124 ("The great and *chief end* therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*." (emphasis in original)). More importantly, Locke equated property with liberty. *Id.* § 123 (Men are "willing to join in society with others, who are already united, or have a mind to unite for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*." (emphasis in original)).

Influenced by Locke, "colonial leaders viewed the security of property as the principal function of government." *The Guardian of Every Other Right* 28. In fact, Thomas Jefferson incorporated Locke's compact theory into the *Declaration of Independence*:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.[2]

The Framers of the Constitution also recognized that "principles of good government started with the protection of private property[.]" Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002). For example, utilizing the philosophy of Locke, John Rutledge of South Carolina told the delegates at the Philadelphia Convention that "[p]roperty was certainly the principal object of Society." *The Guardian of Every Other Right* 43 (quoting 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed. 1937)). Likewise, Alexander Hamilton stated "[o]ne great objt. of Govt. is personal protection and the security of Property." *Id.* (quoting 1 *The Records of the Federal Convention of 1787* 302). Thus, the Framers saw "property ownership as a buffer protecting individuals from government coercion." *Id.*

---

[2] Although Jefferson substituted "Pursuit of Happiness" for "estates," this change should not be interpreted as lessening the importance of property rights. In fact, "'the acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both.'" *The Guardian of Every Other Right* 29 (quoting Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (University of North Carolina Press 1980)).

In 1790 John Adams declared: "[p]roperty must be secured or liberty cannot exist." *Id.* (quoting *Discourses on Davila, in* 6 *The Works of John Adams* 280 (Charles Francis Adams ed., 1851)). The next year, the Fifth Amendment became effective and expressly incorporated into the Constitution Adams's belief that property is fundamental to liberty. As finally adopted:

> [T]he Fifth Amendment contains two important property guarantees, along with procedural safeguards governing criminal trials. The amendment provides in part that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Madison's decision to place this language next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close association of property rights with personal liberty. *Individuals needed security against both arbitrary punishment and deprivation of property.*

The Guardian of Every Other Right 54 (emphasis added).

This Court has also consistently recognized that private property is essential to a free society. For example, in 1897, this Court declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty . . . is that of enjoying

> private property without undue interference or molestation." The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897) (citations omitted). Seventy-five years later, this Court again emphasized that private property was an essential component to liberty:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted).

In sum, "[t]he right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." *The Guardian of Every Other Right* 26 (quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (New York 1775)).

II. CERTAINTY OF TITLE IS OF PARAMOUNT IMPORTANCE TO PRIVATE PROPERTY OWNERS AND SOCIETY.

Private property is meaningless if settled expectations regarding the ownership thereof may be dashed at the whim of any branch or level of government. *See, e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994) (noting that "the presumption against statutory retroactivity" is strongest when new legislation "affect[s] contractual or property rights, matters in which predictability and stability are of prime importance."); *Peralta v. United States*, 70 U.S. 434, 439 (1865) (refusing to relax the evidentiary requirements for recognition of a Mexican land grant because "[t]he right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions."); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592, 2602 (2010) (plurality opinion) ("[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." (emphasis in original)). In fact, it is the responsibility

of governments to ensure certainty of title because "the general welfare of society" is at stake. *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911) ("As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government."); *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (Ruling that a clear and convincing evidentiary standard for the diversion of interstate water "accommodates society's competing interests in increasing the stability of property rights and in putting resources to their most efficient uses. . . .").

Based upon these principles, this Court has always sought to preserve certainty of title.[3] *See e.g.*, *Doolittle's Lessee v. Bryan*, 55 U.S. 563, 567 (1852) (Refusing to void a sale of land by a marshal who had been previously removed from office because "[t]he purchaser paid his money and obtained his deed upon the faith of a judgment of the court that the sale was regular, and has held the land under this title ever since. . . . Under such circumstances a court should be

---

[3] Congress has also sought to preserve certainty of title by prohibiting resurveys from "impairing the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement." 43 U.S.C. § 772; *see United States v. Reimann*, 504 F.2d 135, 138 (10th Cir. 1974) (Once patents are issued, "the rights of patentees are fixed and the government has no power to interfere with these rights, as by a corrective resurvey." (citing, *inter alia*, 43 U.S.C. § 772)).

even [sic] astute in avoiding a construction which may be productive of much litigation and insecurity of titles."); *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U.S. 196, 207 (1886) (Rejecting the argument that surface lines of a mining claim should be readjusted as a vein is developed because "[s]uch readjustment at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims. The rule, whatever hardship it may work in particular cases, should be settled, and thus prevent, as far as practicable, such uncertainty."); *Kean v. Calumet Canal & Improvement Co.*, 190 U.S. 452, 460 (1903) (noting that "it would be likely to do more harm than good to" upset title that was passed "on the faith of" earlier decisions).

Indeed, this Court reaffirmed this principle in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). That case involved the checkerboard land pattern created by the railroad land grants. *Id.* at 676-77. The Leo Sheep Company, as successor-in-interest to the Union Pacific Railroad, owned the odd-numbered sections of land and the United States owned the even-numbered sections. *Id.* at 677-78. After the United States constructed a road across the corners of Leo Sheep's property, Leo Sheep brought a quiet title action against the United States. *Id.* at 678.

The district court quieted title in favor of Leo Sheep. *Id.* However, on appeal, the Tenth Circuit reversed. *Id.* In so doing, the Tenth Circuit opined that when Congress granted the land to the Union Pacific Railroad it implicitly reserved an easement to

cross over the odd-numbered sections in order to reach the even-numbered sections that were still owned by the United States. *Id.* In reversing the Tenth Circuit, this Court ruled that an easement across private land should never be implied in favor of the United States when doing so would "upset settled expectations":

> This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.

Id. at 687-88.

Lower federal courts have also recognized that certainty of title is necessary for protection of private property and society. *See, e.g.*, *Fulton v. Harris*, 658 F.2d 641, 644 (8th Cir. 1981) ("[O]ur decision is not inconsistent with and does not undermine legitimate state interests in the orderly disposition of decedents' estates and the certainty of title to property."); *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 655 (10th Cir. 1960) ("Certainty of title is an elementary prerequisite for the sound development of any mineral resource."); *Geosearch, Inc. v. Andrus*, 508 F. Supp. 839, 845 (D. Wyo. 1981) ("Predictability and certainty of title are mandatory to the entire oil and gas leasing system."). Indeed, as Judge Matthew Deady explained 150 years ago: "[s]ecurity and certainty of title to real property are among the most important

objects of the law in any civilized community." *Lownsdale v. Portland*, 15 F. Cas. 1036, 1039 (D. Or. 1861).

Many state courts also recognize that public policy favors certainty of title to private property. *See, e.g.*, *Alvey Dev. Corp. v. Mackelprang*, 51 P.3d 45, 50 (Utah Ct. App. 2002) ("[I]n Utah there is an important interest for property owners to possess unencumbered titles because public policy favors certainty in title to real property, to protect bona fide purchasers and to avoid conflicts of ownership, which may engender needless litigation." (internal quotation omitted)); *Matter of Estate of Violi*, 482 N.E.2d 29, 32 (N.Y. 1985) (recognizing "public policy favoring certainty in title to real property"); *Shields v. Collins*, 268 N.W.2d 371, 373 (Mich. Ct. App. 1978) (certainty of title represents "important public policy"); *Carpenter v. Duke*, 56 S.E. 938, 940 (N.C. 1907) (certainty of title is a requirement of "sound public policy"); *Morse v. Lorenz*, 104 N.E. 237, 239 (Ill. 1914) ("security and certainty of titles to land is of the utmost public importance"). Needless to say, the Montana Supreme Court may not be one of them. *See, e.g.*, *Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984) (upsetting settled expectations regarding ownership of streambeds and adjoining fee land); *Galt v. State Dept. of Fish, Wildlife & Parks*, 731 P.2d 912 (Mont. 1987) (same); *Seven Up Pete Venture v. Montana*, 114 P.3d 1009 (Mont. 2005), *cert. denied*, 546

U.S. 1170 (2006) (upsetting settled and investment-backed expectations regarding contract and property rights).

As the foregoing demonstrates, the importance of certainty in title for private property owners and society cannot be understated. This explains why so many legal principles were developed to protect certainty of title. For example, the primary purpose of the doctrine of adverse possession and its first cousin, prescriptive easements, is to provide certainty of title. Indeed, adverse possession "has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing." Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135 (1918). Similarly, statutes of limitations involving claims to land are also based upon the importance of certainty of title. *E.g., United States v. Beggerly*, 524 U.S. 38, 49 (1998) (ruling that the statute of limitations in the Quiet Title Act, 28 U.S.C. § 2409a, must be strictly construed because landowners must "know with certainty what their rights are, and the period during which those rights may be subject to challenge."); *McIver v. Ragan*, 15 U.S. (2 Wheat.) 25, 29 (1817) (noting that the policy behind statutes of limitations is not to punish those who neglected to assert their rights, but to establish certainty of title); *see also Proctor v. Sagamore Big*

Game Club, 265 F.2d 196, 202 (3rd Cir. 1959) (noting that a statute of repose is "intended to insure greater certainty of title and make more secure the enjoyment of real estate"); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 347-48 (1985) (concluding that statutes of limitation benefit society). Estoppel principles were also developed, in part, to ensure certainty of title and to avoid upsetting settled and investment-backed expectations.[4] *See Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) ("While the consent of individual officials representing the United States cannot 'estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." (internal citations omitted)); *see also United States v. Wharton*, 514 F.2d 406, 410 (9th Cir. 1975) (noting that estoppel was available against the

---

[4] These principles were implicated in the instant case because the State of Montana sat idly by and watched PPL's predecessor construct the facilities and operate the facilities for decades. *See Sumner v. Seaton*, 19 A. 884, 887 (N.J. Ch. 1890) ("[W]here a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent. . . ."). Even during the relicensing of PPL's facilities, the State never raised the issue that, perhaps, the facilities were on State lands. Notwithstanding this egregious behavior, these principles could not be used to stop the State's massive land grab. *PPL Montana*, 229 P.3d at 430-31, 451.

federal government when real property interests are at stake); *United States v. Locke*, 471 U.S. 84, 110-12 (1985) (O'Connor, J., concurring) (same).

III. THE EQUAL FOOTING DOCTRINE IS IN ACCORDANCE WITH CERTAINTY OF TITLE PRINCIPLES.

The principles behind the Equal Footing Doctrine predate the formation of this Nation.

> Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. When the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown.

Utah Div. of State Lands v. United States, 482 U.S. 193, 195-96 (1987) (internal citation omitted).

Based upon these principles, the Northwest Ordinance, enacted under the Articles of Confederation in 1787, provided that new states would be admitted to the Union "on an equal footing with the

original States in all respects whatever. . . ." Northwest Ordinance of 1787, art. V. Two years later, this principle was incorporated into an act by the First Congress. An Act to provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50, 53 (1789). As a result:

> In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within [a state] passed to that state when it was admitted to the Union, if the rivers were *then navigable*; and, if they were not *then navigable*, the title to the river beds remained in the United States

United States v. Utah, 283 U.S. 64, 75 (1931) (emphases added). Importantly, "[o]nce the equal-footing doctrine vested title to the riverbed . . . as of the time of [statehood] . . . *the force of that doctrine was spent*; it did not operate after that date to determine what effect on titles the movement of the river might have." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977) (emphasis added). Thus, on the date of admission to the Union, title to a riverbed either vests in a state or it does not, depending on whether the river is navigable in fact on that date. By requiring the determination be made as of a precise date, the Equal Footing Doctrine is in accordance with certainty of title principles. Therefore, neither subsequent events (such as natural changes in hydrology of a water body and/or the construction of dams), nor present-day use have any bearing on title under the Equal Footing Doctrine.

IV. THIS COURT SHOULD EMPHATICALLY DECLARE THAT EVIDENCE OF PRESENT-DAY USE HAS LITTLE, IF ANY, ROLE IN DETERMINING NAVIGABILITY FOR TITLE PURPOSES BECAUSE IT CREATES UNCERTAINTY OF TITLE.

A. Navigability For Title Purposes Is Determined By Federal Law.

The test for determining navigability for title is a question of federal law. *Utah v. United States*, 403 U.S. 9, 10 (1971); *United States v. Oregon*, 295 U.S. 1, 14 (1935) ("Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local, one."); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926) ("Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts."). Moreover, because of the important federal, state, and private interests at stake, having one test for navigability for title purposes is crucial. *Id.* at 56 (rejecting the use of state law to determine navigability for title purposes because "uniformity" is needed).

The federal test for determining navigability for title has remained virtually unchanged since it was first articulated by this Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870):

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[5]

Thus, the elements necessary to establish navigability for title purposes are: (1) the water body was used, or was susceptible of being used; (2) in its "*natural and ordinary condition*"; (3) as a highway of useful commerce, and (4) by the customary modes of trade and travel at the time of statehood. *Holt State Bank*, 270 U.S. at 56 (emphasis added). If the state fails to prove any one of these elements, it does not own the bed of the water body. *North Dakota ex rel. Bd. of*

---

[5] Granted, *The Daniel Ball* involved a navigability determination relative to Congress's power to regulate under the Commerce Clause. 77 U.S. at 563-64. However, this Court has never questioned its applicability for title purposes. And, although the navigability for title test is similar to the test for navigability for the exercise of the Commerce Clause power, the two tests are different. Indeed, the navigability for title test is much narrower than the navigability test for Commerce Clause purposes because navigability for title is determined as of a specific date, *i.e.*, the date the state was admitted into the Union. *Compare Oregon ex rel. State Land Bd.*, 429 U.S. at 371 (navigability for title is to be determined as of the date of admission) *with Kaiser Aetna v. United States*, 444 U.S. 164, 170-71 (1979) (noting that to Congress's Commerce Clause power may be extended to water bodies made susceptible to interstate commerce by man-made efforts after statehood).

Univ. and Sch. Lands v. United States, 972 F.2d 235, 238 (8th Cir. 1992) (burden of proof rests with the party asserting navigability).

B. The Montana Supreme Court Created A New Navigability For Title Test That Is Based Upon Present-Day Use.

This Court has recognized that states may not always be trusted when navigability for title is at issue. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 89 (1922) ("Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control."). This is especially true considering that some states have shown a tendency to redefine property rights when it either serves their purposes or will allow them to avoid paying just compensation. *Hughes v. State of Wash.*, 389 U.S. 290, 296-97 (1967) (Stewart, J., dissenting) ("For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."); *cf. Kaiser Aetna*, 444 U.S. at 170-71 (rejecting the federal government attempt to

redefine private property to avoid having to pay just compensation).

In the instant case, the Montana Supreme Court effectuated a massive land grab and bestowed a huge financial windfall on the State when it held that the relevant stretches of Missouri, Clark Fork, and Madison Rivers were navigable for title purposes. One basis for this holding was the ruling that "present-day recreational use is sufficient" to prove that a river was navigable at the time the State was admitted to the Union. *PPL Montana*, 229 P.3d at 448. The Montana Supreme Court further expounded that, in spite of PPL's substantial evidence to the contrary, it is "clear that the *present-day usage* of the Madison, Clark Fork, and Missouri Rivers demonstrates that these rivers were susceptible of providing a useful channel of commerce throughout the state of Montana at the time of statehood." *Id.* (emphasis added). In short, the Montana Supreme Court concluded that the present-day recreational use of a water body trumps evidence of impossibility of navigation at statehood.[6]

---

[6] The relevant inquiry is commercial use, *i.e.*, whether the water body "is used, or is susceptible of being used, in its natural and ordinary condition *as a highway for commerce*, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922) (emphasis added). Thus, the Montana Supreme Court's reliance on recreational use was totally erroneous. *Parm v. Shumate*, 513 F.3d 135, 143 (5th Cir. 2007) ("Neither navigation nor commerce encompass recreational

(Continued on following page)

C. The Montana Supreme Court's New Present-Day Use Test Has No Support In This Court's Decisions Or Those Of Other Courts.

This Court's precedents do not support the Montana Supreme Court's belief that present-day use trumps all other evidence when it comes to determining whether a river was navigable for title purposes on the date of statehood. This is especially true when post-statehood events, such as the construction of dams, have changed a river's hydrology, as in this case.

For example, in *United States v. Utah*, this Court ruled that the question of navigability "is one of fact as to the capacity of the rivers in their *ordinary condition* to meet the needs of commerce. . . . And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams *have been put*." 283 U.S. at 83 (emphases added). Accordingly, this Court considered evidence that showed the relevant section of river had been navigated prior to Utah's admission to the Union in 1896. 283 U.S. at 81-82. Granted, this Court also considered evidence that, in the years immediately following Utah's admission to the Union, navigation

---

fishing.") *cert. denied*, 555 U.S. 813 (2008); *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) ("[T]o our knowledge none of the authoritative cases has liberalized the [navigability for title] rule so as to indicate that mere pleasure fishing on a stream of water is such usage as would constitute navigability.").

occurred on the relevant section of river. *Id.* at 82. However, there was no evidence that major projects that could have altered the river's navigability – such as dams – were built between the time of admission and the years immediately following Utah's admission to the Union.[7] *Id.* at 77-86. That is not true in the instant case. *PPL Montana*, 229 P.3d at 426 (noting that PPL Montana's dams were all constructed after statehood).

Moreover, although *United States v. Utah* considered some post-statehood evidence, it did not suggest that "present-day use" could trump all other evidence. Instead, this Court allowed the consideration of post-statehood evidence in the years immediately following statehood to corroborate the pre-statehood evidence of navigability. *Id.* at 81-82. It stretches *United States v. Utah* beyond its breaking point to conclude, as did the Montana Supreme Court, that evidence of present-day use *ipso facto* proves that the relevant

---

[7] Later, in *Utah v. United States*, this Court reaffirmed these principles in holding that the Great Salt Lake was navigable in 1896. 403 U.S. at 11-12. In so doing, this Court ruled that the question of who owned title to the "bed of the Great Salt Lake – *whether now submerged or exposed* – ultimately rests on whether the lake was navigable at the time of Utah's admission." *Id.* at 10 (emphasis added) (internal citation omitted). By noting the irrelevancy as to whether the bed was "now submerged or exposed," this Court implicitly rejected the Montana Supreme Court's present-day use theory.

portions of the rivers were navigable more than 120 years earlier.[8]

Not surprisingly, no other court has applied the Montana Supreme Court's present-day use test in making a navigability for title determination. In *North Dakota ex rel. Bd. of Univ. and Sch. Lands v. United States*, North Dakota argued that "modern day recreational canoe use on some portions of the Little Missouri," that were "similar to that of water-craft historically used on waterways for commerce" was sufficient to prove the river was navigable upon the state's admission to the Union. 972 F.2d at 240. The Eighth Circuit, however, rejected this argument. Instead, the Eighth Circuit affirmed the district court's holding that such "modern day canoe use and modern day 'boatability' data are not reliable indicators of the River's navigability at statehood." *Id.*; *see also North Dakota ex rel. Bd. of Univ. and Sch. Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982) (the issue is one of "navigability at the time of statehood, *not in the present day*"), *rev'd on other grounds*, 461 U.S. 273 (1983) (emphasis added); *Arkansas River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 (Ark. App. 2003) ("present-day navigability"

---

[8] Importantly the *United States v. Utah* was handed down only 35 years after Utah was admitted into the Union. 283 U.S. at 73. In contrast, the Montana Supreme Court made its navigability determination based upon present-day use 120 years after statehood.

may be relevant to navigability for Commerce Clause purposes but not for title purposes).

Even the decision relied upon by the Montana Supreme Court for the proposition that present-day use trumps evidence of non-navigability at statehood, *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1402 (9th Cir. 1989), does not stand for that proposition. *See PPL Montana*, 229 P.3d at 447. In *Ahtna*, the Ninth Circuit was asked to determine title to 30 miles of the lower Gulkana River in Alaska. 891 F.2d at 1402. Although the Ninth Circuit allowed present-day use of the Gulkana River to be considered, *id.* at 1402-03, it did so only because the parties stipulated "that the River's physical characteristics have remained unchanged since statehood." *Ahtna*, 891 F.2d at 1405. Thus, the Ninth Circuit did not hold, as the Montana Supreme Court seemed to believe, that present-day use of a river is "sufficient" to prove that the river was navigable upon statehood when physical characteristics of the river were significantly altered after statehood. *See PPL Montana*, 229 P.3d at 447-48.

As the foregoing demonstrates, the Montana Supreme Court's present-day use theory has no support in this Court's decisions or those of lower courts. This is especially true when the hydrology of the relevant stretch of the river has been significantly altered post-statehood by immense hydropower facilities.

D. The Montana Supreme Court's Present-Day Use Test Violates Certainty Of Title Principles And Undermines Private Property Rights.

Under the Montana Supreme Court's novel present-day use theory, title to a bed of a water body is never certain. A future event, either natural or artificial, that transforms a non-navigable water body into a navigable water body could suddenly transfer title of the bed to the state.

The ramifications of such a rule are startling. For example, a landowner may reasonably believe that he owns title to a riverbed underlying a section of river that everyone assumed was non-navigable when the state was admitted into the Union. Based upon that reasonable belief, the landowner may have invested substantial sums of money in constructing water diversion facilities and may have used those facilities for decades for irrigation purposes. But under the Montana Supreme Court's new interpretation of the Equal Footing Doctrine, present-day use of the river could trump the landowner's settled and investment-backed expectations and transfer ownership of the portion of the riverbed to the state.[9] In other words,

---

[9] More to the point, if the Montana Supreme Court's present-day use test was in effect back in the day when private dam building was prevalent, no dams would have been built because the dam owners would not want to risk losing their investment by making the rivers navigable.

the Montana Supreme Court's decision allows present-day use of a river to upset certainty of title.

Indeed, if *United States v. Utah* were litigated today under the Montana Supreme Court's novel present-day use test, the outcome may have been significantly different. In *United States v. Utah*, this Court explained that "there is no controversy as to the nonnavigability" of the Colorado River through Cataract Canyon at statehood. 283 U.S. at 80. However, in 1963 the Glen Canyon Dam was constructed, which flooded about 30 miles of Cataract Canyon. *See* Steven W. Carothers & Dorothy A. House, *Decommissioning Glen Canyon Dam: The Key to Colorado River Ecosystem Restoration and Recovery of Endangered Species?*, 42 Ariz. L. Rev. 215, 219 (2000). Thus, applying the Montana Supreme Court's novel test, that the flooded, flatwater portion of Cataract Canyon may be navigable today would be "sufficient" to conclude that the entirety of Cataract Canyon was navigable upon statehood. The possibility of this outcome shows why present-day use should not be considered in navigability for title determinations and why Montana Supreme Court's decision is so seriously flawed.

Moreover, if the Montana Supreme Court's decision is allowed to stand, notions of certainty of title would be further eroded.[10] A state would be encouraged to sit

---

[10] The Montana Supreme Court's complete disregard for certainty of title is most obvious in its flippant dismissal of a

(Continued on following page)

on its hands and wait until such time as a section of river may support recreational use – through the construction of a dam, or some other man-made or even natural cause – and then assert that it owned the relevant section of riverbed all along. To make matters worse, a state could then seek retroactive rent payments from those who reasonably believed that they, not the state, owned the riverbed. Therefore, this Court should emphatically reject the Montana Supreme Court's present-day use test.

CONCLUSION

As the foregoing demonstrates, the Montana Supreme Court's present-day use test violates certainty of title principles. It is also incompatible with any notion of private property that is essential for the protection of other individual liberties. Accordingly, this Court should reverse the decision of the Montana

---

1910 decision by a federal district court finding that the stretch of the Clark Fork River in Sanders County, Montana, to be non-navigable and quieting titled to the bed in favor of PPL's predecessor. *PPL Montana*, 229 P.3d at 434, 448. By rejecting the 1910 decree, and, instead, relying on present-day use, the Montana Supreme Court upset the settled and investment-backed expectations of PPL and, perhaps, other landowners.

Supreme Court and emphatically declare that present-day use has little, if any, role in determining navigability for title purposes.

Respectfully submitted:

STEVEN J. LECHNER
Counsel of Record
JOEL M. SPECTOR
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com

Attorneys for Amici Curiae

September 7, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
NOV - 2 2011
OFFICE OF THE CLERK

No. 10-218

In The
Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Montana

BRIEF OF THE NATIONAL WILDLIFE FEDERATION; THE NATURE CONSERVANCY; DELAWARE NATURE SOCIETY; ENVIRONMENTAL LEAGUE OF MASSACHUSETTS; INDIANA WILDLIFE FEDERATION; LOUISIANA WILDLIFE FEDERATION; MONTANA WILDLIFE FEDERATION; NATURAL RESOURCES COUNCIL OF MAINE; NORTH CAROLINA WILDLIFE FEDERATION; NORTH DAKOTA WILDLIFE FEDERATION; CITIZENS FOR PENNSYLVANIA'S FUTURE; SOUTH CAROLINA WILDLIFE FEDERATION; SOUTH DAKOTA WILDLIFE FEDERATION; TENNESSEE WILDLIFE FEDERATION; VERMONT NATURAL RESOURCES COUNCIL; WEST VIRGINIA RIVERS COALITION; WISCONSIN WILDLIFE FEDERATION; MONTANA TROUT UNLIMITED; OREGON COUNCIL TROUT UNLIMITED; RIVER MANAGEMENT SOCIETY; UTAH STREAM ACCESS COALITION AND WESTERN RESOURCE ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

NEIL KAGAN
NATIONAL WILDLIFE FEDERATION
Great Lakes Regional Center
213 W. Liberty St., Suite 200
Ann Arbor, MI 48104

SEAN H. DONAHUE*
DONAHUE & GOLDBERG, LLP
2000 L St., NW, Suite 808
Washington, DC 20036
(202) 277-7085
sean@donahuegoldberg.com
**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

Library of Congress
Law Library

PHILIP TABAS
General Counsel
THE NATURE CONSERVANCY
4245 North Fairfax Dr.,
Suite 100
Arlington, VA 22203

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson St., 8th Floor
New York, NY 10013

Attorneys for the Nature Conservancy

BART MILLER
2260 Baseline Road, Suite 200
Boulder, CO 80302

JORO WALKER
150 South 600 East, Suite 2A
Salt Lake City, UT 84102

Attorneys for Western Resource Advocates

DAVID J. RYAN
RYAN LAW OFFICES, PLLC
234 East Pine St.
Missoula, MT 59802

Attorney for the River Management Society

W. CULLEN BATTLE
FABIAN & CLENDENIN, P.C.
215 South State St.,
Suite 1200
Salt Lake City, UT 84111

CRAIG C. COBURN
KALLIE A. SMITH
RICHARDS BRANDT
MILLER NELSON
Wells Fargo Center,
15th Floor
299 South Main St.
Salt Lake City, UT 84111

Attorneys for Utah Stream Access Coalition

LAURA ZIEMER
STAN BRADSHAW
PATRICK BYORTH
TROUT UNLIMITED
321 East Main St.,
Suite 411
Bozeman, MT 59715

Attorneys for Montana Trout Unlimited and Oregon Council Trout Unlimited

TABLE OF CONTENTS

Table of Authorities iii

Interest of Amici 1

Introduction and Summary of Argument 4

ARGUMENT 7

I. THE RULE THAT STATES OWN NAVIGABLE WATERS AND THE LANDS BENEATH THEM IS DEEPLY ROOTED AND SERVES VITAL SOVEREIGN AND PUBLIC INTERESTS 7

A. State Ownership of Navigable Waters and the Lands beneath Them is Central to State Sovereignty 7

B. Sovereign Title to Navigable Waters Derives from their Vital Public Benefits 9

II. PPL'S PROPOSED TEST IS INCONSISTENT WITH PRECEDENT 13

III. A FRAGMENTED ANALYSIS OF NAVIGABILITY FOR TITLE WOULD INTERFERE WITH THE PUBLIC TRUST AND IMPAIR STATES' ABILITY TO MANAGE NATURAL RESOURCES 19

IV. PPL'S OTHER ATTACKS ON THE MONTANA SUPREME COURT'S LEGAL ANALYSIS ARE UNFOUNDED 25

A. The Montana Supreme Court Properly Relied upon Evidence of Log Drives as Evidence of Navigability 25

B. Evidence of Post-Statehood Recreational Uses Can Support Navigability in Fact at Statehood 28

Conclusion 34

TABLE OF AUTHORITIES

Cases:

Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987), *aff'd sub nom. Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). . 29,30

Arkansas v. McIlroy, 595 S.W.2d 659 (Ark. 1980) . 12

Barney v. Keokuk, 94 U.S. 324 (1876) 10

Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 17

Canal Comm'n v. People ex rel. Tibbits, 5 Wend. 423 (N.Y.1830) 10,18

Defenders of Wildlife v. Hull, 18 P.3d 722 (Ariz. Ct. App. 2001) 31

Harrison v. Fite, 148 F. 781 (8th Cir. 1906). 33

Idaho v. Coeur D'Alene Tribe, 521 U.S. 261 (2001). .....passim

Idaho Northern R. Co. v. Post Falls Lumber & Mfg.,119 P. 1098 (Idaho 1911) 27

Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892). 9,10

In re Water Use Permit Applications, 9 P.3d 409 (Haw. 2000) 11

Lessee of Pollard v. Hagan, 3 How. 212 (1845) ... 8,23

Martin v. Lessee of Waddell, 16 Pet. 367 (1842) ... 7,8

Montana Coalition for Stream Access v. Curran, 683 P.2d 163 (Mont. 1984). 12,27

National Audubon Society v. Superior Court, 658 P.2d 709 (Cal. 1983) 11

North American Dredging Co. of Nevada v. Mintzer, 245 F.297 (9th Cir. 1917) 33

North Dakota ex rel. Bd. of Univ. and Sch. Lands v. Andrus, 671 F.2d 271 (8th Cir. 1982), *rev'd on other grounds sub nom. Block v. N.D.*, 461 U.S. 273 (1983) 31,33

N.D. ex rel. Bd. of Univ. and Sch. Lands v. United States, 972 F.2d 235 (8th Cir. 1992) 30,32

Northwest Steelheaders Ass'n, Inc. v. Simantel, 112 P.3d 383 (Or. Ct. App. 2005) 12,31

Oklahoma v. Texas, 258 U.S. 574 (1922) 17

Oregon Div. State Lands v. Riverfront Protection Ass'n, 672 F.2d 792 (9th Cir. 1982) 27

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977). 9

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) 9

St. Anthony Falls Water Power v. St. Paul Water Commn's, 168 U.S. 349 (1897) 15

State v. Aucoin, 20 So. 2d 136 (La. 1944). 34

State v. Bunkowski, 503 P.2d 1231 (Nev. 1972) 27

Taylor Fishing Club v. Hammett, 88 S.W. 2d 127 (Tex. Civ. App. 1935) 33,34

The Daniel Ball, 77 U.S. 557 (1871) .....passim

The Montello, 87 U.S. 430, 439 (1874).....passim

The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) 10

United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d. 457 (N.D. 1976) 11

United States v. Holt State Bank, 270 U. S. 49 (1926) 8,28

United States v. Oregon, 295 U.S. 1 (1935) 31,32

United States v. Utah, 283 U.S. 64 (1931) .....passim

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). 7

Statutes and Regulations:

43 U.S.C. § 1311(a)(1) 10

Northwest Ord., Art IV, 1 Stat. 52 (1789). 10,27

Mont. Code Ann. § 1-1-501 23

General Laws of Colorado, § 1856 (1872) 27

33 CFR § 329.6 27

Miscellaneous:

Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 Envtl. L. 973 (1995) 21

J.D. Allan, *Landscapes and Riverscapes: The Influence of Land Use On Stream Ecosystems*, 35 Ann. Rev. Ecol. Evol. Syst. 257 (2004) 21

Robert E. Beck, *et al.*, eds., Waters and Water Rights § 30.02(a) (2010) 11,28

Timothy J. Beechie, *et al.*, *Process Based Principles for Restoring River Ecosystems*, 60 Bioscience 209 (2010) 22

Earl E. Brown, Commerce on Early American Waterways (2010) 26

Bureau of Land Managment, Land Exchange Handbook, H-2200-01 (Aug. 31, 2005) 24

Norman L. Christensen, *et al.*, *The Report of the Ecological Society of America on the Scientific Basis for Ecosystem Management*, 6 Ecological Applications 665 (1996) 21

Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 Penn. State Envtl. L. Rev. 1 (2008) 12

Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology Law Q. 53 (March 2010) 12

Gregory C. Crampton, *et al.*, The Navigational History of Bear River— Wyoming, Idaho, Utah (U. of Utah 1975). 26

Kurt D. Fausch, *et al.*, *Landscapes to Riverscapes; Bridging the Gap Between Research and Conservation of Stream Fishes*, 52 Bioscience 483 (2002) 21

Burchard H. Heede, *et al.*, *Hydrodynamic and Fluvial Geomorphological Processes: Implications for Fisheries Management and Research*, 10 N. Am. J. Fisheries Mgmt. 249 (1990) 22

Heritage Research Center, Montana Navigable Water Study (submitted to Montana Dept. of State Lands, December 1986) 26

Lawrence L. Master, *et al.*, eds., *Rivers of Life: Critical Watersheds for Protecting Freshwater Biodiversity* (TNC 1998) 20

Clint C. Muhlfeld, *et al.*, *Seasonal Movement and Habitat Use by Subadult Bull Trout in the Upper Flathead River System, Montana*, 25 N. Am. J. of Fisheries Mgmt., 797 (2005) 23

Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 Tul. Envtl. L.J. 315 (2009) 11

John Copeland Nagle, *et al.*, The Law of Biodiversity and Ecosystem Management (2d ed. 2006) 22

Charles S. Peterson, *et al.*, A History of the of the Wasatch–Cache National Forest (report to U.S. Dept. of Agriculture 1980) 26

Robert E. Pike, Tall Trees, Tough Men (2000) 26

N. Leroy Poff, *et al.*, *The Natural Flow Regime: A Paradigm for River Conservation and Restoration*, 47 Bioscience 769 (1997) 21

Karen A. Poiani, *et al.*, *Biodiversity Conservation at Multiple Scales: Functional Sites, Landscapes, and Networks*, 50 Bioscience 133 (2000) 21

Malcolm Rosholt, The Wisconsin Logging Book (1980) 21

J. A. Stanford, *et al.*, *Ecological Connectivity in Alluvial River Ecosystems and its Disruption by Flow Regulation*, 11 Regulated Rivers: Research & Mgt. 105 (1995) 21

Melanie Tang, *SNPLMA, FLTFA, and the Future of Public Land Exchanges*, 9 Hastings W.-N.W. J. Envtl. L. & Pol'y 55 (2002) 24

A. Dan Tarlock, The Law of Water Rights and Resources (2011) 11,12

U.S. Census Office, Abstract of Census Legislation of the United States, 1790 to 1850 Inclusive (1953). 14

U.S. Census Office, Report on Population of the United States at the Eleventh Census, Part I (1895) 14

U.S. Fish & Wildlife Service, *et al.*, National Survey of Fishing, Hunting and Wildlife-Associated Recreation (2006). 20

Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989) 27

William H. Wroten, The Railroad Tie Industry in the Central Rocky Mountain Region: 1867-1900 (Ph. D. thesis, U. Colo. 1956) 26

INTEREST OF AMICI*

Amici are organizations dedicated to the protection of natural resources and activities that depend on those resources. Amici represent members who comprise a substantial number of America's conservationists, paddlers, anglers, and hunters. All of amici have a strong and demonstrated interest in the ability of states, in their sovereign capacity, to protect water resources.

The National Wildlife Federation ("NWF") is a national, non-profit corporation working to protect the ecosystems that are most critical to native wildlife in order to ensure a healthy wildlife legacy for future generations. Founded in 1936, NWF is headquartered in Virginia and has regional offices across the country. NWF has approximately four million members and supporters nationwide. NWF members fish, hunt, and observe wildlife, and use wetlands, streams, rivers, and lakes for recreation and aesthetic enjoyment.

The Nature Conservancy ("TNC") is a non-profit corporation founded in 1951 whose mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. TNC is the largest private owner of conservation land in the United States – over 2.6 million acres – much of which includes riparian lands. Through ownership of riparian lands or in

---

* The parties have filed letters with the Clerk indicating blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

partnership with others, TNC has protected over 5,000 river miles. TNC's nearly 4,000 staff members work in 50 states and 39 countries. Because of its scientific expertise and wide-ranging strategic partnerships, TNC is considered the leading global freshwater conservation organization.

The Delaware Nature Society; Environmental League of Massachusetts; Indiana Wildlife Federation; Louisiana Wildlife Federation; Montana Wildlife Federation; Natural Resources Council of Maine; North Carolina Wildlife Federation; North Dakota Wildlife Federation; Citizens for Pennsylvania's Future (PennFuture), South Carolina Wildlife Federation; South Dakota Wildlife Federation; Tennessee Wildlife Federation; Vermont Natural Resources Council; West Virginia Rivers Coalition and Wisconsin Wildlife Federation are state-based non-profit organizations affiliated with the National Wildlife Federation. All are dedicated to the conservation of fish and wildlife and their habitat including, in particular, the rivers and lakes upon which fish and wildlife depend. They are committed to a science-based, watershed approach to management of fish, wildlife, and water resources, and to preserving opportunities for recreation in and on the waters subject to the public trust.

Montana Trout Unlimited ("MTU") and Oregon Council Trout Unlimited ("OCTU") are affiliates of Trout Unlimited, a national non-profit corporation founded over 50 years ago with more than 140,000 volunteers organized into about 400 chapters from Maine to Alaska. OCTU has 2,836 members in five chapters, each formed around a watershed; MTU has thirteen river-based chapters, comprised of approximately 3,400 volunteer members. MTU's and

OCTU's members are avid anglers dedicated to the conservation, protection, and restoration of wild and native trout and salmon in their watersheds.

The River Management Society ("RMS") is a national non-profit professional organization. The mission of the Society is to support professionals who study, protect, and manage North American rivers. Dedicated to holistic river management, its diverse membership includes federal, state, and local agency employees, educators, researchers, consultants, organizations and citizens. The objective of RMS is to advance the profession of river management by providing managers, researchers, educators and others a forum for sharing information about the appropriate use and management of river resources. RMS builds its organization with a broad base of expertise in all aspects of river management and stewardship including an ecosystem approach to recreation, water quality, riparian health, and watershed management.

The Utah Stream Access Coalition ("the Coalition") is a Utah non-profit corporation with over 1,000 members. The Coalition's mission includes restoring and preserving the public's right to use Utah's public waters for recreational and other lawful purposes, and securing recognition that the title to the beds of all navigable waters is in the state of Utah in trust for the people. The Coalition is currently involved in litigation in the Utah state courts seeking a determination that the Weber River, the site of commercial log drives in the late 1800s and early 1900s, meets the federal navigability for title test.

Western Resource Advocates ("WRA") is a regional organization dedicated to protecting the

West's land, air and water. Founded in 1989, and headquartered in Boulder, Colorado, WRA works in eight states of the interior West (Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, and Wyoming). Core program areas include creating a clean energy future and curtailing climate change, defending public lands and iconic landscapes from the impact of energy development, and protecting rivers and water supplies. WRA staff, members, and supporters rely on western rivers for working, fishing, recreating, researching, and aesthetic enjoyment.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari to address the proper test for determining navigability for title, which governs whether a state holds title to waters and submerged lands under the Equal Footing doctrine. *See* Pet. i; 131 S. Ct. 3019 (2011).

The case presents issues of great importance to amici and their members. As this Court's decisions emphasize, ownership of navigable waters and the lands beneath them has traditionally been regarded as a central aspect of state sovereignty because these resources serve vital public interests. Long before the founding of the United States, public trust principles have protected citizens' rights to engage in commerce and enjoy fisheries in navigable waters. The basic premise of the Equal Footing doctrine is that ownership of navigable waters and their submerged lands is an essential attribute of statehood; a state deprived of that ownership would not share fully in what it means in our constitutional system to be a state.

In many states, the public trust extends beyond commerce, navigation, and fisheries to a variety of other public values such as protecting natural ecosystems and providing opportunities for recreation. State governments' ability and responsibility to protect these values, and the public's ability to enjoy them, depend upon a stable and rational test for determining navigability for title.

The rule advocated by petitioner PPL Montana, LLC ("PPL"), which affirmatively promotes highly fragmented ownership of rivers and other waterbodies, would interfere with consistent resource management and likely impair the public's interests in the management and protection of these valuable resources. Amici fully recognize that neither federal ownership nor private ownership of river resources is inherently incompatible with protecting river resources; but a rule of fragmentation like that urged here is certain to harm public interests and interfere with the practical needs of river management.

As we explain below, the test urged by PPL – which would eliminate state ownership of river segments that had to be portaged at statehood – is inconsistent with longstanding precedent and would destabilize title to rivers and their beds that has long been considered soundly vested in the states. Fragmenting ownership in this way would impair the states' ability to protect fisheries and river ecosystems and provide public access for recreation.

Contrary to PPL's rendition, the Montana Supreme Court correctly applied this Court's decisions setting forth the test for navigability for title. It is instead PPL and its supporters that urge

the Court to abandon its traditional inquiry – whether a waterbody serves as a highway for commerce – and embrace instead a new test that would be difficult to administer and would invite piecemeal challenges that would fragment state ownership of navigable waters.

As we demonstrate below, the Montana Supreme Court's consideration of evidence of log drives was consistent with settled precedent, which recognizes that such activities were a central mode of commerce throughout much of the country at the time many states were admitted to the Union, and can establish that a river served as a "channel of useful commerce" at statehood.

The Montana court also properly considered post-statehood recreational use as evidence of a river's susceptibility to use as a highway of commerce at statehood. Allowing such proof of "susceptibility" is particularly important to enforcing the Constitution's Equal Footing doctrine, given the sparse populations and undeveloped economies of many states upon their entry into the Union, as well as the evolution of commerce since that time.

ARGUMENT

I. THE RULE THAT STATES OWN THE NAVIGABLE WATERS AND THE LANDS BENEATH THEM IS DEEPLY ROOTED AND SERVES VITAL SOVEREIGN AND PUBLIC INTERESTS

A. State Ownership of Navigable Waters and the Lands beneath Them Is Central to State Sovereignty

PPL discusses the Equal Footing doctrine as if it were a disfavored common-law technicality or a historical relic, to be applied grudgingly, without regard to the doctrine's purposes or history. But state ownership of navigable rivers and riverbeds is deeply ingrained in both state and federal law. This Court has repeatedly emphasized that the doctrine serves state and public interests of the highest order, and the Court has rejected narrow and restrictive approaches similar to those advocated by PPL here.

This Court has explained that

> lands underlying navigable waters have historically been considered "sovereign lands." State ownership of them has been "considered an essential attribute of sovereignty." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). The Court from an early date has acknowledged that the people of each of the Thirteen Colonies at the time of independence "became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Lessee of Waddell*,

> 16 Pet. 367, 410 (1842). Then, in *Lessee of Pollard v. Hagan*, 3 How. 212 (1845), the Court concluded that States entering the Union after 1789 did so on an "equal footing" with the original States and so have similar ownership over these "sovereign lands." *Id.*, at 228-229.

Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 283 (2001). Thus, states' title to navigable waters and the lands submerged beneath them "is 'conferred ... by the Constitution itself.'" *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). *See also Pollard*, 44 U.S. (3 How.) at 230 ("To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.").

The Equal Footing doctrine extends to waters that were navigable in fact at the time of a state's admission to the Union. *See United States v. Utah*, 283 U.S. 64, 76 (1931). Rivers are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel in water." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). Navigability does not depend on the particular mode of use of a waterway, but instead on whether "the stream in its natural and ordinary condition affords a channel for useful commerce." *Utah*, 283 U.S. at 76 (quoting *United States v. Holt State Bank*, 270 U. S. 49, 56 (1926)). In *Utah*, for example, the Court accepted statehood-era evidence

of navigation on various stretches of the Green and Colorado Rivers by timber rafts, rowboats, flatboats, steamboats, motorboats, barges and scows, "some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying, and mining operations." *Id.* at 79, 82.

B. Sovereign Title to Navigable Waters Derives from their Vital Public Benefits

The Equal Footing doctrine flows from the recognition that navigable waters and their submerged lands implicate exceptionally important public interests, and that that states are trustees of these resources for the benefit of their citizens. As early as 1842, the Court held that the "public trust doctrine" – the "absolute right," vested in the people of the new republic, to "to all their navigable waters, and the soils under them" – defeated an oyster harvester's claim to own the land below the high water mark of Raritan Bay. *Martin v. Lessee of Waddell,* 16 Pet. 367, 410 (1842). This Court's elaboration of the Equal Footing doctrine in *Shively v. Bowlby,* 152 U.S. 1, 26 (1894), followed from the longstanding public trust character of submerged lands. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988) (referring to *Shively* as the "seminal case in American public trust jurisprudence") (citation omitted).

The states hold title to navigable waters and the lands under them in their sovereign capacity "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1892).

While the public character of submerged lands dated back to English common law and earlier, American law "enhanced and extended" that principle – by, among other things, extending sovereign title to navigable streams and lakes not subject to the tides. *Coeur d'Alene Tribe*, 521 U.S. at 284. The interests of the sovereign and the public in navigable waters were especially acute here because of inland waterways' central place in the growth and commerce of the young nation and in the survival of its people. *See Barney v. Keokuk*, 94 U.S. 324, 338 (1876) ("[P]ublic authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience."); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851); *Canal Comm'n v. People ex rel. Tibbits*, 5 Wend. 423, 460 (N.Y.1830) ("Had the common law originated on this continent we should never have heard of the doctrine that fresh water rivers are not navigable above the flow of the tide").[1]

States' public trust doctrines, and state statutes effectuating public trust principles, continue to safeguard the uses historically protected – commerce, navigation and the fishery – as well as

---

[1] *See also* 43 U.S.C. § 1311(a)(1) (Submerged Lands Act provision declaring it to be "in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources" be confirmed and vested in the states).

rights of public access. Many state judicial decisions have held that the public trust embraces protection of other public values, such as water conservation, protection of aquatic ecosystems, and recreation.[2]

Because state ownership of navigable waters and their submerged lands carries with it a variety of protections for the public interest in water resources, the navigability for title question has significant implications for the public at large.

A ruling for PPL here could have repercussions even beyond unsettling state titles, insofar as a number of states have adopted the navigability for title test to determine the right to recreational uses of rivers. State ownership of streambeds under the navigability for title test is often a critical element of state law regarding public recreational rights to rivers and streams. *See* 4 *Water and Water Rights*, §30.01(a) ("The public right to use water in place frequently is founded upon state sovereign ownership of navigable waters and the land beneath them."); *see also* A. Dan Tarlock, *The Law of Water Rights and Resources*, at 494 (2011); Robin K. Craig, *A Comparative Guide to the Eastern Public Trust*

---

[2] *See* 4 Waters and Water Rights § 30.02(a) (Robert E. Beck, *et al.*, eds.. 2010) (overview of the public trust doctrine); James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. Colo. L. Rev. 331, 379 (1998) (describing trust protection for recreational and ecological values associated with navigable waters); Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 Tul. Envtl. L.J. 315, 377 (2009); *see also In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000); *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983); *United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W.2d. 457 (N.D. 1976).

Doctrines: Classifications of States, Property Rights, and State Summaries, 16 Penn. State Envtl. L.J. 1 (2008); Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 Ecology Law Q. 53 (March 2010); *Arkansas v. McIlroy*, 268 Ark. 227, 595 S.W.2d 659 (1980).[3]

Particularly in states where the federal navigability for title test directly governs public recreational rights, a federal standard that segments rivers into "navigable" and "non-navigable" according to what obstacles may have existed on a river is to place fishermen and boaters in the untenable position of having to decide when, in a given circumstance, a river is open to use and when it is not. *See Northwest Steelheaders Ass'n v. Simantel*, 112 P.3d 383 (Ore. App. 2005) (rejecting criminal trespass claims against anglers who had fished on section of John Day River on which navigability and state ownership were disputed), *review denied*, 12 P.3d 65 (Ore. 2005). The likely result will be

---

[3] In other states, including Montana, navigability for title does not determine the public's right to access rivers for fishing and boating; that right is governed by a more liberal standard. *See Montana Coalition for Stream Access v. Curran*, 683 P.2d 163, 170 (Mont. 1984). It is, of course, well within a state's authority to determine its citizens' recreational access to the state's waterways. *See id.* ("Navigability for use is a matter governed by state law. It is a separate concept from the federal question of determining navigability for title purposes."). But even in such states, losing ownership of sections of rivers and their submerged lands would work a significant restriction in state authority and the loss of statutory protections and public trust obligations uniquely applicable to state-owned lands.

escalating conflict between members of the public and the purported "owners" of the river.

II. PPL'S PROPOSED TEST IS INCONSISTENT WITH PRECEDENT

PPL's central submission is that a proper understanding of the navigability for title test would have focused only on the natural obstructions on the Missouri and Clark Fork Rivers and denied navigability because those segments themselves were not navigated by vessels – despite the acknowledged fact that pre-statehood travelers and traders portaged around these obstructions to continue their progress along the river. *See* PPL Br. 15-16, 40, 41. The United States, as amicus, urges that the obstructed reaches (including the Great Falls themselves) and any other river obstacles that needed to be portaged, must be excised from the title that passes to the state under the Equal Footing doctrine. *See* U.S. Br. at 7 ("Although portaging may connect *navigable* segments into a continuous highway for commerce, portaging around a non-navigable segment does not make *that* segment navigable for title purposes.") (emphasis in original).

The path-marking decisions of this Court do not point PPL's way. Navigability for title is governed by the "navigability in fact" test articulated in *The Daniel Ball*, and consistently applied in Equal Footing doctrine cases. Under that test,

> [t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce*, over which trade and travel are or may be

> conducted in the customary modes of trade and travel on water.

77 U.S. at 563 (emphasis added). The *Daniel Ball* test is uncongenial to PPL's segmentation argument here; for under the test articulated by the Court, what becomes "public" or state-owned is the *river*, not *segments* of the river.

This Court's decisions have been marked by practical recognition of the widely varying conditions under which different states entered the Union and the inequity of diminishing a state's sovereign entitlement because it was sparsely populated or economically undeveloped at statehood.[4] Thus, the Court has made clear that it suffices if a river was *susceptible* to serving as a channel of commerce, *see Utah*, 283 U.S. at 76, and has refused to impose rigid limits on the types of activity that can establish that a river served as a useful channel of commerce, *see id.*; *St. Anthony Falls Water Power v. St. Paul Water*

---

[4] Census figures suggest how extraordinarily sparsely populated the Western territories were on the eve of statehood. The 1890 Census, conducted the year Idaho and Wyoming joined the Union, and the year after Montana did, reported the following populations for these enormous states (each one of which covers an area far larger than all of New England): Idaho – 84,385; Montana – 132,159; Wyoming – 60,705. U.S. Census Office, Report on Population of the United States at the Eleventh Census, Part I, lxviii (1895). The population density for the three states was 1.0, 0.91, and 0.62 persons per square mile, respectively, *see id.* at xxxv, a tiny fraction of the density of most of the original states a century earlier. The census for 1850, conducted a year after California became a state, tallied 92,597 (not counting Native Americans), yielding a population density of 0.49 persons per square mile. U.S. Census Office, Abstract of Census Legislation of the United States, 1790 to 1850 Inclusive xxxiii (1853).

Comm'rs, 168 U.S. 349, 359 (1897) (finding navigability based on evidence of floating "logs with shutes that are artificially prepared" even though it was argued that the stretch was not navigable "by boat"); *infra*, pp. 28-32.

This Court elaborated upon the navigability in fact test in *The Montello*, 87 U.S. 430, 439, 442-43 (1874), where it found Wisconsin's Fox River had been navigable in fact in its natural state even though the river in that condition was obstructed by several rapids and falls, necessitating portages. The Court rejected the lower court's decision against navigability, which was based "chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation." *Id.* at 442. The Court acknowledged that these obstructions made navigation difficult, but noted that even with these difficulties, "commerce was successfully carried on." *Id.* As the Court explained:

> [T]he rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country *which were so interrupted by rapids as to require artificial means to enable them to be navigated without break*. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox River, they may be so great while they last as to prevent the use of the *best* instrumentalities for carrying on commerce, but *the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce*. If this be so the river is navigable in fact, although its navigation may be encompassed with

> difficulties by reason of natural barriers, such as rapids and sand-bars.

Id. at 443 (emphases added).

The Montello disposes of PPL's segmentation argument, because it establishes that the need to portage around an obstacle does *not* defeat navigability. *See* Montana Br. 28-31. The United States (Br. 25) attempts to dismiss *The Montello* on the ground that it was not a title case, but the *Montello* Court explicitly held, based on *The Daniel Ball* test that the United States concedes (Br. 9) governs navigability for title purposes, that the Fox River "has always been navigable *in fact*." *The Montello*, 87 U.S. at 443 (emphasis added). And this Court and lower courts have repeatedly cited *The Montello* as stating the law for purposes of navigability for title. *See* Montana Br. 30-31.

PPL bases its arguments for segmentation and excision primarily upon *United States v. Utah*, 283 U.S. 64 (1931), which it says authorizes denying navigability when there is a non-trivial obstacle to vessel passage. But this reading of the case is itself improperly segmented; it takes out of context a few passages that, read in context, are entirely unsupportive of PPL's position. As Montana explains at length, the portion of the Colorado River found non-navigable in *Utah* — the impassable reach within Cataract Canyon – undisputedly represented a "dead end" (Montana Br. 31) to trade navigation – no one passing upriver or downriver could or did portage the canyon to engage in continued commerce on the river. *See* 283 U.S. at 77. Thus, under the settled *Daniel Ball/Montello* test (which the Court applied to all of the disputed

reaches in the case), the river ceased to be a useful channel or highway for commerce at that point.[5]

In contrast to the dead-end obstacle in *Utah*, there was no dead end at either the Missouri River's Great Falls or the Clark Fork's Thompson Falls; to the contrary, both were regularly portaged, and both rivers served as highways for commerce both above and below the respective falls. *See* Montana Br. 34-35. Neither *Utah*, nor any other authority, provides for a denial of navigability in such circumstances.[6]

PPL's and the United States' theory that river reaches that required a portage must be excised from state sovereign title would mean that states' ownership of navigable rivers is shot through with interruptions. Each falls, rapid, riffle, or obstacle significant enough to have required a portage would be separated out from state ownership of all of the

---

[5] The *Utah* opinion bears little resemblance to PPL's rendition of it as establishing a grudging and demanding standard: The Court applied *The Montello*; it sustained navigability over numerous exceptions by the United States, including that sand bars precluded a finding of navigability; and it emphasized that susceptibility for use in commerce is sufficient, specifically, various vessels plied the segments for exploration; pleasure; the transport of passengers and supplies; and prospecting, surveying, and mining operations. 283 U.S. at 67, 82, 87.

[6] As Montana explains (Br. 35), *Oklahoma v. Texas*, 258 U.S. 574 (1922), does not support PPL's proposed rule. Nor does *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922) (cited at PPL Br. 35; US Br. 14, 18), authorize considering a river segment in isolation; the Court there found that the navigational head of the Arkansas River was downstream of the reservation lands in question, 260 U.S. at 86. Thus, the upstream, non-navigable portion was not part of a highway for commerce under the *Daniel Ball* test.

portions of the river that statehood-era boats did pass through. Given that most navigable rivers were marked by "serious obstacles to uninterrupted navigation," *The Montello*, 87 U.S. at 443, this rule would make a patchwork pattern of state and non-state ownership of rivers extremely common.

But, as Montana points out, the extreme segmentation of ownership that PPL's rule would produce – thousands of federal or private inholdings along the beds of navigable rivers – does not in fact prevail. *See* Montana Br. 39 & n. 14; *Canal Comm'n*, 5 Wend. 423, at 464 (holding that private claimant failed to show title to a waterfall in the Mohawk River).

To be sure, as *Utah* illustrates, a natural obstacle may destroy the practical utility of a river for commerce – rendering the river non-navigable upstream or downstream of the obstacle. But the navigability inquiry requires consideration of the relationship of that interruption to commerce along the river; when commerce passed around the obstacle by portage or otherwise, and continued along the river above or below the obstacle, the river is navigable, and there is no excision of the obstructed segment from the State's ownership. A "segment" of river is *only* non-navigable if it is not part of a useful channel for commerce. *See The Montello*, 87 U.S. at 442-43.

Contrary to PPL's contentions, the Montana Supreme Court carefully examined, and adhered to, the precedents of this Court. *See* 53a-62a. It did not, as PPL charges, adopt a casual "whole river" test that would find navigability whenever any part of the river supported commerce. And aspersions on the state court's motives are as unwarranted here as

such aspersions would be against a federal court adjudicating a claim of ownership by the United States.[7]

III. PPL'S FRAGMENTED ANALYSIS OF NAVIGABILITY FOR TITLE WOULD INTERFERE WITH THE PUBLIC TRUST AND IMPAIR STATES' ABILITY TO MANAGE NATURAL RESOURCES

In addition to being inconsistent with this Court's precedents, PPL's proposed approach would be highly problematic for the public interests the Equal Footing doctrine is intended to safeguard. PPL tellingly makes no serious attempt to explain its favored segmentation approach in terms of the purposes and policies of the Equal Footing doctrine.

The Equal Footing doctrine is built upon a recognition that navigable waters serve vital public interests, particularly commerce, navigation, and fisheries, that state governments exist to protect. While rivers may lack the unrivalled economic importance they had in 18th- and much of 19th-century America, rivers' economic importance remains great – and includes not only transportation of persons and goods from point to point, but also enormously valuable uses such as sport fishing, whitewater rafting, canoeing and a host of other

---

[7] Skepticism about state courts' ability to resolve submerged lands claims is hard to square with *Coeur d'Alene Tribe*, which required a federally recognized Indian Tribe to go to Idaho state court to resolve its federal law-based claims of ownership to a lakebed. 521 U.S. at 288.

recreational activities.[8] Moreover, scientific study has only broadened our understanding of the critical roles rivers play in sustaining entire ecosystems – a function that has prompted a further set of state laws and programs to protect these public resources.[9]

A rule that chopped up sovereign title to rivers wherever waterfalls, rapids, sand bars, vegetation, or myriad other natural obstacles required Statehood-era travelers to portage would directly undermine those interests. It would invite third-party "owners" (and claimants) to engage in activities in rivers without regard to the public interest in these resources and fragment the trust responsibility over the river.

It would be hard to design a rule more inimical to effective river resource management than one that extracted from state ownership every place along a river that 19th-century navigators had to portage. It is now widely understood that fragmented management authority can seriously frustrate efforts to protect fisheries, aquatic ecosystems, water

---

[8] In 2006, anglers in the United States spent $26.3 billion on freshwater fishing trips and equipment. *See* U.S. Fish & Wildlife Service & U.S. Census Bureau, National Survey of Fishing, Hunting and Wildlife-Associated Recreation 10 (2006).

[9] *See, e.g.*, Lawrence L. Master, *et al.*, eds., *Rivers of Life: Critical Watersheds for Protecting Freshwater Biodiversity* 14-15 (TNC 1998) ("Freshwater habitats provide for many of our fundamental needs: water for drinking and irrigation, food in the form of fishes and waterfowl; and in-stream services such as flood control, transportation, recreation and water quality protection. Health river systems retain water and buffer the effects of storms, reducing the loss of life and property to floods. Naturally vegetated streamside riparian zones help trap sediments and break down nonpoint source pollutants.").

quality, and other natural resources and amenities.[10] A large body of scientific literature supports the proposition that, to the extent possible, ecosystems should be managed in a holistic, landscape-scale manner, and administrative fragmentation should be avoided.[11] The extreme fragmentation resulting from the approach PPL and its amici propose would impede effective natural resource management.

Excising from state ownership river reaches that at statehood contained waterfalls, rapids, sandbars and other obstacles is all the more problematic because such features often have exceptional importance in terms of public trust values. For example, reaches punctuated by navigational

---

[10] *See, e.g.*, Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 Envtl. L. 973, 981-1003 (1995) (discussing imperatives for watershed-based approaches to river management); J. A. Stanford, *et al.*, *Ecological Connectivity in Alluvial River Ecosystems and its Disruption by Flow Regulation*, 11 Regulated Rivers: Research & Mgt. 105, 116 (1995) ("Resource managers must become 'conservators of ecological connectivity'"); N. Leroy Poff, *et al.*, *The Natural Flow Regime: A Paradigm for River Conservation and Restoration*, 47 Bioscience 769, 769-70 (1997) (explaining that water resources management has suffered from "fragmented responsibility," making it "difficult, if not impossible, to manage the entire river ecosystem").

[11] Karen A. Poiani, *et al.*, *Biodiversity Conservation at Multiple Scales: Functional Sites, Landscapes, and Networks*, 50 Bioscience 133, 134 (2000) ("a growing appreciation of the enormous complexity and dynamic nature of ecological systems led to the concept of ecosystem management, wherein success is best assured by conserving and managing the ecosystem as a whole"); Norman L. Christensen, *et al.*, *The Report of the Ecological Society of America on the Scientific Basis for Ecosystem Management*, 6 Ecological Applications 665, 669 (1996); John Copeland Nagle, *et al.*, The Law of Biodiversity and Ecosystem Management (2d ed. 2006).

obstructions such as boulders, sandbars or logjams that may have made boat passage hazardous or impossible often create the pools, riffles and other geomorphic areas that are vital habitats for fish and other species. *See* J.D. Allan, *Landscapes and Riverscapes: The Influence of Land Use On Stream Ecosystems*, 35 Ann. Rev. Ecol. Evol. Syst. 257, 260 (2004); Kurt D. Fausch, *et al.*, *Landscapes to Riverscapes; Bridging the Gap Between Research and Conservation of Stream Fishes*, 52 Bioscience 483, 483 (2002).[12] These features are critical to the maintenance of river ecosystems, and they are especially important to the health of aquatic species.[13] Moreover, reaches that might have required portage at statehood may be especially important for recreation and scenic enjoyment. *See* Montana Br. 39 (citing example of Niagara Falls);

---

[12] *See also* Timothy J. Beechie, *et al.*, *Process Based Principles for Restoring River Ecosystems*, 60 Bioscience 209, 209-211 (2010) (noting that fish are highly adapted to natural, dynamic processes such as erosion, channel migration, and recruitment of woody debris); Burchard H. Heede, *et al.*, *Hydrodynamic and Fluvial Geomorphological Processes: Implications for Fisheries Management and Research*, 10 N. Am. J. Fisheries Mgmt. 249 (1990).

[13] An example is the bull trout, which occurs in the Clark Fork and is listed as a threatened species by the U.S. Fish and Wildlife Service. Bull trout need deep runs with unembedded boulder and cobble substrates, and pools with large woody debris. Scientists advocate maintaining natural connections and a diversity of complex habitats over a large spatial scale to maintain dispersal of bull trout populations. C.C. Muhlfeld, *et al.*, *Seasonal Movement and Habitat Use by Subadult Bull Trout in the Upper Flathead River System, Montana*, 25 N. Am. J. of Fisheries Mgmt. 797, 797 (2005). These management approaches may be taken to scale to benefit not just the bull trout but an entire ecosystem.

Mont. Code Ann. § 1-1-501 (depiction of Great Falls on Montana's state seal). Thus, quite apart from its dissonance with this Court's precedents, PPL's rule is a particularly undesirable one from the perspective of states' sovereign ability to pursue a rational natural resources policy. *Cf. Pollard*, 44 U.S. (3 How.) at 230 (emphasizing importance of ownership of navigable rivers to "numerous and important" state powers).

A rule that fragmented ownership and management authority over navigable rivers among states, the federal government, and private parties would be likely to create jurisdictional and policy conflicts. Fish and wildlife, of course, move freely across property lines and jurisdictional boundaries, but a patchwork of management regimes is likely to disserve even shared management goals. Furthermore, managing fragmented lands is expensive and inefficient – a point that federal agencies frequently make when they pursue policies designed to minimize fragmentation.[14]

Finally, there is real irony in PPL's efforts to invoke interests in stability of title and settled expectations. *See, e.g.*, PPL Br. 47, 57; Br. of Creekside Coalition, *et al.* 11-12, 24-27. For it is PPL

---

[14] *See* Melanie Tang, *SNPLMA, FLTFA, and the Future of Public Land Exchanges*, 9 Hastings W.-N.W. J. Envtl. L. & Pol'y 55, 59 (2002) ("Increasingly since 1981, both the [Bureau of Land Management (BLM)] and the [U.S. Forest Service] have 'used exchanges to dispose of fragmented parcels of land to consolidate land ownership patterns to promote more efficient management of land and resources.'") (citation omitted); BLM, Land Exchange Handbook H-2200-01 at 1-1 (characterizing land exchanges as an "important tool to consolidate ownership for more effective management") (Aug. 31, 2005); *id.* at 11-1 to 11-2 (discussing assembled land exchanges).

that seeks an abrupt change in the law of navigability. A rule inviting challenges to state title whenever intermittent obstacles required Statehood-era travelers and traders to portage would impose massive burdens on states to defend titles long thought to be settled. As noted above, such a rule would invite conflicts between public users of navigable rivers and riparian owners who believe that a waterfall, rapid, or riffle along the shore ousts public ownership of portions of the river passing their land.

Such a new rule would present serious problems of proof – especially daunting if, as PPL insists, it would be the State's burden to show that a particular reach was *not* portaged in statehood days. *See* PPL Br. 54; *but cf.* U.S. Br. 20 n. 11. Whether trappers or traders portaged around a particular rocky reach of river more than a century ago is likely to be extremely difficult and costly to determine. Evidence whether travelers ran or portaged a particular river segment is likely to become even sparser over time.

Because of these difficulties, and the sheer volume of property at issue, PPL's proposed test would impose massive burdens on state governments, and would divert state resources toward defending title to isolated pieces of their sovereign lands.

IV. PPL'S OTHER ATTACKS ON THE MONTANA SUPREME COURT'S LEGAL ANALYSIS ARE UNFOUNDED

Although most of its attention is devoted to advocating the segmentation theory, PPL also challenges certain other features of the Montana Supreme Court's decision, including its reliance on evidence concerning log drives and evidence of post-statehood recreational use to demonstrate navigability for title. But these arguments are similarly mistaken.

A. The Montana Supreme Court Properly Relied upon Evidence of Log Drives as Evidence of Navigability

The Montana Supreme Court was well within the mainstream of settled legal opinion when it relied on evidence of log drives, an especially important commercial use of rivers in nineteenth century America, in considering the navigability of the Madison and Clark Fork Rivers.

From the mid-1800s to the early 1900s, many rivers across the northern half of the Nation served as vital highways of commerce for the logging industry. *See* Robert E. Pike, Tall Trees, Tough Men (2000) (New England); Earl E. Brown, Commerce on Early American Waterways (2010) (Mid-Atlantic); Malcolm Rosholt, The Wisconsin Logging Book, Palmer Publications (1980) (Midwest); William H. Wroten, The Railroad Tie Industry in the Central Rocky Mountain Region: 1867-1900 (Ph. D. thesis, U. Colo. 1956) (Rocky Mountains); Heritage Research Center, Montana Navigable Water Study (submitted to Montana Department of State Lands December 1986); Montana Br. 12-13.

Log drives arrived in the Rocky Mountains in the 1860s with the construction of the transcontinental railroad, which needed 2,400 wooden "ties" for every mile of track. Wroten, *supra*. Log drives were also vital to the mining industry in the West, supplying prop timbers for mine shafts and tunnels, and cordwood to make charcoal for ore smelters. *See* Charles S. Peterson, *et al.*, A History of the Wasatch–Cache National Forest (report submitted to the U.S. Dept of Agriculture 1980); Gregory C. Crampton, *et al.*, The Navigational History of Bear River— Wyoming, Idaho, Utah (U. of Utah 1975).

This country abolished the European practice of allowing riparian landowners and local authorities to extract tolls and duties from loggers driving the river. Brown, *supra*. Beginning as early as 1771, laws declared many eastern American rivers to be "public highways." *Id.* This principle extended into the Midwest by virtue of the Northwest Ordinance which declared that "[t]he navigable waters leading into the Mississippi and the Saint Lawrence, and the carrying places between, shall be common highways, and forever free, . . . without any tax, impost, or duty therefor." Northwest Ordinance, Art IV (adopted 1787), 1 Stat. 52 (1789). In the 1800s, Western territories adopted laws recognizing rivers as public highways, often for the specific purpose of protecting public log driving rights. For example, in 1872 the Colorado Territory adopted a law stating that "it shall be lawful for any person . . . to float and all kinds of timber . . . down any of the streams of this Territory . . . ." Colo. Gen. L. § 1856 (1872). *See also* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 431-38 (1989). Early case law in the West also

recognized this public right. *See Idaho Northern R. Co. v. Post Falls Lumber & Mfg.*, 119 P. 1098, 1101 (Idaho 1911) ("Any stream in which logs will go by the force of water is navigable.") (quoting and endorsing standard from Oregon decisions).

When Montana and the other Rocky Mountain states entered the Union in the late 1800s, log driving was not just a common commercial use of the waterways; it was vital to the Nation's development. Not surprisingly, modern state and federal court decisions in the West have relied on a history of log drives to find that rivers meet the federal navigability for title test. *See Oregon Div. State Lands v. Riverfront Protection Ass'n*, 672 F.2d 792 (9th Cir. 1982) (McKenzie River in Oregon); *State v. Bunkowski*, 503 P.2d 1231 (Nev. 1972) (Carson River in Nevada); *Montana Coalition for Stream Access*, 682 P.2d 163 (Dearborn River in Montana, ultimately decided on state law grounds); *see also* 33 CFR § 329.6 (regulatory definition of navigability includes commercial log drives). The leading modern treatise discussion of navigability for title concludes that "[t]he use of water to drive logs to market qualifies." 4 Waters and Water Rights, § 30.01(d)(3)(C).

B. Evidence of Post-Statehood Recreational Uses Can Support Navigability in Fact at Statehood.

Since title to the lands beneath navigable waters passes to a State upon its admittance to the Union, the navigability of a State's rivers must be determined as of that date. *Utah*, 283 U.S. at 75. PPL has challenged the Montana Supreme Court's use of post-statehood evidence, claiming that such evidence is only permissible under narrow

circumstances, namely, when "conditions of exploration and settlement explain the infrequency or limited nature of [actual] use." Br. at 45 (quoting *Utah*, 283 U.S. at 82). PPL's assertion, however, ignores key language in the opinion. Nor has any subsequent court read the language PPL quoted to limit post-statehood evidence in the way PPL advocates.

In *Utah*, the Court confirmed that rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are *or may be* conducted in the customary modes of trade and travel on water." 283 U.S. at 76 (quoting *The Daniel Ball*, 77 U.S. at 563 and citing *Holt State Bank*, 270 U.S. at 56) (emphasis added); *accord The Montello*, 87 U.S. at 441 ("[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, *or may be*, conducted") (emphasis added). Neither in *The Daniel Ball* nor in *Holt State Bank* did the Court limit the "susceptible of being used" phrase in the manner PPL claims.

Utah did not hold that "[e]vidence of 'susceptibility to use' . . . is rarely relevant to whether a river was navigable at statehood," PPL Br. at 43, or that such evidence is "irrelevant[] outside the context of remote and undeveloped rivers." *Id.* Rather, the Court held that "[t]he extent of existing commerce is not the test." 283 U.S. at 82. In the section of the opinion PPL relies upon, the Court did not prescribe a general limitation on the consideration of a river's susceptibility to use, but confirmed the appropriateness of considering

susceptibility in the circumstances of the case at hand:

> In view of past conditions, the government urges that the consideration of future commerce is too speculative to be entertained. Rather is it true that, as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. . . . The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce *as these may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources*. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

283 U.S. at 83 (emphasis added). *Utah* makes clear that the navigability inquiry is not confined to the specific kinds of activities or vessels that were present at statehood. *See also Alaska v. United States*, 662 F. Supp. 455, 463 (D. Alaska 1987), *aff'd sub nom. Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). Courts determining navigability for title after *Utah* have not construed the phrase "susceptible of use" narrowly. *See, e.g., Ahtna*, 891 F.2d at 1405.

The only limitations on consideration of post-statehood evidence are that the physical characteristics of the body of water must be similar to those present at statehood, and the vessels employed in post-statehood uses must be comparable to vessels available at the time of statehood. When physical characteristics have changed since statehood to make river *more* amenable to

navigation, *i.e.*, to enable post-statehood uses that would not have been possible at statehood, evidence of those post-statehood uses ordinarily will not support a finding of title navigability. *N.D. ex rel. Bd. of Univ. and Sch. Lands v. United States*, 972 F.2d 235, 240 (8th Cir. 1992) (finding river non-navigable because of changed physical characteristics of river, in spite of evidence of modern use of canoes comparable to boats in use at statehood); *see also Ahtna*, 891 F.2d at 1405 (finding river navigable based on modern uses where parties had stipulated that physical conditions of the river had not changed since statehood). Courts have also considered the characteristics of the post-statehood watercraft, specifically, their draft (hull depth in water) and their weight-bearing capacity. *Id.* (finding weight-bearing capacity of contemporary boats comparable to those used at time of statehood).

PPL also maintains that *recreational use* may not be considered as evidence supporting a finding of navigability. Br. at 49. There is no merit to that proposition, however, and courts have frequently accepted evidence of recreational use of a body of water in determining navigability for title purposes. *See* U.S. Br. at 31 & n.16 (acknowledging this point).

Contrary to PPL's claim that the Court in *Utah v. United States* "went out of its way to avoid placing any weight on recreational use," Br. at 51, the Court in that 1971 decision expressly cited an "excursion boat" in its survey of the evidence supporting a finding of navigability, 403 U.S. at 12; *accord Utah*, 283 U.S. at 82 (characterizing evidence of post-statehood activity of boats, including "some [used] for pleasure," as "properly received" by the special master and as "relevant upon the issue of the

susceptibility of the rivers to use as highways of commerce" at the time of statehood); *Ahtna*, 891 F.2d at 1405 (finding that guided fishing and sightseeing trips qualify as commercial activity for purposes of establishing navigability for title); *North Dakota ex rel. Bd. of Univ. and Sch. Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982) (finding evidence of uses including modern recreational canoe use to support title navigability because such use was a "viable means of transporting people and goods" at the time of statehood), *rev'd on other grounds sub nom. Block v. N.D.*, 461 U.S. 273 (1983); *Northwest Steelheaders Ass'n*, 112 P.3d at 391-92 (finding navigability for title based in part by recreational use); *Defenders of Wildlife v. Hull*, 18 P.3d 722, 734-35 (Ariz. Ct. App. 2001).

Where courts have found waters non-navigable in spite of evidence of recreational uses, the reason has not been that the uses were recreational, but that they were "demonstrably ineffective," *United States v. Oregon*, 295 U.S. 1, 23 (1935), or that they occurred in river conditions that differed significantly from those present at the time of statehood. *North Dakota*, 972 F.2d at 240 (finding river non-navigable because river's physical characteristics changed, in spite of evidence of modern use of canoes comparable to boats in use at statehood).

In *United States v. Oregon*, the Court determined the navigability in fact of three small lakes and the two waters that connected them, finding that all but one "disappear completely or become negligible during a dry season." 295 U.S. at 16. The fifth measured less than two feet in depth over half its area and in the summer was largely "made up of

small lakes or ponds, separated by mud or dry land." *Id.* at 17. Most of the areas covered by water were also covered with thick vegetation. *Id.* Based on these conditions, the Court found "impracticable" the two activities offered as evidence of navigability, trapping and boating. *Id.* at 20-22. Trappers had to operate largely by wading, and boaters had to get out and pull their craft frequently, encountering "impenetrable" vegetation and a "labyrinth of channels" that they had to mark with flags to return safely. *Id.* Thus, the Court did not reject evidence of uses because of their "recreational" character, as PPL maintains, Br. at 50, but because the physical characteristics of the waters could not support those uses. Of course, in the territories, activities such as fishing, hunting, rafting, and canoeing, which are primarily recreational today, were often essential for subsistence and basic commerce.

Likewise, the remaining cases PPL cites do not support the claim that "courts have routinely found evidence of recreational use insufficient to establish title navigability." *Id.* In the first of the two early-twentieth century appellate decisions PPL invokes, the court found Big Lake non-navigable despite the use of "canoes, skiffs, and dugouts." *Harrison v. Fite*, 148 F. 781, 786 (8th Cir. 1906). The court made this finding, however, not because these uses were recreational, but because of the physical characteristics of the lake and the river: the lake was "largely a tangled jungle, choked with willows, aquatic growth, and dead trees and stumps," and during most of the year the lake bed was visible and used as pasture. *Id.* The water body at issue in *North American Dredging Co. of Nevada v. Mintzer*, 245 F.297, 299 (9th Cir. 1917), was a channel cutting

through a tidal salt marsh; the court emphasized that the bottom of the channel was "practically exposed" at low tide, rendering navigation of any sort possible only during times of high water. Neither decision, then, rested on the "recreational" character of the uses.

Further, *Harrison* and *American Dredging* predate the Court's key decisions on navigability for title, *United States v. Utah* and *Utah v. United States*, as well as more recent decisions within the same circuits that expressly upheld the relevance of recreational use to title navigability determinations. *North Dakota*, 671 F.2d at 278; *Ahtna*, 891 F.2d at 1405. *Harrison* and *American Dredging*, then, and not *Ahtna*, 891 F.2d at 1405, are best understood as "outliers," Br. for Petitioner at 52, and do not support the contention that recreational uses may not provide evidence of navigability for title.[15]

In sum, evidence of recreational use is sanctioned, not forbidden, by previous court decisions. Where courts have found waters non-navigable, it was not because the uses were recreational, but because the physical characteristics of those waters rendered any navigation impracticable. Recreational uses may support a finding of navigability for title, and post-

---

[15] In addition to *Harrison* and *American Dredging*, PPL cites to two state court cases. In both cases, the courts focused on the inland lakes' lack of any connection with any other body of water. *Taylor Fishing Club v. Hammett*, 88 S.W. 2d 127, 129-30 (Tex. Civ. App. 1935); *State v. Aucoin*, 20 So. 2d 136,160 (La. 1944). Furthermore, in *Aucoin* the physical characteristics of the lake made navigation impracticable. 20 So. 2d at 160 (finding that boats often became bogged down and had to be dragged through the mud of lake "surrounded by cypress swamps and impassable prairie").

statehood recreational uses such as sport fishing, whitewater rafting, and canoeing are properly considered as evidence of a waterway's navigability.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted,

NEIL KAGAN
NATIONAL WILDLIFE FEDERATION
Great Lakes Regional Ctr.
213 W. Liberty St., Ste. 200
Ann Arbor, MI 48104
Tel: (734) 887-7106

SEAN H. DONAHUE*
DONAHUE & GOLDBERG, LLP
2000 L St., NW, Ste. 808
Washington, DC 20036
Tel: (202) 277-7085
sean@donahuegoldberg.com
Counsel of Record

PHILIP TABAS
General Counsel
THE NATURE CONSERVANCY
4245 North Fairfax Dr.
Suite 100
Arlington, VA 22203

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, NY 10013

Attorneys for the Nature Conservancy

BART MILLER
2260 Baseline Road,
Suite 200
Boulder, CO 80302

JORO WALKER
150 S. 600 East, Suite 2A
Salt Lake City, UT 84102

Attorneys for Western Resource Advocates

DAVID J. RYAN
RYAN LAW OFFICES, PLLC
234 East Pine St.
Missoula, MT 59802

Attorney for the River Management Society

W. CULLEN BATTLE
FABIAN & CLENDENIN, P.C.
215 South State St.
Suite 1200
Salt Lake City, UT 84111

CRAIG C. COBURN
KALLIE A. SMITH
RICHARDS BRANDT
MILLER NELSON
Wells Fargo Ctr., 15th Fl.
299 South Main St.
Salt Lake City, UT 84111

Attorneys for Utah Stream Access Coalition

LAURA ZIEMER
STAN BRADSHAW
PATRICK BYORTH
TROUT UNLIMITED
321 East Main St.
Suite 411
Bozeman, MT 59715

Attorneys for Montana Trout Unlimited and Oregon Council Trout Unlimited

AMICUS CURIAE BRIEF

NO. 10-218

IN THE SUPREME COURT OF THE UNITED STATES

PPL MONTANA, LLC,

Petitioner.

v.

STATE OF MONTANA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MONTANA

AMICUS BRIEF IN SUPPORT OF RESPONDENT BY OREGON, WASHINGTON, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, VERMONT, WEST VIRGINIA, AND WISCONSIN

JOHN R. KROGER
Oregon Attorney General

Mary H. Williams
Deputy Attorney General

Anna M. Joyce
Solicitor General

Denise G. Fjordbeck
Attorney-in-Charge
Civil Appeals

Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

ROBERT M. MCKENNA
Washington Attorney General

Jay D. Geck*
Deputy Solicitor General
**Counsel of Record*

Joseph V. Panesko
Janis Snoey
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

Library of Congress
Law Library

Luther Strange
Attorney General of Alabama
PO Box 300152
Montgomery, AL 36130-0152

John J. Burns
Attorney General of Alaska
PO Box 110300
Juneau, AK 99811

Dustin McDaniel
Attorney General of Arkansas
323 Center Street Suite 200
Little Rock, AR 72201

Kamala D. Harris
Attorney General of California
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004

Pamela Jo Bondi
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050

Samuel S. Olens
Attorney General of Georgia
132 Judicial Building
40 Capitol Square SW
Atlanta, GA 30334-1300

David M. Louie
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

Lawrence G. Wasden
Attorney General of Idaho
PO Box 83720
Boise, ID 83720-0010

Lisa Madigan
Attorney General of Illinois
100 W Randolph Street
12th Floor
Chicago, IL 60601

James D. "Buddy" Caldwell
Attorney General of Louisiana
1885 N Third Street
Baton Rouge, LA 70802

Douglas F. Gansler
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

Lori Swanson
Attorney General of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr.
Boulevard
St. Paul, MN 55155-1609

Jim Hood
Attorney General of Mississippi
PO Box 220
Jackson, MS 39205

Catherine Cortez Masto
Attorney General of Nevada
100 N Carson Street
Carson City, NV 89701

Michael A. Delaney
Attorney General of New Hampshir
33 Capitol Street
Concord, NH 03301

Gary K. King
Attorney General of New Mexico
PO Drawer 1508
Santa Fe, NM 87504-1508

Wayne Stenehjem
Attorney General of North Dakota
600 E Boulevard Avenue
Bismarck, ND 58505-0040

Robert E. Cooper, Jr.
Attorney General Of Tennessee
425 5th Avenue N
Nashville, TN 37243

Michael DeWine
Attorney General of Ohio
30 E Broad Street
Columbus, OH 43215

William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

Linda L. Kelly
Attorney General of Pennsylvania
16th Floor Strawberry Square
Harrisburg, PA 17120

Darrell V. McGraw, Jr.
Attorney General of West Virginia
State Capitol Room 26-E
Charleston, WV 25305

Marty J. Jackley
Attorney General of South Dakota
1302 E Highway 14 Suite 1
Pierre, SD 57501-8501

J.B. Van Hollen
Attorney General of Wisconsin
PO Box 7857
Madison, WI 53707-7857

TABLE OF CONTENTS

INTERESTS OF THE AMICI STATES 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. STATE TITLE TO THE BEDS OF NAVIGABLE WATERS IS AN ATTRIBUTE OF SOVEREIGNTY THAT PROMOTES PUBLIC CONTROL AND USE OF NAVIGABLE WATERS 5

II. A RIVER IS NAVIGABLE-IN-FACT WHERE IT CAN BE USED FOR CUSTOMARY TRADE AND TRAVEL BY WATER, EVEN IF INTERRUPTED BY OBSTRUCTIONS COMMON TO RIVERS 8

A. This Court Has Long Held That State Title Is Not Defeated At River Segments Defined By Obstructions, Portages, Or Rapids 10

1. This Court Has Repeatedly Applied The Navigability-In-Fact Test From *The Montello* To Determine State Title 12

2. The Petitioner Misreads *United States v. Utah*, Which Did Not Create A New Segment-By-Segment Test For State Title 16

B. Before And After *The Montello*, State Courts Have Consistently Held That Obstructions And Interruptions In Navigable Rivers Do Not Defeat State Title 20

III. THE PETITIONER'S TEST IS ILL-DEFINED AND WOULD CAUSE UNCERTAINTY OF TITLE 23

IV. THE PETITIONER'S RESTRICTIVE VIEW OF EVIDENCE OF NAVIGABILITY IS INCONSISTENT WITH ESTABLISHED STANDARDS FOR NAVIGABILITY 25

A. Navigability For Title Does Not Require Evidence Of Actual Use At Statehood 26

B. Navigability-In-Fact Can Be Shown By A Range Of Evidence, Including Modern Use And Recreational Use 28

CONCLUSION 31

APPENDIX

TABLE OF AUTHORITIES

Alaska v. Ahtna, Inc.
891 F.2d 1401 (9th Cir. 1989) 28

Barney v. City of Keokuk
94 U.S. (4 Otto) 324 (1877) 13, 14

Brewer-Elliott Oil & Gas Co. v. United States
260 U.S. 77 (1922) 19

Broadnax v. Baker
94 N.C. 675 (1886) 22

Brown v. Chadbourne
31 Me. 9 (1849) 3, 20

Idaho v. Coeur d'Alene Tribe
521 U.S. 261 (1987) 7, 8

Idaho v. United States
533 U.S. 262 (2001) 15

Illinois Cent. R.R. Co. v. Illinois
146 U.S. 387 (1892) 8

In re State Reservation at Niagara
37 Hun. 537, 16 Abb. N. Cas. 395 (N.Y. Sup. Ct. 1885), *appeal dismissed*, 57 Sickels 734, 102 N.Y. 734, 7 N.E. 916 (1886) 22

Martin v. Waddell
41 U.S. (16 Pet.) 367 (1842) 5, 6, 10

Montana v. United States
450 U.S. 544 (1981) 7

Moore v. Sanborne
2 Mich. 519 (1853) 21

Northwest Steelheaders Ass'n, Inc. v. Simantel
199 Or. App. 471, 112 P.3d 383,
review denied, 339 Or. 407, 122 P.3d 65
(2005), *cert. denied sub nom. Grover v.*
Northwest Steelheaders Ass'n, Inc. 547 U.S.
1003 (2006) 29

Oklahoma v. Texas
258 U.S. 574 (1922) 19

Phillips Petroleum Co. v. Mississippi
484 U.S. 469 (1988) 14, 23, 24

Pollard v. Hagen
44 U.S. 212 (1845) 6, 10

Shively v. Bowlby
152 U.S. 1 (1894) 6, 7, 15, 26

Spooner v. McConnell
1 McLean 337, 22 F. Cas. 939 (Cir. Ct. D.
Ohio 1838) 21

St. Anthony Falls Water-Power Co. v. Bd. of
Water Comm'rs
168 U.S. 349 (1897) 12

The Daniel Ball
77 U.S. (10 Wall.) 557 (1870).... 10-13, 15-16, 28, 30

The Propeller Genesee Chief v. Fitzhugh
53 U.S. (12 How.) 443 (1851) 13

United States v. Alaska
521 U.S. 1 (1997) 7

United States v. Appalachian Elec. Power Co.
311 U.S. 377 (1940) 14, 15

United States v. Rio Grande Dam & Irrigation Co.
174 U.S. 690 (1899) 19

United States v. The Steamer Montello
87 U.S. (20 Wall.) 430 (1874) 9, 11-17, 20-22, 30

United States v. Utah
283 U.S. 64 (1931) 14-19, 24, 27

Utah v. United States
403 U.S. 9 (1971) 14, 30

Constitutional Provisions

Wash. Const. art. XVII, § 1 ..... 3, 6

Statutes

11 Stat. 383, § 1 (1859) 6

11 Stat. 383, § 2 (1859) 6

25 Stat. 676 (1889) 6

Other Authorities

http://lewisandclarkjournals.unl.edu/read/?_xmlsrc=img_1805-10-22.01.xml&_xslsrc=LCstyles.xsl (last visited Nov. 1, 2011) (map) 25

Richard A. Epstein,
The Public Trust Doctrine,
7 Cato J. 411 (Fall 1987) 2

The Journals of Lewis and Clark
(Bernard DeVoto ed., 1953) 25

Treatises

27 R.C.L. *Waters* § 218 (1920) 22

78 Am. Jur. 2d *Waters* § 126
(WL db updated Aug. 2011) 22

INTERESTS OF THE AMICI STATES

The amici are twenty-six sovereign states. Under the framework of the Constitution, at the time of statehood, each state received title to the beds of navigable rivers within its borders. This constitutional grant of title to the beds of navigable waters is a vital incident of each state's sovereign power to protect public use of navigable rivers and promote intrastate and interstate travel and commerce. This incident of sovereignty was necessary to the development of the nation and remains vital to the states today.

The states are deeply concerned because the petitioner asks the Court to jettison the longstanding constitutional rule that obstructions to navigation do not defeat the navigability of a river for purposes of state title. Moreover, the states are concerned that the petitioner would have the Court substitute an ill-defined and unworkable standard that would segment title to the beds of navigable rivers in a patchwork fashion, which would upset settled expectations and defeat the very reasons that the states received this incident of sovereignty.

Throughout our country's history, navigable rivers and streams have provided ways for travel and trade within and among the states. Rivers, both great and small, provide avenues for travel and trade despite obstacles like sandbars, shifting channels, shallow stretches, high or low water periods, blockages, ice, rapids, and waterfalls. Travel and trade could bypass rapids, sandbars, and other obstructions by using appropriate vessels and techniques to move a vessel through a difficult area,

while people, goods, or vessels could portage around an obstruction. These obstacles have never defeated a state's title to the beds of navigable rivers where the river was used, or susceptible to being used, as a highway for travel and trade.

A test for navigability that excludes segments of navigable rivers from a state's title would severely hamper public use of the river by creating segments under private control that could exclude the public.[1] Moreover, a change to the established test of navigability-in-fact could also unsettle the rights of a wide variety of existing uses that rely on a state's title to navigable rivers. By way of example, Washington has over 3,600 active leases, use agreements, and easements affecting state-owned river beds, and Oregon has over 4,500 such agreements. Washington has approximately 4,000 past sales of "shore-lands" (submerged lands below the ordinary high water mark) along rivers in Washington. Similarly, other states have a variety of use authorizations, permissions, and laws that govern use of navigable rivers. With these various forms of permission, the states authorize use of navigable rivers for marinas and boat ramps, utility lines, roads and bridges, water rights diversions, habitat and conservation projects, mineral development projects, and even hydropower facilities. Without

---

[1] Richard A. Epstein, *The Public Trust Doctrine*, 7 Cato J. 411, 415 (Fall 1987) ("Each segment of the river is worth very little for transportation unless all segments could be subjected to uniform ownership. The risk is that the owner of one segment will hold out against all the others, so that bargaining breakdown will prevent any use of the river at all for navigation.").

doubt, some of the long-established uses allowed by states are on segments of navigable rivers that the petitioner would excise from state title.

A change in the test regarding the scope of state title to beds of navigable rivers could affect any state that contains navigable rivers. In states like Washington, the petitioner's arguments would affect title because the state asserts sovereignty and title to its navigable rivers to the extent allowed by the federal constitution. Wash. Const. art. XVII, § 1 (state takes "ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes"). The petitioner's changes to the test for navigability-in-fact, however, would also upset state jurisprudence where state sovereignty is manifested with public navigation rights in navigable rivers. *E.g.*, *Brown v. Chadbourne*, 31 Me. 9, 23 (1849) (Maine law preserves public use of rivers that are navigable-in-fact, but state title extends only to the highest influence of the ocean tides.).[2]

---

[2] The states have a variety of property laws applicable to navigable rivers. *See Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324, 338 (1877). The issues in this case address the scope of state title received at statehood, not how states utilized their sovereignty and developed different common laws applicable to navigable rivers. For example, the *Barney* Court recognized that some states had limited state title to tidally influenced rivers, but asserted navigation servitudes and other public rights on navigable rivers, even when state law assigned title or rights to riparian owners.

The Court should reject the petitioner's invitation to alter the scope of state title and affirm application of the long-established test that determines when a river is navigable-in-fact.

SUMMARY OF ARGUMENT

Under the framework of the Constitution, the states receive title to the beds of all rivers and streams that were navigable-in-fact in their ordinary condition at the time of statehood. The state's power over the title to beds of navigable waters is a fundamental attribute of state sovereignty, which the states have long used to advance the public interest in navigable waters.

This Court has long held that rivers and streams may be navigable-in-fact even if they include natural barriers such as rapids, waterfalls, and sandbars, so long as the river or stream is useful for a highway for travel and commerce, or susceptible to that use. The petitioner's argument would change this well-established definition of navigable-in-fact and defeat state title at these obstructions and interruptions. The result of petitioner's argument would be segments of private title within the nation's navigable rivers. This result would undermine the constitutional design that placed this incident of sovereignty in the states—to preserve public control over navigable rivers that were used as ways for travel and trade.

Moreover, by changing the navigability-in-fact definition, the petitioner's standard would upset long-settled expectations built upon the established navigability-in-fact test. It would trigger endless line drawing to define the beginnings and ends

of the petitioner's ill-defined non-navigable segments. The Court should, therefore, reject the petitioner's argument and affirm that the long-established navigability-in-fact test applies to determining the scope of a state's sovereign title.

The Court should also reject the petitioner's argument that navigability-in-fact requires evidence of actual use at statehood or extensive commercial use, or that the test precludes consideration of modern use. The navigability-in-fact test has always allowed evidence of post-statehood use with a proper foundation for relevance. Moreover, the test has always examined whether a river is used, or was susceptible to being used, as a way for travel and trade by the type of small vessels used at statehood.

ARGUMENT

I. STATE TITLE TO THE BEDS OF NAVIGABLE WATERS IS AN ATTRIBUTE OF SOVEREIGNTY THAT PROMOTES PUBLIC CONTROL AND USE OF NAVIGABLE WATERS

After the American Revolution, the original states succeeded to attributes of sovereignty formerly held by Great Britain. As sovereigns, each state held "absolute right to all their navigable waters *and the soils under them* for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842) (emphasis added). This sovereignty and title to beds of navigable rivers (and to the ocean shore, bays, and arms of the sea) allowed the states, as sovereigns, to preserve public interests in using waters and beds

for navigation, commerce, and fisheries. *Id.* at 413; *see Shively v. Bowlby*, 152 U.S. 1, 23 (1894) (states "succeeded to the rights, both of the crown and of the proprietors, in the navigable waters and the soil under them").

Every subsequent state received this same sovereignty over beds of navigable waters upon entering the union on an equal footing with the original states. *Pollard v. Hagen*, 44 U.S. 212 (1845). In *Pollard*, the Court held that Alabama had the rights of sovereignty, possession, and title that had belonged to the predecessor sovereign, the state of Georgia. *Id.* at 223. Alabama, not the United States, received and controlled title to the beds of navigable waters when Alabama became a state. *Id.* at 229.[3]

The landmark ruling in *Shively* reviewed a long history of cases establishing state sovereign title to beds of navigable waters. States received such title to ensure that the people, as the ultimate sovereign, could preserve and protect navigation, commerce, and fishing. *Shively*, 152 U.S. at 11-12. The Court has repeatedly relied on this foundational

---

[3] The Acts admitting states recognize the importance of public title to navigable rivers. For example, Congress admitted the state of Oregon to the Union on February 1, 1859, "on an equal footing with the other States in all respects whatever[.]" 11 Stat. 383, § 1 (1859). The admissions act provided "*all the navigable waters of said State, shall be common highways and forever free*, as well as to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." 11 Stat. 383, § 2 (1859) (emphasis added). Similarly, Congress admitted the state of Washington on an equal footing in 25 Stat. 676 (1889). Washington, in turn, accepted "ownership to the beds and shores of all navigable waters[.]" Wash. Const. art. XVII, § 1.

principle when examining the scope of a state's title to rivers and submerged lands. *See Montana v. United States*, 450 U.S. 544, 552 (1981) (ownership of the land underlying navigable waterways is "strongly identified with the sovereign power of government"); *United States v. Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty.") (citing *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987)).

Shively also established a strong presumption that a state's sovereignty includes *all* navigable waters found within its borders. Before statehood, the government holds the beds of navigable waters "'in trust for the future states that might be erected out of such territory.'" *Shively*, 152 U.S. at 30 (quoting *Knight v. United Land Ass'n*, 142 U.S. 161, 183 (1891)). This obligation to the future states prevents the federal government from defeating a state's sovereign title except when required by public exigency or international need, and except when congressional intent is "definitely declared or otherwise made very plain." *Alaska*, 521 U.S. at 34 (citing *Utah Div. of State Lands*, 482 U.S. at 201-02); *see also Montana*, 450 U.S. at 553 (recognizing established presumption that beds of navigable rivers pass to the states as they assume sovereignty).

Submerged lands thus have "a unique status in the law" and are "infused with a public trust the State itself is bound to respect." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1987) (Kennedy, J., plurality opinion). The Court's decision in *Illinois*

Central Railroad Co. v. Illinois, 146 U.S. 387, 453-54 (1892), is a prominent example of the "weighty public interests in submerged lands." *Idaho*, 521 U.S. at 285. The Court in *Illinois Central* held that the Illinois legislature lacked power to grant submerged lands along Lake Michigan. While states may sell, lease, and allow private use of lands under navigable waters, a state cannot "abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties[.]" *Illinois Central*, 146 U.S. at 453.

The amici states therefore ask the Court to reaffirm the test for navigability-in-fact relied on by the Montana Supreme Court. That test preserves the states' sovereign interest in protecting public use and control over the beds of our nation's navigable rivers as intended by the framework of the Constitution.

II. A RIVER IS NAVIGABLE-IN-FACT WHERE IT CAN BE USED FOR CUSTOMARY TRADE AND TRAVEL BY WATER, EVEN IF INTERRUPTED BY OBSTRUCTIONS COMMON TO RIVERS

The Court's earliest decisions addressing the navigability of rivers hold that a river is navigable-in-fact despite interruptions and obstacles when it is used for travel and trade, or is susceptible to providing a way for travel and commerce. The petitioner asks the Court to abandon this established rule in favor of a rule where segments as short as four miles in a navigable river would be excluded from the sovereign title received by states, and to that extent, defeat the purposes that justified

granting this title to the states in the first instance. Pet'r Br. at 38 (arguing that state title exists only at a "*de minimus* 'short interruptions'" and that 4.35 mile segments are per se greater than *de minimus* and outside the state's title).

The United States, who seeks to claim title to river beds adjacent to federal lands, offers a more restrained argument. The United States argues that state title can be defeated "on a segment-by-segment basis" but its rule would apply only for "*discrete and substantial portions* [of a navigable river] that could not be navigated at all[.]" U.S. Br. at 11; *see also* U.S. Br. at 25 (to address state title, the navigability-in-fact test excludes "substantial river segments where navigation is impossible").

The Court should reject petitioner's argument that would defeat state title at ill-defined segments where there are interruptions to navigation. The petitioner's view of navigability-in-fact is contrary to this Court's rulings, and to rulings by the numerous state courts applying the long-standing test from *United States v. The Steamer Montello*, 87 U.S. (20 Wall.) 430 (1874), upholding state title through interruptions and obstructions. The petitioner's view of state title would, if adopted, unsettle expectations across the country built upon the legal standard in *The Montello*—which is the standard relied on by the Montana Supreme Court and the standard applied by courts across the country for the past 137 years.

The Court should also reject the United States' invitation to excise "discrete and substantial segments" from a state's title to a navigable river. This Court's decisions universally hold that the

states received title to navigable rivers, including areas of interruptions to navigation, so long as the river is navigable-in-fact. The essential point for navigability-in-fact is whether the river is used, or is susceptible for use, as a highway for travel and commerce. When the river is navigable-in-fact under this test, then state title is not defeated at segments with interruptions, even if the interruption is "discrete and substantial."

A. This Court Has Long Held That State Title Is Not Defeated At River Segments Defined By Obstructions, Portages, Or Rapids

Shortly after *Martin* and *Pollard*, which involved tidally influenced waters, the Court addressed navigable, non-tidal rivers. In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), the Court re-affirmed its earlier decisions that navigability is not limited to tidally influenced rivers, as in English common law. Rivers in the states were navigable hundreds of miles above tidewater, and for these rivers a navigability-in-fact test applied:

> A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable-in-fact. And *they are navigable-in-fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or*

> *may be conducted in the customary modes of trade and travel on water.*

The Daniel Ball, 77 U.S. at 563 (emphasis added).

Four years later, in *The Montello*, the Court established that navigability-in-fact was not defeated and did not disappear at the segments of a river posing common obstructions to navigation. *The Montello* considered the Fox River in Wisconsin, which included chutes, falls, and rapids that made navigation difficult: "All these embarrassed the navigation of early days, but they did not destroy or even much arrest it." *The Montello*, 87 U.S. at 432. Marquette and Joliet explored and traveled the Fox River before the Revolution, and fur traders used the river despite obstructions. The traders would unload their boats and portage the cargo, loading it into another boat or the same boat to continue the journey up to the source of the Fox River. After this, the traders portaged to the Grand River, which connected to the Mississippi. *Id.* These facts established that the Fox River was navigable-in-fact:

> [T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be conducted, *nor the difficulties attending navigation.* If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. * * * *Indeed, there are but few of our fresh water rivers which did not originally present serious obstructions to an uninterrupted navigation.*

The Montello, 87 U.S. at 441 (emphasis added).

Beyond holding that navigability-in-fact was not affected by the various obstructions, the test in *The Montello* holds that navigability-in-fact is demonstrated by any kind of small boats, whether propelled by humans, wind, or steam, or even pulled by animals. These "are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river." *Id.* at 442.

The Court emphasized this broad view of the navigability-in-fact test when it considered a water-fall obstruction in *St. Anthony Falls Water-Power Co. v. Board of Water Commissioners*, 168 U.S. 349 (1897). "[I]n its natural state the river at this point was not navigable at ordinary stages of the water for 1/2 mile below St. Anthony Falls, and in its natural state it was not navigable immediately above the falls, but that it was navigable in its natural state above Nicollet Island." *Id.* at 359. At the stretch containing the falls, "boats could not go up and down [the river] in its natural condition;" but the river "was navigable above the rapids for the purpose of running shallow boats and for floating logs." *Id.* The Court concluded that the river was navigable-in-fact at the stretch obstructed by the falls. *Id.* (concluding that the river was a "navigable river at all points referred to").

1. This Court Has Repeatedly Applied The Navigability-In-Fact Test From *The Montello* To Determine State Title

The petitioner asks the Court to avoid the test as stated in *The Montello* and *The Daniel Ball* by

arguing that those cases addressed only "regulatory navigability, not title navigability" and that the test has not been applied to determine state title. Pet'r Br. at 42. The Court, however, has long applied the navigable-in-fact test from *The Montello* and *The Daniel Ball* to determine state title. Never has the Court suggested that a state's title is incomplete or missing at the rapids, waterfalls, or other obstructions that do not otherwise defeat navigability-in-fact.[4]

In *Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324 (1876), the Court demonstrated that navigability-in-fact for purposes of state title was determined by applying the test from *The Montello* and *The Daniel Ball*. The *Barney* Court started by noting that *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), had held that navigable rivers above tidewaters were "amenable to the admiralty jurisdiction[.]" *Barney*, 94 U.S. at 338. The same navigability test applied to title, because there was "no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters." *Id.* Under the navigable-in-fact test of

---

[4] The United States implies that the Court may avoid the test from *The Montello* because navigability can involve different contexts such as a decision defining the scope of federal commerce power long after statehood. U.S. Br. at 9. The United States provides no basis for establishing a different test for navigability-in-fact when considering state title, or why state title should be defeated at the obstructions or rapids that do not otherwise defeat a conclusion that a river is navigable-in-fact. The United States' argument confirms only that when title is at issue, navigability-in-fact examines the river's condition at the time of statehood.

The Montello, these same rivers "properly belong[] to the States by their inherent sovereignty[.]" *Id.*

The Court has reaffirmed this ruling from *Barney* numerous times. *See, e.g.*, *United States v. Utah*, 283 U.S. 64 (1931) (citing and applying *The Montello* to address state title and obstructions in rivers); *Utah v. United States*, 403 U.S. 9, 10 (1971) (holding that "the test of navigability" for purpose of determining ownership of the bed of the Great Salt Lake was the test from *The Daniel Ball*, quoted above). As recently as 1988, the Court recognized that navigability-in-fact for state title was the same test as used for admiralty jurisdiction. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) ("decisions in *The Genesee Chief* and *Barney v. Keokuk* extended admiralty jurisdiction *and public trust doctrine* [establishing state title] to navigable freshwaters and the lands beneath them" (emphasis added)).

Despite the above cases, amicus United States argues that a decision addressing the federal commerce power to license hydroelectric dams implies that *The Montello* test does not apply to state title. U.S. Br. at 25 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 398 (1940)). *Appalachian Electric* does not support the United States' argument. Citing to both *The Montello* and *United States v. Utah* (a state title case), the Court in *Appalachian Electric* explained "[t]here has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents." *Appalachian Elec.*, 311 U.S. at 409. The Court's alignment of *The Montello* and

United States v. Utah to support a statement that obstructions do not destroy navigability-in-fact refutes any argument that the Court had in mind a different test of navigability for state title.[5]

For the above reasons, there is no merit to the petitioner's premise that the Court should abandon the established navigability-in-fact test when determining state title at obstructions in rivers. As shown by *The Montello* and *The Daniel Ball*, the reasons for finding admiralty jurisdiction over those sections of river are the same reasons that states received sovereign title. In both contexts, the navigability-in-fact test preserves public control over the navigable river. *Compare The Montello*, 87 U.S. at 441, *with Shively*, 152 U.S. at 11-12. Moreover, the grant of title to the states protects these public interests immediately at statehood, whereas federal protection of public interests in rivers depends on an act of Congress. *See also Idaho v. United States*, 533 U.S. 262, 272 (2001) (it is "ownership of the land underlying" navigable waters that is identified with sovereign control over a navigable river); *United States v. Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands . . . carries with it the power to control navigation, fishing, and other public uses[.]").

---

[5] The part of the *Appalachian Electric* opinion cited by the United States explains only that cases fixing ownership of river beds examine navigability-in-fact at statehood, but "[t]he power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." *Appalachian Elec.*, 311 U.S. at 408. This statement does not alter the test for navigability-in-fact. It simply recognizes that Congress has greater powers over commerce.

The Montana Supreme Court, therefore, correctly held that *The Montello* provides the applicable legal standard for evaluating petitioner's claim to segments of the Madison, Missouri, and Clark Fork rivers. *See* Pet. App. at App-54 to App-56 (Opinion at ¶¶ 99-101).

2. The Petitioner Misreads *United States v. Utah*, Which Did Not Create A New Segment-By-Segment Test For State Title

Contrary to the petitioner's arguments, *United States v. Utah* did not change the legal standard for determining state title, nor does it preclude state title of any segment of a river where obstructions disrupt navigation. This is demonstrated first because the *Utah* Court disclaimed any intent to change legal standards—there was no controversy "in relation to the general principles of law that are applicable." *Utah*, 283 U.S. at 75. Those general principles, which the Court set out, were the tests from *The Montello* and *The Daniel Ball*, quoted above. *Id.* at 74-75. The Court went on to emphasize that state title extends through "difficulties in navigation," when as a matter of "fact . . . the stream in its natural and ordinary condition affords a channel for useful commerce." *Id.* at 76 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926)). As in all those prior cases, the Court emphasized that "useful commerce" was a broad category, and did not depend on the mode; such commerce might occur in small boats and in shallow draft "flatboats." *Utah*, 283 U.S. at 76.

Furthermore, the *Utah* Court emphasized that navigability-in-fact for title typically involved

determining how far along its length a river is susceptible for travel and trade. "Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends." *Id.* at 77. Again, the Court reaffirmed that rivers were navigable-in-fact even where "serious obstructions" impede navigation. *Id.* at 86-87 (quoting *The Montello*, 87 U.S. at 443). The Court specifically referenced the rule from *The Montello* when it described the special master's ruling as involving a length of impassable canyon, which was not a "short interruption of navigability in a stream otherwise navigable[.]" *Id.* at 77.

The petitioner, however, argues that *Utah* supports examining river segments as short as 4.35 miles. *E.g.*, Pet'r Br. 38. This argument has no basis in the issues decided, nor in the Court's holdings, nor in its stated reasons. The issue in *Utah* was not whether a potentially non-navigable 4.35 mile segment within a navigable river was excluded from the state's title. The parties briefed and disputed the location of a point that divided the upper end of the nearly 40-mile stretch of impassible Cataract Canyon from the navigable Green and Grand rivers above. *Utah*, 283 U.S. at 74-75. As the Court noted, the parties were looking for "the exact point at which navigability may be deemed to end, in the approach to Cataract [C]anyon[.]" *Utah*, 283 U.S. at 90; *see also id.* at 89 (Utah's exception "relates to the first 4.35 miles *of the stretch of the Colorado River*" entering Cataract Canyon (emphasis added)).

The *Utah* Court's ruling upholding the navigability of the Green and Grand Rivers also rebuts the petitioner's theory that the case endorses excising relatively short segments of a few miles from state title. The special master and the Court recognized a three-mile segment of the Grand that was "less susceptible of practical navigation." *Id.* at 79. But the Court and special master did not claim that such segments should be excised from the state's title. Nor did the special master or the Court excise any segments of "difficult and dangerous rapids" in the Green river. *Id.* at 78.

Accordingly, there is simply no merit to petitioner's arguments that interruptions of a few miles defeat state title. The *Utah* opinion simply addresses the narrower issue presented by the parties. With regard to the long stretch of the Colorado river, the decision only describes the conclusion of the special master regarding Cataract Canyon as addressing "long reaches" with characteristics of navigability and non-navigability. This description of the unchallenged decision by the special master did not declare a new, ill-defined standard for state title. Indeed, the description is not a ruling about a legal standard at all because it does not resolve a question presented to the Court.[6]

---

[6] The petitioner ascribes great significance to the *Utah* Court's statement approving the master's decision to limit findings and conclusions as to navigability to sections of the rivers described in the complaint. Pet'r Br. at 37. The Court's statement, however, no matter how it is configured, means nothing more than that the Court observed that the master's decision analyzed only those portions of the river in dispute.

The *Utah* Court, however, did reaffirm that "[e]ach determination as to navigability must stand on its own facts." *Utah*, 283 U.S. at 87. Accordingly, the special master's unchallenged ruling on Cataract Canyon is, at most, a ruling on the specific facts, where a long stretch of river did not provide *any* highway for travel or trade because of the lengthy canyon. *See* U.S. Br. at n.13 (special master ruled that trade and travel could not follow the river or return to the river once it dropped into the canyon).

Although petitioner and its amici cite other decisions by this Court, those opinions do not address carving out a non-navigable segment within a navigable river. Instead, each case examines a dispute over the head point of navigation, the point to which navigation extends. *See Oklahoma v. Texas*, 258 U.S. 574, 584 (1922) (the Red River was "in a general way, known to be navigable in [its] lower reaches and not navigable in [its] upper reaches, but how far up the stream[] navigability extended was not known"); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 87 (1922) ("the head of navigation is and was the mouth of the Grand River . . . a number of miles below the reservation"); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) ("at what particular place between its mouth and its source navigability ceases" is not a matter for judicial notice).

In light of the Court's established principles about how navigability-in-fact must be determined, the Court should reject petitioner's efforts to carve out a new, ill-defined test of navigability-in-fact that would serve only to avoid state title. Petitioner's

approach would add confusion to well-established principles. Instead, the Court should affirm that the Montana Supreme Court relied on the proper test for navigability-in-fact for determining the scope of state title.

B. Before And After *The Montello*, State Courts Have Consistently Held That Obstructions And Interruptions In Navigable Rivers Do Not Defeat State Title

When the Court in *The Montello* held that obstructions such as rapids or shallows do not defeat navigability of a river that has capacity to serve as a channel for travel and trade, the Court relied on numerous state court decisions applying that same standard. Since then, the states have commonly followed the test in *The Montello*. Together, the federal and state courts have created reasonable expectations that state title to the beds of navigable rivers extends to areas of obstructions like rapids and waterfalls. The petitioner's theory would greatly disrupt these expectations and change long-settled property interests.

For example, the Court in *The Montello* looked to an early decision from the Maine Supreme Court which held that a river is navigable despite "rocks, falls and other obstructions." *Brown v. Chadbourne*, 31 Me. 9, 23 (1849), *cited in The Montello*, 87 U.S. at 443 n.16. The Maine court observed that most of the rivers in Maine contain various interruptions, and that a "rigid and severe" test of navigability "would annihilate the public character of all our fresh rivers, for many miles in their course, from their sources towards the ocean." *Brown*, 31 Me. at 23.

The Court in *The Montello* also looked to the Michigan Supreme Court's holding that the character of rivers in the United States necessitates a "liberal adaptation" of English common law to the states and "that the right of the public to a common passage, has been liberally supported and applied." *Moore v. Sanborne*, 2 Mich. 519, 523, 524 (1853), *cited in The Montello*, 87 U.S. at 443 n.16. This application of navigability recognizes the fundamental public policy of maintaining public ways across our country's waters.[7]

Numerous contemporaneous and subsequent state cases endorse *The Montello* rule that interruptions in a river do not defeat navigability-in-fact where the river provides a channel for travel and commerce above and below the interruption. For example, Niagara Falls stands impassable to navigation, but the New York court did not hesitate to declare the river navigable-in-fact through the falls: "And that the fact, that at the particular place in question the river is not navigable by reason of the interruption produced by the Falls, does not qualify or distinguish it in that locality as a public river from its general character." *In re State Reservation at Niagara*, 37 Hun. 537, 547-48, 16 Abb. N. Cas. 395

---

[7] In addition to the cases cited by *The Montello*, cases in other states had similarly held that an interruption in a river does not defeat navigability. For example, in *Spooner v. McConnell*, 1 McLean 337, 22 F. Cas. 939 (Cir. Ct. D. Ohio 1838), the judge observed that the Maumee River in Ohio is navigable despite sixteen miles of rapids at its mouth prior to entering Lake Erie, where the river was clearly navigable for 120 miles above such rapids. The court did not question the sixteen miles of rapids as defeating the river's navigability.

(N.Y. Sup. Ct. 1885), *appeal dismissed*, 57 Sickels 734, 102 N.Y. 734, 7 N.E. 916 (1886). The North Carolina Supreme Court in *Broadnax v. Baker*, 94 N.C. 675 (1886), observed that the waters of a river do not lose their navigability because of falls or other obstructions when the waters support commerce both above and below the obstructions.[8]

Similarly, the settled expectations surrounding the established navigability-in-fact test are illustrated by historic and current legal treatises that follow *The Montello* for determining navigability-in-fact. A historic treatise, Ruling Case Law, under the topic of *Waters*, stated as a rule that natural obstructions do not preclude navigability. 27 R.C.L. *Waters* § 218 (1920) (citing, among others, *St. Anthony Falls Water-Power Co. v. Bd. of Water Comm'rs*, 168 U.S. 349 (1897); *United States v. The Steamer Montello*, 87 U.S. (20 Wall.) 430 (1874)); *see also* 78 Am. Jur. 2d *Waters* § 126 (WL db updated Aug. 2011) ("A river is navigable-in-fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars, if the natural navigation of the river is such that it affords a channel for useful commerce or a useful purpose.").

The test set out in *The Montello*, which includes obstructions and interruptions as part of a

---

[8] In addition to cases cited in the text from Maine, Michigan, New York, North Carolina, and Ohio, courts in many other states and circuits also apply and rely on the test from *The Montello*, where interruptions to navigability do not defeat state title or state navigation easements in rivers determined to be navigable-in-fact. The attached Appendix provides a sample of reported cases on this topic.

navigable-in-fact river, has been the established law for the last 137 years. The Court should reject petitioner's invitation to alter this test and change the long-established scope of the public's title to navigable rivers.[9]

III. THE PETITIONER'S TEST IS ILL-DEFINED AND WOULD CAUSE UNCERTAINTY OF TITLE

Petitioner proposes an ill-defined and unmanageable standard that will generate litigation and disrupt long-standing expectations regarding property. The uncertainty created by petitioner's segmentation test would be significant. To identify and delineate segments of private property, the states and private parties would be called upon to litigate boundary lines for the non-navigable segments. In doing so, the litigants would be forced to litigate historic boundaries of the obstructed section, notwithstanding that rapids, sandbars, and slides are often geological transients in dynamic river systems.

This Court has long recognized that uniformity, certainty, and ease of application are important considerations in determining state title to land such as where tidally influenced waters are at issue. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988). As in *Phillips Petroleum*, the petitioner does not provide useful "alternatives for

---

[9] Given this long history of state courts applying the federal standard, the Court should give no weight to the petitioner's arguments that impugn the integrity of state courts. Instead, the Court may presume that state courts faithfully apply the federal law as set forth by this Court.

delineating the boundaries of public trust" lands. *Id.* Similarly, the Court today should recognize that segmenting discrete portions of the beds of navigable rivers would defeat uniformity, certainty of title, and provide no ease of application.

The United States, however, argues that segmenting ownership could fulfill expectations of hypothetical riverfront owners who, the United States argues, should form expectations of ownership "based on conditions at his location, not somewhere else." U.S. Br. at 18. Riparian owners, however, should have always expected that rivers are granted to the states when the river is navigable-in-fact. Navigability-in-fact, in turn, has always depended on use and potential use of the river upstream and down. "[E]xpectations can only be of consequence where they are 'reasonable' ones." *Phillips Petroleum*, 484 U.S. at 482. The expectations described by the United States brief are unreasonable.[10]

---

[10] The United States' argument is also inconsistent with its brief on the merits in *Utah*, where it explained that navigability-in-fact considers characteristics of a river above and below a disputed area:

> In order to determine the value of the rivers as highways of commerce, *the whole river must be taken into consideration*. This was done in *Brewer-Elliott Oil and Gas Company v. United States*, *St. Anthony Falls Water Power Company v. Board of Water Commissioners*; *Packer v. Bird*; *Oklahoma v. Texas*, *supra*.

Br. For The United States Of America at 102-03, *United States v. Utah*, 283 U.S. 64 (1931) (No. 14) (original).

The Court need only consider the Lewis and Clark expedition to see potential impacts from petitioner's argument. On its journey west, the expedition circumvented falls and rapids in numerous places along the Missouri River and its tributaries. The explorers then navigated the Columbia River to the Pacific, where they encountered the Great Falls of the Columbia—Celilo Falls. Under petitioner's argument, every falls, rapids, or other difficulty in that journey provides a basis to challenge the state's title to portions of the Missouri or Columbia rivers. Indeed, in its 700 mile run from the Canadian border to the Pacific, the Columbia River had numerous areas of rapids. Each set of historic rapids could trigger challenges to state title under the petitioner's proposed test. But the Celilo Falls, like other obstructions on the Columbia River, did not defeat the vital fact the Columbia River could be used as useful highway for travel and commerce and, therefore, was navigable-in-fact.[11]

IV. THE PETITIONER'S RESTRICTIVE VIEW OF EVIDENCE OF NAVIGABILITY IS INCONSISTENT WITH ESTABLISHED STANDARDS FOR NAVIGABILITY

The petitioner also attacks several features of the Montana Supreme Court's evaluation of the

---

[11] In 1805, Captain Clark noted a portage route on the north side of the river on his hand-drawn map of the area. *See* http://lewisandclarkjournals.unl.edu/read/?_xmlsrc=img_1805-10-22.01.xml&_xslsrc=LCstyles.xsl (last visited Nov. 1, 2011). The intrepid explorers successfully navigated over and around the rapids of Celilo taking their boats all the way to the Pacific. *See The Journals of Lewis and Clark*, ch. XIX, ch. XX (Bernard DeVoto ed., 1953).

summary judgment record. The petitioner's evidentiary arguments should be rejected because they would change the test for navigability-in-fact to the detriment of the states and the public interests that depend on the long-established test.

A. Navigability For Title Does Not Require Evidence Of Actual Use At Statehood

The petitioner asks the Court to rule that evidence of a "river's 'susceptibility' to commercial use" should be barred except when an absence of historic use is explained by the absence of historic settlement of the areas. Pet'r Br. at 26. Petitioner argues that its rule is needed to focus on the river's conditions at statehood. Pet'r Br. at 44. Petitioner seeks proof of "actual, contemporaneous uses of the river" at the time of statehood. Pet'r Br. at 44. The petitioner's attacks on the evidence are contrary to the definition of navigability-in-fact. Moreover, the petitioner's unwarranted evidentiary rules would unfairly prevent states from protecting their sovereign title.

As shown above, the constitutional framework places title in the states to ensure that the people of the states, as sovereigns, receive title and dominion over the lands below navigable rivers. *E.g.*, *Shively*, 152 U.S. at 11-12. The test for title examines use or susceptibility for use as a way for travel and trade without preference for, or requirement of, actual use at the time of statehood. As stated in *Utah*:

> *The extent of existing commerce is not the test.* The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.

Utah, 283 U.S. at 82 (emphasis added). Requiring actual use at statehood deprives states of "the possibilities of growth and future profitable use[.]" *Id.* at 83. These rulings from *Utah* defeat the petitioner's argument that navigability-in-fact favors or requires evidence of actual use at statehood.

Moreover, parties may have practical needs for modern evidence when examining navigability-in-fact. There may be no evidence of actual use at the time of statehood. The earliest users may have been illiterate, or failed to keep written records. As in *Utah*, there might have been limited settlement in the area. In more recently admitted states, the use of cars and airplanes, and the displacement of rural and native inhabitants can bear on the actual use at the time of statehood. Additionally, even if evidence of navigability or non-navigability existed at or around the time of statehood, that evidence may have been lost to the passage of time.

Navigability determinations occur long after statehood and will continue in years to come. The public's right of ownership of its rivers should not be victim to the vagaries of spoliation of evidence over

the centuries and, therefore, there is no requirement that the states address why there may be limited evidence of actual use at the time of statehood. Navigability-in-fact is shown equally by actual use, *or* by showing the river at statehood was susceptible to being used as a highway for travel and trade.

B. Navigability-In-Fact Can Be Shown By A Range Of Evidence, Including Modern Use And Recreational Use

A wide variety of evidence can reveal a river's condition at statehood and whether, "in their ordinary condition," it could be used for "the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. at 563. The test for navigability-in-fact should not categorically exclude or discount evidence of modern use by fishing and recreation because it will often be relevant to the conditions at statehood. Many boats today displace water and float according to the same rules of physics that governed the "customary modes of trade and travel on water" at the time of statehood. When there is modern use on a river with the same flow and gradient as at statehood, modern use can demonstrate navigability-in-fact.[12]

---

[12] As pointed out by amicus United States, on page 29 of their brief, the Ninth Circuit provided a sound explanation for relying on modern use evidence in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). First, the court recognized that the river's physical characteristics today were consistent with the conditions at statehood. Next, the court observed that the modern vessels shown to navigate the river were comparable to vessels used for travel and commerce at statehood. Thus, modern evidence showed the river was "susceptible for use as a highway for commerce at statehood." *Id.* at 1405.

A recent case in Oregon illustrates the range of evidence states use to establish title. In *Northwest Steelheaders Association, Inc. v. Simantel*, 199 Or. App. 471, 112 P.3d 383, *review denied*, 339 Or. 407, 122 P.3d 65 (2005), *cert. denied sub nom. Grover v. Northwest Steelheaders Association, Inc.*, 547 U.S. 1003 (2006), the state called a historian, a hydrogeologist, and a university professor of natural resources. These witnesses supplemented evidence of Native Americans' use of a river before statehood with evidence of the river's susceptibility for navigation. *Northwest Steelheaders*, 199 Or. App. at 485. The historian testified to historical uses and the river's capacity for navigation. The hydrogeologist testified to the characteristics of the watershed based on analysis of stream flow, precipitation, and runoff.[13] The natural resource expert testified about a study of recreational use and river-flow requirements for various types of boats. The evidence showed that Native Americans used the watershed for commerce in canoes drafting six to eight inches of water, and that modern craft of similar draft regularly travel the river. The court held that "in its ordinary condition [at statehood], the John Day River as it passes the defendants' properties would have provided ample capacity for travel and trade by means of dugout canoes." *Northwest Steelheaders*, 199 Or. App. at 486.

---

[13] For example, the river had far less water in modern times because of extensive irrigation. *Northwest Steelheaders*, 199 Or. App. at 475.

Petitioner argues that recreational use is not commerce, and that the Court should conclude that the Great Falls reach is not susceptible to "commercial navigation." Pet'r Br. at 43. Navigability-in-fact, however, does not depend on the nature of the commerce. In *Utah v. United States*, 403 U.S. 9, 11 (1971), the Court recognized that use by a single rancher to move animals in a shallow draft boat showed navigability-in-fact. As stated in *The Montello*, trade and travel early in our Nation's history used fleets of flatboats and freight canoes. Therefore, "commercial utilization on a large scale" (Pet'r Br. at 49) has never been the test for state title. The only question is whether the states can show that the river was used, or susceptible for use, by vessels used in the "customary mode of trade and travel on the water." *The Daniel Ball*, 77 U.S. at 563. Recreational vessels are quite likely, as in this case, to be the descendants of the types of vessels customarily used in trade and travel a century ago.

Furthermore, labeling use as "recreation" does not defeat the fact that it is also commerce. Today's businesses and travelers have different needs for river travel, but countless people undeniably engage in travel and commerce when they pay for a vessel to move them along a river to fish, camp, and travel through an area. This type of commerce is vital to the economy of many regions of the country. There is no basis for the petitioner's arguments that would treat this extensive commerce as if it were irrelevant. *See also* U.S. Br. at 31 (agreeing that navigation for commerce includes boats carrying paying passengers for recreation).

APPENDIX

Alaska: *Alaska v. Ahtna*, 891 F.2d 1401, 1404 (9th Cir. 1989) (citing with approval the statement that a river qualifies as a highway for commerce despite shallow sections and difficulty), *cert. denied*, 495 US 919 (1990).

Arizona: *Arizona Center for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 363, 837 P.2d 158 (Ct. App. 1991) (quoting *The Montello* test for determination of state title to rivers: "[T]he river is navigable-in-fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars").

California: *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560, 570, 127 Cal. Rptr. 830, 836 (Ct. App. 1976) (quoting with approval a California treatise for the statement: "Neither the existence of rapids or sandbars, nor the necessity of portages . . . nor the availability of the stream only at certain times during the year, impairs whatever right of navigation otherwise exists.").

Florida: *Bucki v. Cone*, 25 Fla. 1, 19-20, 6 So. 160, 162 (1889) (finding the Suwanee river navigable because it could float logs most of the time, despite shoals that prevented it at times of low water).

Illinois: *Schulte v. Warren*, 218 Ill. 108, 120, 75 N.E. 783 (1905) ("It is not necessary that the waters should be navigable in all their parts in order that the public may have a right of navigation where the waters are deep enough and fit for such use.").

Indiana: *Indiana ex rel. Indiana Dep't of Conservation v. Kivett*, 228 Ind. 623, 630, 95 N.E.2d 145, 148 (1950) ("And the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times renders the stream unfit for transportation, does not destroy its actual capacity and susceptibility for that use.").

Kansas: *Dana v. Hurst*, 86 Kan. 947, 956, 964, 122 P. 1041 (1911) (citing *The Montello*'s discussion of obstructions at page 956, and pointing out at page 964 that it would be anomalous and absurd to submit different sections of the same river to different juries which would result in shifting and inconsistent findings of navigability).

Louisiana: *Goodwill v. Police Jury of Bossier Parish*, 38 La. Ann. 752, 755 (1886) (navigability depends on usefulness as a channel for commerce despite natural barriers such as rapids or sandbars).

Maine: *Brown v. Chadbourne*, 31 Me. 9, 23 (1849), *cited in The Montello*, 87 U.S. 430, 443 n.16 (1874) (a river is navigable despite "rocks, falls and other obstructions").

Minnesota: *Minnesota v. Longyear Holding Co.*, 224 Minn. 451, 29 N.W.2d 657, 663 (1947) (citing *The Montello* for the proposition that interruptions do not preclude a finding of navigability).

Nevada: *Nevada v. Bunkowski*, 88 Nev. 623, 629-31, 503 P.2d 1231, 1234-35 (1972) (applying *The Montello*, *Holt State Bank*, and *Utah* (1931) to find the Carson river to be navigable despite segments with obstructions, low water, and irregular flows).

New York: *In the Matter of the Application of the Commissioners of the State Reservation at Niagara*, 37 Hun. 537, 547-48, 16 Abb. N. Cas. 395 (N.Y. Sup. Ct. 1885) ("And that the fact that at the particular place in question the river is not navigable by reason of the interruption produced by the falls, does not qualify or distinguish it in that locality as a public river from its general character."), *appeal dismissed*, 102 N.Y. 734, 7 N.E. 916 (1886).

North Carolina: *Broadnax v. Baker*, 94 N.C. 675, 681 (1886) (waters do not lose navigability because of falls or other obstructions when the waters support commerce both above and below the obstructions).

Ohio: *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193, 197, 163 N.E.2d 373 (1959) (falls, rapids sand bars, and shifting currents do not preclude navigability); *Spooner v. McConnell*, 1 McLean 337, 22 F. Cas. 939 (Cir. Ct. D. Ohio 1838) (Maumee River in Ohio is navigable despite 16 miles of rapids at its mouth prior to entering Lake Erie, where the river was clearly navigable for 120 miles above such rapids).

Pennsylvania: *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 722 (Pa. Super. 1999) (Lehigh River is navigable, in fact, despite segment with waterfall and shallows. "[W]e cannot piecemeal by piecemeal re-examine the navigability of an acknowledged public waterway.").

South Carolina: *South Carolina v. Head*, 498 S.E.2d 389, 394 (S.C. App. 1997) (holding that neither natural obstructions such as rapids and falls, nor artificial obstructions such as dams, can change the character of an otherwise navigable stream).

Tennessee: *Tennessee ex rel. Cates v. West Tennessee Land Co.*, 127 Tenn. 575, 586-96, 158 S.W. 746 (1913) (even though portions of a lake are not navigable due to trees, stumps and shallows, navigability of the main part renders the lake navigable as a whole).

Washington: *Kemp v. Putnam*, 47 Wash. 2d 530, 534, 288 P.2d 837 (1955) ("Navigability is not destroyed because of occasional natural obstructions or portages, nor is it necessary that navigation continue at all seasons of the year[.]").

Wisconsin: *Olson v. Merrill*, 42 Wis. 203, 213 (1877) (obstructions in river that force log drivers to illegally touch upper shores does not preclude a conclusion that the river channel is navigable).

AMICUS CURIAE BRIEF

RECORD
BRIEF

No. 10-218

In The

Supreme Court of the United States

PPL MONTANA, LLC,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF OF AMICA CURIAE STEPHENIE AMBROSE TUBBS IN SUPPORT OF RESPONDENT STATE OF MONTANA

BRENDA LINDLIEF-HALL
Counsel of Record
MORRISON, MOTL & SHERWOOD, P.L.L.P.
401 North Last Chance Gulch
Helena, Montana 59601
(406) 442-3261
brenda@mmslawgroup.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

INTEREST OF *AMICA CURIAE* STEPHENIE AMBROSE TUBBS 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. EARLY NAVIGATION AND COMMERCE ON MONTANA'S RIVERS 6

II. THE LOUISIANA PURCHASE AND LEWIS AND CLARK'S EXPEDITION UP THE MISSOURI 11

A. President Jefferson's Quest for a Navigable Route Through the Northwest 11

B. Lewis and Clark and the Corps of Discovery: The Beginning of the Expedition 16

C. Lewis and Clark's Travels From Fort Mandan to the Great Falls 18

D. The Great Falls Portage 21

III. NAVIGATION AND COMMERCE FOLLOWING LEWIS AND CLARK'S EXPEDITION 25

A. Steamboats and Navigation on the Missouri up to Fort Benton and Beyond to the Headwaters of the Missouri at Three Forks 25

TABLE OF CONTENTS – Continued

Page

B. The Clark's Fork River 28

C. The Madison River 29

IV. A DECISION FINDING THE RIVERS AT ISSUE NON-NAVIGABLE WOULD HAVE A NEGATIVE IMPACT ON PUBLIC ENJOYMENT OF THE RIVERS 30

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

United States v. Utah, 283 U.S. 64 (1931) 30

BOOKS AND ARTICLES

Stephen E. Ambrose, *Undaunted Courage* (Simon and Schuster 1996).....1, 12, 13

Stephenie Ambrose Tubbs, *Why Sacagawea Deserves the Day Off and Other Lessons From the Lewis and Clark Trail* (University of Nebraska Press 2008) 1

Stephenie Ambrose Tubbs with Clay Strauss Jenkinson, *The Lewis and Clark Companion: An Encyclopedic Guide to the Voyage of Discovery* (Henry Holt and Co., LLC 2003) 1, 19, 23

George Catlin, *The North American Indians* (John Grant 1903), *reprinted* Digital Scanning, Inc. (2000) 4, 9, 10, 26

Bernard DeVoto, *Across the Wide Missouri* (Houghton Mifflin Co. 1947).....*passim*

Greg Gordon, *Steamboats, Woodhawks, and War On the Upper Missouri River*, Montana The Magazine of Western History (Summer 2011, Vol. 61, No. 2).....26

Institute for Tourism and Recreation Research, *Montana's Outfitting Industry* (2007), *available at* http://www.itrr.umt.edu/research07/outfitterguidereport.pdf 31

TABLE OF AUTHORITIES – Continued

Page

Donald Jackson, *Letters of the Lewis and Clark Expedition, With Related Documents 1783-1854* (Urbana: University of Illinois Press 2d ed. 1978) 13

The Journals of the Expedition Under the Command of Capts. Lewis and Clark to the sources of the Missouri, thence across the Rocky Mountains and down the river Columbia to the Pacific Ocean, performed during the years 1804-5-6 by Order of the Government of the United States, 1 Nicholas Biddle ed., The Heritage Press (1962) (1804-06) 12, 15

Donna J. Kessler, *The Making of Sacagawea: An Euro-American Legend*, University of Alabama Press (1996) 8

National Archives and Records Administration, *Exhibit: The Louisiana Purchase, available at* http://www.archives.gov/exhibits/american_originals/loupurch.html (last visited Nov. 2, 2011) 11

Original Journals of the Lewis and Clark Expedition, Ruben Gold Thwaites, Ed. (1904) 8

The Lewis and Clark Journals, An American Epic of Discovery, Gary E. Moulton, Ed., University of Nebraska Press (2003) 19, 20, 21, 22, 23

PBS, *Lewis and Clark, Inside the Corps, Sacagawea, available at* http://www.pbs.org/lewisandclark/inside/saca.html (last visited Nov. 2, 2011) 8

TABLE OF AUTHORITIES – Continued

Page

Junius P. Rodriguez, *The Louisiana Purchase: A Historical and Geographical Encyclopedia*, ABC-CLIO (2002) 11

SaleeshHouse.org, http://saleeshhouse.org/ (last visited Nov. 2, 2011) 28, 29

Thomas Wessel, *Agriculture, Indians, and American History*, Ag. History, Vol. 50, No. 1, pp. 9-20 (Jan. 1976), *available at* http://www.cals.ncsu.edu/agexed/aee501/indians.html 7

HISTORICAL RECORDS

General Laws and Memorials and Resolutions Of the Territory of Montana, Passed At The Fourth Session Of The Legislative Assembly, An Act to re-enact an act entitled, "An Act to authorize Robert Tingley and John Kennedy and their associates to construct a wagon road around the Falls of the Missouri River." (Montana Historical Society Archives, Collection MC 13, box 8-2), *available at* http://nwda-db.wsulibs.wsu.edu/findaid/ark:/80444/xv40361 ..... 25, 27

Historical Sketch and Essay on the Resources of Montana: Including a Business Directory of the Metropolis Helena Herald and Job Printing Office (1868) (Montana Historical Society Archives, Collection MC 13, box 9-19), *available at* http://nwda-db.wsulibs.wsu.edu/findaid/ark:/80444/xv40361 27

TABLE OF AUTHORITIES – Continued

Page

Hubert Howe Bancroft, *History of Washington, Idaho, and Montana*, San Francisco The History Company (1890) (Montana Historical Society Archives, Collection MC 13, box 7-8), *available at* http://nwda-db.wsulibs.wsu.edu/findaid/ark:/80444/xv40361 26

Gustav Sohon pictorial of a Flathead Indian river crossing, http://s132.photobucket.com/albums/q18/bigskytrapper/?action=view&current=1861gustavsohonmodeofcrossingriversbyflatheadandotherindians.jpg, Archives and Special Collections, Mansfield Library, The University of Montana 11

Statistics of Mines And Mining In The States And Territories West Of the Rocky Mountains: being the annual report of Rossiter W. Raymond, U.S. commissioner of mining statistics, Government Printing Office (1873) 27, 28

The Upper Missouri and the Great Falls (recounting a trip down the Missouri from Helena, Montana to Fort Benton on the Missouri River), The Century Illustrated Monthly Magazine (Jan. 1888) (Montana Historical Society Archives, Collection MC 13, box 7-6), *available at* http://nwda-db.wsulibs.wsu.edu/findaid/ark:/80444/xv40361 24

INTEREST OF AMICA CURIAE STEPHENIE AMBROSE TUBBS

Amica Curiae Stephenie Ambrose Tubbs[1] is a well-known historian, researcher, author, and speaker. She most recently authored *Why Sacagawea Deserves the Day Off and Other Lessons From the Lewis and Clark Trail*.[2] She also co-authored *The Lewis and Clark Companion: An Encyclopedic Guide to the Voyage of Discovery*.[3] Stephenie is the daughter of late historian and author, Stephen E. Ambrose, who penned the best-seller *Undaunted Courage*, which chronicles Lewis and Clark's expedition up the Missouri River. Stephenie has extensive, first-hand knowledge of the Missouri River and the travels and travails of Lewis and Clark as they navigated up the Missouri River into what is now the State of Montana. Stephenie met her husband, John Tubbs, whose family operated the famous Gates of The Mountains boat tours on the Upper Missouri River near Helena, Montana, while on a voyage with her family retracing Lewis and Clark's trail in the mid-1970s. Stephenie continues to explore and paddle the Missouri River, hosting tours of the White Cliffs section of the River and sharing

---

[1] Pursuant to Supreme Court Rule 37.6, amica states that no counsel for a party authored this brief in whole or in part; and no person or entity, other than the amica and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. Letters of consent from the appropriate counsel have been submitted to the Clerk.

[2] University of Nebraska Press (2008).

[3] Henry Holt and Company, LLC (2003).

her knowledge of the River and Lewis and Clark's historic journey.

Having followed the Lewis and Clark trail with her family, led by her father, Stephen E. Ambrose, and having spent her adult life in Montana and on its Rivers and steeped in its history, Stephenie Ambrose Tubbs is well qualified to provide the Court with a unique perspective on the Rivers at issue in this case, and, in particular, on Lewis and Clark's historic navigation on the Upper Missouri, including the Expedition's portage around the Great Falls.

INTRODUCTION AND SUMMARY OF ARGUMENT

Water is the quintessential elixir of life and legend, the stuff of miracles and mystery, power and wealth, and the preeminent means of empire building. Throughout history, water has played a pivotal role in connecting continents and cultures and the commerce that links them. Without water for navigational purposes – the expanse of the seas and ribbons of inland waters – one can scarcely imagine how the world would look today, or how history might have played out.

Nowhere does the preeminent role that navigable waters played in the development of nations and commerce manifest itself more than in the legacy of the American West. President Thomas Jefferson's Louisiana Purchase, and Lewis and Clark's subsequent journey up the Missouri River with the Corps

of Discovery, exposed the Eastern United States and Europe to the cultures of the American Indians, opening corridors for commerce with them.

Navigating the Missouri to the interior West and across the Continental Divide also invigorated the battle between the United States and the British Empire for control of the land and its bountiful natural resources. But in addition to fostering the hunger for national expansion and security, Lewis and Clark's discovery of the Upper Missouri route into what is now the State of Montana, and beyond to the Pacific Ocean, sparked the imagination of not only Jefferson, but private commercial entrepreneurs, leading to the formation of the American Fur Company and the Rocky Mountain Fur Company, both of which competed with the Hudson's Bay Company for resources and trade with American Indian Tribes inhabiting the region.

Trade with the American Indians rapidly expanded into an international trade in furs, buffalo hides, textiles, spirits, munitions, and more. By the early 1830s, less than two decades after Lewis and Clark's expedition, the Eastern U.S. and Europe had developed voracious appetites for beaver pelts and buffalo robes. U.S. merchants based in St. Louis were soon ferrying unimaginable numbers of pelts, buffalo robes, meats, tallow, and other precious goods from the as-yet unsettled West to St. Louis via the Missouri River. In turn, the fur traders were importing goods from Europe and the Eastern U.S. and transporting them westward up the Missouri via keelboats

and pirogues, and eventually steamboats, for trade with the Indians and to provision the forts that sprang up along the Missouri to support such trade. Thus, the Missouri River served not only as an immensely important route for trade with the American Indians, but created a far broader international market.

On the heels of Lewis and Clark's expedition, use of the Missouri for commercial navigation surged. Fort Benton was built and became a bustling and raucous frontier town, with regular steamboat traffic coming up the Missouri bringing commercial goods from St. Louis and other towns along the lower Missouri. Those same steamboats navigated back down the Missouri laden with treasures from the West: pelts, buffalo robes, gold, silver, and more.

In 1832, George Catlin, the renowned artist, took passage up the Missouri on the steamboat Yellow Stone. In his book, *The North American Indians,* Catlin describes the immense quantities of gold, silver, and other splendors coming down the Missouri River from Fort Benton. During the mid-1800s, rich veins of gold and silver were struck in Helena, Montana and surrounding areas, most notably the Last Chance Gulch strike of 1864, increasing the use of steamboats and navigation on the Missouri.[4]

---

[4] Helena, Montana's main street is still named Last Chance Gulch.

But centuries before Jefferson entered into the Louisiana Purchase, before Lewis and Clark navigated up the Missouri into Montana and over to the Pacific Ocean, the Missouri, the Columbia, and the Clark's Fork Rivers had historically served as highways for navigation and commerce amongst the American Indian Tribes of the region. Likewise, the fur traders who found their way to the northwest via the Pacific, and the Columbia, and those who came down from Canada, were ferrying furs on these waters.

And of course, Lewis and Clark's much heralded expedition and findings harkened a new day for the West and what became the Territory of Montana. By about 1819, steamboats were navigating the Missouri, and became a common means of transportation to Fort Benton in the Montana Territory not far below the Great Falls of the Missouri. Steamboats, log floats and other means of navigation were also prevalent on the Missouri above Great Falls up to Three Forks, where the Madison, Jefferson, and Gallatin flowed together to form the headwaters of the Missouri.

Navigation by water was then, and remains, paramount to the economy of Montana and the American West in general. And while the role of Montana's Rivers for navigational and commercial purposes has evolved dramatically, from being the preeminent means of commercial navigation, to now serving primarily recreational pursuits, Montana's Rivers continue to contribute extensively to Montana's economy,

and that of the West in general. The Missouri, the Madison, and the Clark Fork Rivers are world-class fly-fishing destinations. Walk into the Helena, Bozeman, and Missoula airports on any given day throughout the summer and fall, and you will see men and women arriving with fly rods in hand, striking out to fish Montana's revered waters.

Those who come to float and fish Montana's Rivers contribute significantly to commerce in Montana, from the airlines they fly, to the hotels they stay in, the restaurants they eat in, and the fishing guides they hire. In turn, the airlines, hotels, restaurants, and guides continue the flow of commerce – in state, inter-state, and international – in innumerable ways. They are employers, they purchase goods in Montana, goods that are both made or grown in Montana, and those that are imported from other states and countries. And so it goes – the cycle of commerce on the great waters of Montana continues.

ARGUMENT

I. EARLY NAVIGATION AND COMMERCE ON MONTANA'S RIVERS

In the expanse of time before Lewis and Clark made their way to the Upper Missouri River, the inland northwest, and the territory that is now Montana, American Indians had a well-established trade route from west to east between the Pacific coast via the Columbia River, and what eventually came to be

known as the Clark's Fork (now the Clark Fork), and the Missouri:

> The intertribal trade of the Indians was amazingly complex. Long before the Flathead or Nez Perces met any white men in person they were occasionally getting manufactured goods, beads or pieces of cloth or bits of iron – brought up the Columbia from tribe to tribe before 1800. . . .[5]

And although the nomadic plains Indians, such as the Blackfeet and Sioux, were horsemen, they traded extensively with the tribes on the Missouri.

> West of the Mississippi where the hunting nomadic horsemen of the plains captured historical interest and popular imagination, strategically placed agricultural tribes controlled and directed the development of the western fur trade. Near the great bend of the Missouri River, the Mandan, Arikara, and Hidatsa Indians maintained a flourishing agricultural economy that sustained themselves and the nomadic tribes. . . .[6]

Sacagawea, the legendary Shoshone woman from the Lemhi River in what is now Idaho, experienced the darker side of such trade, having been kidnapped

---

[5] Bernard DeVoto, *Across the Wide Missouri*, p. 11, Houghton Mifflin Company (1947).

[6] Thomas Wessel, *Agriculture, Indians, and American History*, Ag. History, Vol. 50, No. 1, pp. 9-20 (Jan. 1976), *available at* http://www.cals.ncsu.edu/agexed/aee501/indians.html.

by Hidatsas and taken to the Hidatsa-Mandan villages on the Missouri when she was about 12 years old and traded at a young age, probably between 12 and 14, to Toussaint Charbonneau, a French-Canadian fur-trader.[7] Charbonneau eventually married Sacagawea, who gave birth to their infant son at Fort Mandan, just before leaving with Charbonneau to accompany Lewis and Clark up the Missouri in 1805.[8]

There was unquestionably an established route of trade on the Missouri by this time. Indeed, the use of bullboats, made from bull buffalo hides, is well documented. Fur trader Nat Wyeth's adventures in Montana are documented in Bernard DeVoto's *Across the Wide Missouri*, and includes a description of his bullboat:

> His boat was made of three skins, tough ones, from elderly bulls. He says it was eighteen feet long, five and a half wide, sharp (he means narrowing) at both ends, with a round bottom and a draft of about

---

[7] *See* PBS, *Lewis and Clark, Inside the Corps, Sacagawea*, *available at* http://www.pbs.org/lewisandclark/inside/saca.html (last visited Nov. 2, 2011); *see also* Donna J. Kessler, *The Making of Sacagawea: An Euro-American Legend*, University of Alabama Press (1996).

[8] In his journal entry for February 11, 1805, Lewis wrote: "About five Oclock this evening, one of the wives of Charbono was delivered of a fine boy." Original Journals of the Lewis and Clark Expedition, Ruben Gold Thwaites, Ed., Vol. I, p. 257 (1904); *see id.* fn. 1 "this was Sacajawea, the Shoshone captive purchased by Charboneau . . . Sacajewea was the only woman taken on the expedition."

> eighteen inches. . . . Its flexibility made it stauncher than any other craft in the rapid, shallow, snag-filled rivers of the high plains. The small half-oranges of the Mandans and other river tribes were longer-lived, being used for short hauls only.[9]

George Catlin, the renowned artist and student of American Indians, their villages, and lifestyles, traveled up the Missouri River on the steamboat Yellow Stone in 1832. Catlin gave this highly amusing account of his ride on a bullboat across the Knife River, a tributary to the Missouri in the Dakotas:

> The old chief, having learned that we were to cross the river, gave instruction to one of the women of his numerous household, who took upon her head a skin canoe (more familiarly called in this country, a bull-boat) made in the form of a large tub, of buffalo's skin, stretched on a frame of willow boughs, which she carried to the water's edge; placing it in the water, made signs for us three to get into it . . . she stepped before the boat, and pulling it along, waded towards the deeper water, with her back towards, carefully with the other hand attending to her dress, which seemed to be but a light slip, and floating upon the surface until the water was above her waist, when it was instantly turned off, over her head, and thrown ashore; and she boldly plunged forward, swimming and

---

[9] Bernard DeVoto, *Across the Wide Missouri*, pp. 116-17, Houghton Mifflin Company (1947).

> drawing the boat with one hand, which she did with apparent ease. In this manner we were conveyed to the middle of the stream, where we were soon surrounded by a dozen or more beautiful girls, from twelve to fifteen and eighteen years of age, who were at that time bathing on the opposite shore.
>
> They all swam in a bold and graceful manner, and as confidently as so many otters or beavers; and gathering around us, with their long black hair floating about on the water, whilst their faces were glowing with jokes and fun, which they were cracking about us, and which we could not understand. . . .
>
> In the midst of this bewildering amusement, we found ourselves suddenly in the delightful dilemma of floating down the current in the middle of the river; and of being turned round and round to the excessive amusement of the villagers, who were laughing at us from the shore. . . .[10]

Like Mandan and other tribes living along the Rivers of the West, the Flathead Indians (Salish), who

---

[10] George Catlin, *The North American Indians*, John Grant (1903), *reprinted* Digital Scanning, Inc. (2000). To view an exceptional George Catlin rendition of a Mandan bullboat *see* http://s132.photobucket.com/albums/q18/bigskytrapper/?action=view&current=1861gustavsohonmodeofcrossingriversbyflatheadandotherindians.jpg#!oZZ83QQcurrentZZhttp%3A%2F%2Fs132.photobucket.com%2Falbums%2Fq18%2Fbigskytrapper%2F%3Faction%3Dview%26current%3DMandan_Bull_Boats_and_Lodges-_George_Catlin1832.jpg.

now primarily reside in Western Montana, but whose ancestral lands extended from the Cascade Mountains east to the continental divide and the headwaters of the Clark Fork River, "navigated streams in the mountain valleys using both dugout canoes and bull-boats."[11] Undoubtedly, the American Indians along the Missouri, the Clark Fork, the Madison and other Rivers of Montana used the Rivers for transportation long before Lewis and Clark navigated the upper Missouri area in pirogues and keelboats.

II. THE LOUISIANA PURCHASE AND LEWIS AND CLARK'S EXPEDITION UP THE MISSOURI

A. President Jefferson's Quest for a Navigable Route Through the Northwest

In a display of remarkable foresight, President Thomas Jefferson entered into a treaty with France and thereby executed the Louisiana Purchase in 1803. Jefferson added approximately 828,000 square miles of land west of the Mississippi River to the political geography of the United States.[12] Political

---

[11] Junius P. Rodriguez, *The Louisiana Purchase: A Historical and Geographical Encyclopedia*, p. 109, ABC-CLIO (2002); *see also* Gustav Sohon pictorial of a Flathead Indian River crossing, http://s132.photobucket.com/albums/q18/bigskytrapper/?action=view&current=1861gustavsohonmodeofcrossingriversbyflatheadandotherindians.jpg, Archives and Special Collections, Mansfield Library, The University of Montana.

[12] See National Archives and Records Administration, *Exhibit: The Louisiana Purchase*, *available at* http://www.archives.gov/exhibits/american_originals/loupurch.html.

expansion and protection of the United States' interests from French, Spanish, and British interests, together with Jefferson's insatiable inquisitiveness regarding the natural world and the American Indian Tribes of the interior West, were central to Jefferson's signing of the Louisiana Purchase.[13] But a third and equally compelling prospect – commercial expansion and the search for a navigable route to the interior northwest and beyond to the Pacific – was as great a motivating factor, if not greater.[14]

Just as this trinity of purposes inspired the Louisiana Purchase, these same goals – national expansion and protection, the pursuit of knowledge of the natural world and civilizations beyond the Mississippi, and the quest for a navigable commercial waterway to the interior northwest and the Pacific ocean – spurred Jefferson to commission Captain Meriwether Lewis to undertake one of the most notable and exploratory missions in the history of the United States.

During his two-year tenure as Jefferson's secretary prior to his expedition up the Missouri, Meriwether

---

[13] Stephen E. Ambrose, *Undaunted Courage*, pp. 71-79, Simon and Schuster (1996).

[14] *Id.*, at 78; *see also The Journals of the Expedition Under the Command of Capts. Lewis and Clark to the sources of the Missouri, thence across the Rocky Mountains and down the river Columbia to the Pacific Ocean, performed during the years 1804-5-6 by Order of the Government of the United States*, 1 Nicholas Biddle ed., The Heritage Press (1962).

Lewis became Jefferson's confidante.[15] Jefferson's confidence in Lewis, and the purposes for the undertaking, are clearly illuminated in Jefferson's letter instructing Lewis to lead the expedition and describing the objectives of the mission:

> To Meriwether Lewis, esquire, captain of the first regiment of infantry of the United States of America:
>
> Your situation as secretary of the president of the United States, has made you acquainted with the objects of my confidential message of January 18, 1803, to the legislature; you have seen the act they passed, which, though expressed in general terms, was meant to sanction those objects, and you are appointed to carry them into execution. . . .
>
> Instruments for ascertaining, be celestial observations, the geography of the country through which you will pass, have already been provided. Light articles for barter and presents among the Indians, arms for your attendants, say from ten to twelve men, boats, tents, and other travelling apparatus . . . and provisions, you will have prepared,

---

[15] Stephen E. Ambrose, *Undaunted Courage*, p. 79, Touchstone Simon and Schuster (1996) (citing Donald Jackson, *Letters of the Lewis and Clark Expedition*, With Related Documents 1783-1854, Vol. II, pp. 18-19, 2d Ed., Urbana: University of Illinois Press (1978)).

with such aids as the secretary at war can yield in his department. . . .

The object of your mission is to explore the Missouri River, and such principal streams of it, as, by its course and communication with the waters of the pacific ocean, whether the Columbia, Oregan [*sic*], Colorado, or any other river, may offer the most direct and practicable water-communication across the continent, **for the purposes of commerce**.

Beginning at the mouth of the Missouri, you will take observations of latitude and longitude, at all remarkable points on the river, and especially at rapids, at islands, and other places and objects distinguished by such natural marks and characters, of a durable kind, as that they may with certainty be recognized hereafter. . . .

The interesting points of the portage between the heads of the Missouri, and of the water offering the best communication with the Pacific ocean, should also be fixed by observation; and the course of that water to the ocean, in the same manner as the Missouri. . . .

The commerce which may be carried on with the people inhabiting the line you will pursue, renders a knowledge of those people important. You will therefore endeavour to make yourself acquainted, as far as a diligent pursuit of your journey shall

> admit, with the names of the nations and their numbers . . . ;
>
> Other objects worthy of notice will be –
>
> The soil and face of the country, its growth and vegetable productions . . .
>
> The mineral productions of every kind, but more particularly metals, lime-stone, pit-coal, and saltpeter; salines and mineral waters. . . .
>
> Should you reach the Pacific ocean, inform yourself of the circumstances which may decide **whether the furs in those parts may not be collected as advantageously at the head of the Missouri** . . . as at Nootka Sound, or any other point of that coast; and **that trade be consequently conducted through the Missouri and United States more beneficially** than by the circumnavigation now practiced.[16]

It is evident from Jefferson's letter to Lewis that commercial navigation on the Missouri River was foremost on his mind.

---

[16] *The Journals of the Expedition Under the Command of Capts. Lewis and Clark to the sources of the Missouri, thence across the Rocky Mountains and down the river Columbia to the Pacific Ocean, performed during the years 1804-5-6 by Order of the Government of the United States*, 1 Nicholas Biddle ed., The Heritage Press (1962) (*quoting* Thomas Jefferson, June 20, 1803 letter to Meriwether Lewis) (emphasis added).

B. Lewis and Clark and the Corps of Discovery: The Beginning of the Expedition

On May 14, 1804, Clark led the party from their encampment at the mouth of the Wood River, near where the Missouri entered the Mississippi.[17] Lewis, who was at that time attending to business matters in St. Louis, joined the party on May 20. Together, they departed on the afternoon of May 21, and made their way up the Missouri. For transportation, they had three boats, a fifty-five foot long keelboat with a sail, twenty-two oars, and "forecastle and cabin" in the stern.[18] The other two boats were open "periogues" (pirogues), one with six and one with seven oars.[19] Two horses for carrying game back from hunting excursions were to be led along the shore.[20]

The entire length of the journey up the Missouri was arduous, including in those stretches of the River that have always been recognized as "navigable" for purposes of the Equal Footing Doctrine. Sandbars, rapids, and riffles were common obstacles throughout the course of the River. About nine days after setting out on the expedition, the party encountered difficulties navigating the River:

> [W]e ascended a very difficult rapid, called the Devil's Race Ground, where the current sets for half a mile against some

---

[17] *Id.* at 2.

[18] *Id.* at 1.

[19] *Id.*

[20] *Id.*

> projecting rocks on the south side. We were less fortunate in attempting a second place of equal difficulty. Passing near the southern shore, the bank fell in so fast as to oblige us to cross the river instantly, between the northern side and a sandbar which is constantly moving and banking with the violence of the current. The boat struck on it, and would have upset immediately, if the men had not jumped into the water and held her, till the sand washed from under her.[21]

Over the course of about five months, the expedition encountered many such difficulties. They made their way to what they named Fort Mandan, where they would spend the winter. For a number of reasons, not the least of which was ice in the River, they would not leave until nearly a year later, in April 1805.

On October 27, 1804, the party reached the five villages of the Mandan Indians near what is now Bismarck, North Dakota.[22] The following day, Lewis determined they were "obliged to pass the winter at this place, [and] we went up the river about one and a half miles . . . with a view of finding a convenient spot for a fort, but timber was too scarce and small for our for purposes."[23] Clark continued up the River another three miles and found a suitable site for a fort, with plenty of timber.[24] While at Fort Mandan, Lewis and

---

[21] *Id.* at 3.

[22] *Id.* at 74.

[23] *Id.*

[24] *Id.* at 77.

Clark met Charbonneau, whom they enlisted as an interpreter, and his Shoshone wife, Sacagawea, who would also serve as an interpreter as they ventured upriver, and whose services would prove essential as the expedition crossed the continental divide through the Bitterroot Mountains.

While at Fort Mandan, the expedition's boats became frozen in the River. Lewis was unable to wrest them from the clutches of the ice until late February, despite numerous attempts.[25] The temperatures were often well below 0 degrees Fahrenheit throughout the winter, dipping as low as 44° below.[26] Being frozen, the Missouri was rendered impassable until spring.

C. Lewis and Clark's Travels From Fort Mandan to the Great Falls

On April 7, 1805, Lewis and Clark were finally able to set out from Fort Mandan, this time with dugout canoes and pirogues.[27] They were sending the keelboat back to St. Louis laden with artifacts for President Jefferson.[28] As the expedition progressed up the Missouri, they passed the Yellow Stone River, the "Muscleshell" (Musselshell) in what is now central Montana, and on June 7, 1805 came upon the Marias River, dubbed Maria's River by Lewis who

---

[25] *Id.* at 98, 102-03.

[26] *Id.* at 89.

[27] *Id.* at 108-10.

[28] *Id.* at 108-10.

wrote: "The whole of my party to a man except myself were fully peswaided that this river was the Missouri, but being fully of opinion that it was neither the main stream or that which it would be advisable for us to take, I determined to give it a name and in honour of Miss Maria W___d[ ] called it Maria's River."[29]

On June 9, Lewis made the decision to take a small group of men and go further upriver to reconnoiter the area.[30] Clark would stay with the main party by the River, as Lewis thought him the better boatman.[31] Lewis remained firmly convinced that they were on the mainstem of the Missouri, but others in the party were unsure.[32] Lewis fell ill that same day, and noted in his journal that "Sâh-câh-gâh, we â, our Indian woman is very sick this evening."[33] Despite being ill, Lewis set out with his small party on the morning of June 11.[34] By the morning of

---

[29] *The Lewis and Clark Journals, An American Epic of Discovery*, p. 125, Gary E. Moulton, Ed., University of Nebraska Press (2003).

[30] *Id.* at 125-26; *see also* Stephenie Ambrose Tubbs with Clay Straus Jenkinson, *The Lewis and Clark Companion: An Encyclopedic Guide To The Voyage of Discovery*, Henry Holt and Company, LLC (2003).

[31] The Lewis and Clark Journals, An American Epic of Discovery, *supra*, at 126-27.

[32] *Id.* at 126.

[33] *Id.* at 127.

[34] *Id.*

June 12, Lewis was "quite revived," and continued upriver.[35]

On June 13, 1805, Lewis reached the Great Falls of Missouri, filled with obvious wonder at the sight:

> Immediately at the cascade the river is about 300 yds. wide . . . [there] is a smoth even sheet of water falling over a precipice of at least eight feet, the remaining part of about 200 yards formes the grandest sight I ever beheld. . . . [T]he water in it's passage down . . . brakes it into a perfect white foam which assumes a thousand forms in a moment sometimes flying up in jets of sparkling foam to the hight of fifteen or twenty feet.[36]

Lewis and his smaller party camped by the Great Falls, the first of five, while the rest of the party camped near Bird Coulee.[37] The following day, June 14, 1805, Lewis sent Joseph Fields with a letter to Clark ordering Fields "to keep sufficiently near the river to observe it's [sic as in original] situation in order that he might be enabled to give Capt. Clark an idea of the point at which it would be best to halt to make our portage."[38] That same day, Lewis continued upriver, and found the other falls, describing them in

---

[35] *Id.* at 128.

[36] *Id.* at 129.

[37] *Id.* at 131.

[38] *Id.*

his journal as "pleasingly beautifull" and "sublimely grand."[39] He was clearly captivated.

On June 16, Lewis returned to join the main party. He and Clark spent the next few days further scouting the area for the best portage route.[40] Preparations for the portage continued, including making "carrage wheels" from an immense cottonwood tree, while Lewis and Clark both administered extensively to Sâh-câh-gâh, we â, fearing she may be near death.[41]

D. The Great Falls Portage

Wagon wheels made, and wagons ready, Lewis and Clark made final preparations for the portage. Clark moved the main party across the River and set up camp at the lowest end of the portage route, where "*one of the small canoes was left below this rappid in order to pass and repass the river for the purpose of hunting as well as to procure the water of the Sulpher Spring*, the virtues of which I now resolved to try on the Indian woman."[42] They decided to leave the white pirogue at the lowest point of the portage for the return trip, and instead determined to use the Iron Boat beyond the portage.[43] Preparations for the portage

---

[39] *Id.*

[40] *Id.* at 135-39.

[41] *Id.* at 134-38.

[42] *Id.* at 135 (emphasis added).

[43] *Id.*

continued through June 21, and on June 22, the portage was underway.[44] The portage was fraught with difficulties. Beginning the first day, they experienced problems with their improvised wagons:

> [W]e were obliged here to renew both axeltrees and the tongues and howns of one set of wheels which took us no more than 2 hours. these parts of our carriage had been made of cottonwood and on axetree of an old mast, all of which proved deficient and *had broken down several times before we reached this place*. . . . after dark we had reached within half a mile of our intended camp when *the tongues gave way and we were obliged to leave the canoe*, each man took as much of the baggage as he could carryon his back and proceeded to the river where we formed our encampment much fortiegued.[45]

Lewis stayed at the upper portage camp, while Clark and the majority of the party worked from the lower portage camp, hauling canoes and equipment overland.[46]

During the portage, between June 22 and July 14, the party experienced extreme weather, and were caught in a torrential downpour and rockslide, with Clark, Sâh-câh-gâh, we â, her baby Jean Baptiste, and others in the party nearly drowning in a gully

---

[44] *Id.* at 139.

[45] *Id.* (Emphasis added.)

[46] *Id.* at 139-49.

during a rainstorm.[47] Others in the party had to abandon their loads on the plains due to a severe hail storm – a problem encountered more than once.[48]

During the portage, Lewis and Clark and their party suffered illness, encounters with bears, they required time to hunt buffalo and gather food, and they had to make moccasins, as on the plains a pair would only last about two days.[49] They were also building canoes, and reassembling the Iron Boat, which they had transported upriver, and which failed when Lewis discovered that "a greater part of the composition had separated from the skins and left the seams of the boat exposed to the water and she leaked in such a manner that she would not answer."[50] Plainly, the "portage" was much more than a simple portage, given their limited supplies and knowledge of the lay of the land.

It is *crucial* to bear in mind that Lewis and Clark created their portage route based on minimal information. As noted above, they were not even certain they were on the mainstem of the Missouri until Lewis sighted the Great Falls, and they had the difficulties with their improvised wagons breaking,

---

[47] *Id.* at 142.

[48] *Id.* at 144-46.

[49] *Id.* at 140-48.

[50] *Id.* at 146-47; *see also* Stephenie Ambrose Tubbs with Clay Straus Jenkinson, *The Lewis and Clark Companion: An Encyclopedic Guide To The Voyage of Discovery*, p. 157, *supra*, fn. 30.

illness, hunting for food, making moccasins, axe handles and canoes, and reconstructing the Iron Boat, among other things.

While the Lewis and Clark Expedition took many days to portage the Great Falls, overcoming many unique hardships and even constructing new boats along the way, subsequent portage routes were much shorted. Indeed, there are historical accounts on the eve of Montana's statehood describing the portage around the Great Falls as a one-day event:

> We portaged the boats around the Great Falls the next day . . . and [when we] launched the boats, it was 2 o'clock, and we were still 24 miles from Fort Benton. . . . Night fell long before we reached the town. There was no moon, and it was impossible to see. . . . Then came the welcome sight of lights ahead. Soon we were safely ashore and sitting down to supper in a comfortable hotel, very tired, and very happy.[51]

---

[51] *See The Upper Missouri and the Great Falls (recounting a trip down the Missouri from Helena, Montana to Fort Benton on the Missouri River)*, The Century Illustrated Monthly Magazine, (Jan. 1888) (Montana Historical Society Archives, Collection MC 13, box 7-6, United States Federal Power Commission Records, Docket #IT-5840, consisting "of hearing materials in a case involving the failure of Montana Power Company to apply for a license to operate its hydroelectric dams on the Missouri River and tributaries. Exhibits in the case (including steamboat logs, diaries, articles, clippings, etc.) sought to document whether the Missouri River was navigable above Fort Benton.") For a complete description and list of materials contained in the

(Continued on following page)

As with other Rivers throughout the country, portaging the Great Falls of the Missouri was common and not viewed as an obstacle to navigation. Indeed, portaging the Great Falls simply presented another commercial opportunity. By 1867, commercial entrepreneurs were vying for rights to a portage route around the falls.[52]

III. NAVIGATION AND COMMERCE FOLLOWING LEWIS AND CLARK'S EXPEDITION

A. Steamboats and Navigation on the Missouri up to Fort Benton and Beyond to the Headwaters of the Missouri at Three Forks

There are numerous accountings of steamboat use on the upper Missouri. The American Fur Company employed traditional water routes on the Missouri, using keelboats, pirogues, and other then-traditional water craft, for transporting "furs – and even feathers, meat, grease and tallow . . . and by 1833 buffalo robes had already become a bigger

---

collection *see* http://nwda-db.wsulibs.wsu.edu/findaid/ark:/80444/xv40361).

[52] *See General Laws and Memorials and Resolutions Of the Territory of Montana, Passed At The Fourth Session Of The Legislative Assembly, An Act to re-enact an act entitled, "An Act to authorize Robert Tingley and John Kennedy and their associates to construct a wagon road around the Falls of the Missouri River."* (Montana Historical Society Archives, *supra* fn. 51, Collection MC 13, box 8-2.)

annual value for its Upper Missouri River Outfit, than beaver was."[53] In addition transporting such items from the Upper Missouri to points along the lower Missouri and on to St. Louis, by 1833, the American Fur Companies steamboat, the Yellowstone, was making its third voyage up the Missouri to Fort Benton.[54] On its trip up the Missouri in 1833 along with numerous dignitaries, "the *Yellowstone* carried the government goods and the bulk of the Company's annual supplies for its upriver posts."[55] As mentioned above, the renowned painter of American Indians, George Catlin, traveled to Fort Benton on the Yellow Stone,[56] as did the other another acclaimed artist of the day, Carl Bodmer.[57] By the middle 1800s, steamboat traffic on the Upper Missouri was common.[58] In 1867, at least 39 steamers plied the waters of the Missouri up to Fort Benton.[59]

---

[53] Bernard DeVoto, *Across the Wide Missouri*, pp. 22-23, (1947).

[54] *Id.* at 23.

[55] *Id.* at 24 (italics in original).

[56] George Catlin, *The North American Indians*, *supra*, fn. 13.

[57] Bernard DeVoto, *Across the Wide Missouri*, pp. 17 and 26.

[58] Greg Gordon, *Steamboats, Woodhawks, and War On the Upper Missouri River*, Montana The Magazine of Western History, pp. 30-46 (Summer 2011, Vol. 61, No. 2).

[59] Hubert Howe Bancroft, *History of Washington, Idaho, and Montana*, p. 732, San Francisco The History Company (1890) (Montana Historical Society Archives, Collection MC 13, 7-8).

Portaging was by then seen as a commercial opportunity, and in that same year, 1867, the Legislative Assembly of the Territory of Montana enacted special legislation authorizing Robert Tingley and John Kennedy to incorporate the Missouri River Falls Wagon Company, giving them exclusive rights to a **one-mile wide, eight-mile long stretch** along the Missouri River to operate a portaging company around the falls – a much shorter distance than the 17-mile route traveled by the Lewis and Clark Expedition.[60]

By 1868, Montana was touted as a commercial and geographical center, with its rich exports of gold, silver exports and other goods, with discussion of navigation on the Missouri above the Great Falls.[61] In 1872, about $1.5 million in gold was taken from Montana via "overland routes *and down the Missouri.*"[62] In that same year silver, "[s]ixty tons of base boullion

---

[60] *See General Laws and Memorials and Resolutions Of the Territory of Montana, Passed At The Fourth Session Of The Legislative Assembly, An Act to re-enact an act entitled, "An Act to authorize Robert Tingley and John Kennedy and their associates to construct a wagon road around the Falls of the Missouri River."* (Montana Historical Society Archives, *supra* fn. 5, Collection MC 13, box 8-2.)

[61] *Historical Sketch and Essay on the Resources of Montana: Including a Business Directory of the Metropolis Helena Herald and Job Printing Office* (1868) (Montana Historical Society Archives, *supra*, Collection MC 13, box 9-19).

[62] *Statistics of Mines And Mining In The States And Territories West Of the Rocky Mountains: being the annual report of Rossiter W. Raymond, U.S. commissioner of mining statistics*, Vol. 5, pp. 214-25, Government Printing Office (1873).

[was][ ] shipped east, via Fort Benton, at $500 per ton," and "silver-ore[ ] shipped East – 75 tons via Fort Benton . . . value $200 per ton."[63]

B. The Clark's Fork River

In addition to the Missouri River having become a regular route of commerce, the Clark's Fork was also widely used as a means of transporting furs and other goods for trade and commerce. "In 1818 [fur traders] built a permanent post at the mouth of the Walla Walla River, naming if Fort Nez Percé for the principal tribe it served. Even earlier, but as part of the same effort to get at the interior West from the Pacific coast, they had built 'Saleesh House' on the Clark's Fork, among the Flatheads," just below what is now Thompson Falls, Montana.[64]

Saleesh House was located near what is now present-day Thompson Falls, Montana on the Clark Fork River near PPL's Thompson Falls Dam. According to the Montana Sanders County Historical Society, by 1809 David Thompson, a fur trader and cartographer had traveled up the Clark's Fork, and in 1810 established Saleesh House, which became a widely-known fur trading post.[65] "In 1821 the North West Company and the Hudson's Bay Company

---

[63] *Id.* at 215.

[64] Bernard DeVoto, *Across the Wide Missouri*, pp. 11-12, (1947).

[65] *Id.*; *see also* http://saleeshhouse.org/.

Today, people flock from around the world to float in the Madison – the "Last Best Place"[70] where trout thrive in its deep, cold, shadowy pools. Simply type the words "Madison River" into any internet search engine, and innumerable websites for fly-fishing outfitters, guides, and stores appear. And while the Madison has developed significantly as a commercially navigable River since Montana joined the Union, it nonetheless survives the time-honored test for navigability, as it is, and has been, "susceptible" of navigation.[71]

IV. A DECISION FINDING THE RIVERS AT ISSUE NON-NAVIGABLE WOULD HAVE A NEGATIVE IMPACT ON PUBLIC ENJOYMENT OF THE RIVERS

There are many potential legal ramifications of a decision holding that the Rivers at issue are non-navigable. But any decision that caused the Rivers to be broken up into navigable and non-navigable pieces would almost certainly limit public access to the Rivers and affect resource management of the Rivers. Having traveled along the entire Lewis and Clark trail and spent time on the Madison and Clark Fork Rivers, I can attest that such a result would be an immense tragedy. These Rivers, and especially the Missouri, given its important role in the

---

[70] William Kittredge, one of Montana's renowned writers, coined the term "Last Best Place" for Montana in the title of his 1988 anthology of works by Montana writers.

[71] *United States v. Utah*, 283 U.S. 64 (1931).

nation's history, are public treasures. Moreover, having spent a great deal of time on these Rivers, it is clear that fish and wildlife do not distinguish between non-navigable and navigable pieces based on the kind of segmentation rule proposed by PPL. Any decision that impacted resource management along the Rivers by breaking them up into navigable and non-navigable pieces would jeopardize critical habitats, and deprive the public of the opportunity to see these beautiful Rivers in a natural state as close as possible to the one that Lewis and Clark encountered on their fateful journey.

CONCLUSION

Lewis and Clark's journey up the Missouri still resonates loud and large. The Expedition's adventures, discoveries, and journals sparked some of the most profound developments in the history of the American West. Their mark irrevocably remains, as witnessed by the thriving commerce and public enjoyment of Montana's waters today. Montana's Rivers are significant resources, contributing substantially to commerce in Montana. For instance, in 2005, about 120,000 people hired guides or outfitters to raft and float her Rivers, and about 64,000 people hired fishing guides.[72] For those of us who have spent our lives

[72] *See* Institute for Tourism and Recreation Research, p. 7, figure 2 (2007), *available at* http://www.itrr.umt.edu/research07/outfitterguidereport.pdf.

on these Rivers, retracing Lewis and Clark's historic footsteps, the prospect of adopting PPL's ahistoric test for navigability is particularly frightening, as any test that would ignore the historic geography of this Nation's great Rivers in favor of a piecemeal ownership scheme threatens to destroy our continued enjoyment of these Rivers.

In light of Lewis and Clark's status as agents of President Jefferson, it is difficult to imagine more weighty evidence of the traditional concept of navigability as applied to these Rivers. The Court should affirm the judgment of the Montana Supreme Court, which recognized that these Rivers were navigable, as that term was understood by President Jefferson and the Founders before him.

Respectfully submitted,

BRENDA LINDLIEF-HALL
Counsel of Record
MORRISON, MOTL &
SHERWOOD, P.L.L.P.
401 North Last Chance Gulch
Helena, Montana 59601
(406) 442-3261
brenda@mmslawgroup.com

Counsel for *Amica Curiae*

November 3, 2011